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DOUGLAS v. SOUTHERN PAC. CO.★

WHITE v. SAME.

(L. A. 7584.)

Supreme Court of California. Feb. 13, 1928.

Rehearing Denied March 12, 1928.

1. Trial 🔑296(1)—Formula instruction should contain elements essential to recovery, and absence of one element is not cured by reference in other correct instructions.

The so-called "formula" instruction should contain all elements essential to recovery, and absence of any one element may not be compensated for nor cured by reference thereto in other instructions correctly and fully stating law.

2. Trial 🔑228(1)—Instruction constituting only expression of doctrine of respondeat superior was not required to state further elements essential to recovery by plaintiffs.

In action against railroad for injuries and death alleged to have resulted when car, being switched, struck pile of ties on which decedents were sitting, since instruction that it was admitted by defendant that named employees were acting within scope of employment, and, if their negligence caused plaintiff's death, verdict should be for plaintiff, since employer was bound by employees' acts in scope of employment, and their negligence is employer's negligence, constituted only expression of doctrine of respondeat superior, it was not erroneous because it did contain all elements essential to recovery, especially where ten separate instructions informed fully as to proximate cause and contributory negligence.

3. Appeal and error 🔑930(2)—Jurors are presumed to have common intelligence and capable of comprehending ordinary language, as applied to issues.

Jurors are presumed to be persons of common intelligence and capable of comprehending ordinary use of language as applied to particular proposition under consideration, and in reference to which it is employed.

4. Trial 🔑295(1)—Instructions must be considered in entirety, and are unobjectionable, if as a whole they state law fairly and clearly.

Instructions must be considered in their entirety, and, if as so considered they state law fairly and clearly, then they are as a whole unobjectionable, even though isolated passages therefrom are objectionable.

5. Railroads 🔑274(2)—Railroad could not claim that decedent and plaintiff were trespassers on private loading platform where they had right to be, as against every one except owner.

In action against railroad for death and injury resulting when part of car being switched struck pile of ties on which decedent and plaintiff were sitting, railroad could not claim that they were trespassers or mere licensees on privately owned loading platform at time of accident relieving it from everything except gross and willful negligence, since they had right to be on platform as against every one, except lessor or possessor thereof.

6. Appeal and error 🔑173(13)—Contention that decedent and plaintiff were trespassers on platform, being urged first on appeal, does not merit consideration.

In action against railroad for death and injury resulting when part of car being switched struck pile of ties on which decedent and plaintiff were sitting, contention that they were trespassers on platform does not merit consideration, where it was first urged in the Supreme Court.

Appeal from Superior Court, Los Angeles County; Chas. S. Burnell, Judge.

Separate actions by Louise Marie Douglas, as administratrix of the estate of Dean Cheney Douglas, and by Jennie H. White, substituted in place of S. I. White, against the Southern Pacific Company. Judgment for plaintiffs, and defendant appeals. Affirmed. Superseding opinion of District Court of Appeal (255 P. 230).

W. I. Gilbert, of San Francisco, for appellant.

Eugene C. Campbell, of Long Beach, for respondents.

WASTE, C. J. This appeal is from each of two judgments entered against the defendant, Southern Pacific Company, in actions instituted to recover damages. The complaints allege, in substance, that the negligence of the defendant's employees was the proximate cause of the death of Douglas and the serious injury of White. Defendant denied the charge of negligence, and urged the defense of contributory negligence. As the two causes of action arose out of the identical accident, they were joined for trial, and were brought here by way of a single appeal. The facts are sufficiently stated in the decision of the District Court of Appeal, the following portion of which is adopted as the opinion of this court:

"On May 7, 1921, the defendant and appellant was switching a steel gondola type car at the Los Angeles Harbor, when some part of the car struck a pile of ties which were stacked alongside of the tracks and upon which Dean Cheney Douglas and the original plaintiff, S. I. White, were sitting, and resulting in the death of Douglas and the injury of White. The exact cause of the accident is very much in doubt. There was testimony, which was also positively denied, that a piece of iron extended out from the side of the car a couple of feet and that the whole pile of ties was knocked out of place about one foot. There is other testimony that, [while] the ties were of the same length and stacked so as to clear the edge of the car by six or eight inches, one of them, about 15 minutes prior to the accident, was observed to be shorter than the others as the witness saw it from the end away from the tracks. This would authorize the inference un-

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★Rehearing denied.

der the circumstances, especially as several witnesses testified that only one tie had been knocked off the pile, that it had been pushed over and protruded sufficiently far to be struck. The engine and car were traveling, according to the prevailing testimony, under 6 miles an hour, although one witness testified that he had told plaintiff's counsel that they were running between 20 and 25 miles an hour. The lookout was not on the forward end of the car, but on the rear of the gondola near the top, from which point he claimed vantage in ability to see. * * *

"The appellant complains that the evidence is insufficient to support the verdicts, and in support of this contention recites a stipulation that the defendant had no control of the platform upon which the ties were piled or over the ties, but that the platform was under lease to the Banning Company, a stranger to the defendant; hence that the defendant was only charged with operating its cars over and along the tracks with ordinary care. Aside from the fact that the jury were entitled to say from the evidence already recited that the crew in charge of this car failed to use ordinary care if they failed to observe a protruding tie, there was the other evidence of a piece of iron which stuck out two feet from the side of the car, which would also be sufficient to justify the verdicts."

[1] We are unable to accept the remaining portion of the opinion of the District Court of Appeal, wherein the giving of the following instruction by the trial court is declared to have constituted prejudicial error:

"It is admitted by defendant in this case that A. J. Beck, E. L. Carr, G. J. Clouth, D. Frazer, and Leslie Straight were employees of defendant and were acting within the scope of their employment at the time of the accident. If you should find that the injury to one plaintiff and the death of the other were caused by the negligence of these employees, or either of them, while operating defendant's engine and car, at the time of or immediately prior to the accident, your verdict should be for plaintiffs and against the defendant, since an employer is bound by the acts of his employee while acting within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence."

The authorities are legion to the effect that a so-called "formula" instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. This principle is well stated in Beyerle v. Clift, 59 Cal. App. 7. 9. 209 P. 1015, 1016, wherein it is held that:

"If an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced. 'It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state.' * * * The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions. 'It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff.' * * *"

Other cases announcing a substantially similar rule are: Rathbun v. White, 157 Cal. 248, 253, 107 P. 309; Pierce v. United G. & E. Co., 161 Cal. 176, 184, 118 P. 700; Killelea v. Cal. H. Co., 140 Cal. 602, 604, 74 P. 157; Sterne v. Mariposa, 153 Cal. 516, 521, 97 P. 66; Starr v. L. A. Ry. Co., 187 Cal. 270, 275, 201 P. 599; Fidelity, etc., Co. v. Paraffine Co., 188 Cal. 184, 192, 204 P. 1076; Rush v. Lagomarsino, 196 Cal. 308, 319, 237 P. 1066; Sappenfield v. Main St. R. Co., 91 Cal. 48, 59, 27 P. 590; Estate of Cunningham, 52 Cal. 465. 466; Zolkoske v. U. S. F. & L. Co., 72 Cal. App. 63, 67, 236 P. 344; Keena v. U. R. R. of S. F., 57 Cal. App. 124, 126, 207 P. 35; Dunne v. Hines, 50 Cal. App. 345, 350, 195 P. 276; Tognazzini v. Freeman, 18 Cal. App. 468, 473, 123 P. 540.

[2] At first blush the instruction complained of upon this appeal might seem to be fatally defective, in the light of the foregoing authorities, because of its failure to touch upon the subjects of contributory negligence and proximate cause. We are not prepared to say, however, that said instruction was given to, or accepted by, the jury as a "formula" instruction. It does not purport to be a complete statement of the law upon which the plaintiffs might recover, but served merely to inform the jury that responsibility attaches to a principal for the negligent acts of his servant committed within the scope of the latter's employment. The concluding language thereof supports this view, for, following the direction that verdicts be brought in for the plaintiffs, if the jury be of the opinion the accident resulted from the negligent operation of the train by defendant's employees, the instruction states:

"Since an employer is bound by the acts of his employees while acting within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence."

In our opinion, the instruction constitutes nothing more than an expression of the doctrine of respondeat superior. This being so, the instruction need not have set forth all of the elements essential to recovery by the plaintiffs. Our examination of the record discloses that these several elements were fully and properly expressed to the jury in the many other instructions given by the lower court.

In the case of Towne v. Godeau, 70 Cal. App. 148, 154, 232 P. 1010, 1012, it was admitted, as here, that the person whose negligence was alleged to have caused the plaintiff's injuries was in the employ of the defendant at the time of the accident. Upon the trial the court there instructed the jury, in part, as follows:

> "If you are satisfied from the evidence that at the time of the collision the defendant J. B. Beauregard was acting within the scope of his employment and doing what his employer had directed, and any damage resulted therefrom, J. S. Godeau is responsible therefor, whether the damage be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

The defendant urged upon appeal that the foregoing instruction was erroneous, in that it "ignores the essential ingredient, in that doing of the thing in an unlawful manner must be (1) the approximate cause of the injury, and (2) the plaintiff must not be guilty of contributory negligence." This contention was held to be without merit; the appellate court therein declaring:

> "It is apparent that the instruction was not intended as a statement of the elements necessary to a recovery, but of the employer's liability for the acts of his employee within the scope of the employment. Other instructions very fully and clearly cover the questions of proximate cause and contributory negligence, and, in view thereof, it does not appear possible that the jury could have been misled by the one of which complaint is made."

We think this reasoning is peculiarly applicable to the case now before us. As intimated above, the jury in no less than ten separate and distinct instructions were fully and correctly informed upon the subjects of proximate cause and contributory negligence. An attempt will not be made herein to set forth each of these several instructions. The following excerpt from one will suffice to illustrate their context:

> "You are instructed * * * if at said time and place they [plaintiffs] were guilty of any negligence directly and proximately contributing to their accident, in any degree, however slight, your verdict will be for the defendant, notwithstanding you may believe that the defendant itself was guilty of negligence."

In the light of the trial court's exposition of the law in other instructions, it is inconceivable that the jury could have been misled by the instruction complained of. But, even if it be said that the instruction was erroneous, the following from Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 78, 173 P. 1117, 1119, quoted with approval in Saltzen v. Associated Oil Co., 198 Cal. 157, 161, 244 P. 338, 339, would seem to be pertinent:

> "We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed, or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the consideration of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict."

In passing it may also be said that the Saltzen Case, supra, concludes:

> "That this court ought not to adopt or give application to a rule that the positive effect of an express instruction upon a specific subject which is admittedly correct will be overcome by a general though erroneous instruction not expressly dealing with that subject in the absence of a very clear showing that the jury have been misled thereby."

[3, 4] Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism.

[5, 6] We find no merit in appellant's further contention that Douglas and White were trespassers, or, at the most, mere licensees, upon the platform of the Banning Company at the time of the accident, thus relieving the appellant of responsibility for any injuries sustained by them, "except through gross and willful negligence." It is elementary that Douglas and White had the legal right to be upon the platform as against every one except the Banning Company, the lessor and possessor thereof. The decisions relied upon by the appellant in support of this contention are not in point, for each presented a situation wherein the asserted trespasser or licensee had instituted an action for damages against the one in lawful possession of the property wrongfully entered and upon which the injury was received. Moreover, the contention does not merit consideration, for it is apparently now being urged for the first time. Throughout the trial, and before the District Court of Appeal, the appellant confined itself to the contention that its servants, at the time of the accident, had not negligently operated the train. This is borne out by the statement in the appellant's original reply brief that it was "only charged with operating a train over and upon the track with ordinary care. * * *"

For the foregoing reasons, the judgments appealed from are, and each is, affirmed.

We concur: RICHARDS, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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203 Cal. 379

VOINICH v. ROLLERI. (Sac. 3907.)★

Supreme Court of California. Feb. 10, 1928.

Rehearing Denied March 8, 1928.

1. Judgment ⚿461(5)—Evidence held to support finding that judgment was not obtained by fraud, as against contention that party was not served and did not appear nor participate in action.

In action to annul judgment quieting title in defendant as against plaintiff's claims, evidence *held* sufficient to support finding that previous judgment was not obtained by fraud or collusion and was not void, as against plaintiff's contention that former judgment was procured without service on her and without her appearance or participation.

2. Attorney and client ⚿70—Attorney's act in entering defendant's appearance carries presumption of authority to so act.

Act of attorney in entering appearance of defendant carries with it presumption of due authority on his part to do so.

3. Judgment ⚿410—Validity of prior judgment quieting title held complete defense to action to set it aside and to quiet plaintiff's title.

In action to annul judgment quieting title in defendant and to quiet plaintiff's title to certain land of which she was deprived by such judgment, validity of prior judgment *held* complete answer to plaintiff's cause of action, justifying judgment for defendant, irrespective of any other issues made by pleadings.

In Bank.

Appeal from Superior Court, Calaveras County; C. P. Vicini, Judge.

Action by Pave Voinich against Rose Rolleri. From a judgment for the defendant, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Chas. P. Snyder and Snyder & Snyder, all of San Andreas, for respondent.

CURTIS, J. This action was brought to annul and set aside a judgment in the superior court of the county of Calaveras, and to quiet plaintiff's title to certain lands of which she was deprived by said judgment. The action in which said judgment was rendered, which it is sought by this action to annul and set aside, was entitled Rose Rolleri v. Martin Voinich et al., and was numbered 951 in said superior court. The grounds set forth in the complaint in this action, upon which plaintiff herein bases her right to an annulment of said judgment, are that the same was procured against her without the service of any process upon her and without her appearance or participation in said action. In support of these grounds plaintiff alleges that no summons or other notice was ever served upon her in said prior action; that she never appeared in said action; that an attorney at law by the name of Will A. Dower purported to represent her in said action; that said attorney prepared and filed in said action an answer in her name, and appeared and conducted the trial of said action representing himself as the attorney of plaintiff; that plaintiff never authorized the said attorney to appear for her in said action, nor to file said answer, nor to represent her or act as her attorney in any manner in said action; that the verification to said answer purported to be sworn to by her; that it was neither signed nor sworn to by her, and she had no knowledge of it until long after the judgment in said action had been rendered; that she did not authorize any person to sign her name to the said verification to said answer, nor to make the same, nor to file said answer in said action; that judgment was thereafter rendered in said action against plaintiff, and that said judgment was "obtained by means of fraud and deceit on the part of said defendants and other persons to plaintiff unknown." The answer denied the allegations of the complaint, and with it the defendant filed a cross-complaint setting up that she was the owner of said real property, and asking that her title thereto be quieted as against all claims of plaintiff. The court found in favor of the defendant on all contested issues and rendered judgment that defendant was the owner of said real property and for costs of the action. From this judgment the plaintiff has appealed under the alternative method provided for by section 953a of the Code of Civil Procedure.

[1] While appellant assigns fourteen particulars in which the evidence is insufficient to sustain the findings, we consider it necessary to discuss only one of said assignments, which is as follows:

> "There is absolutely no evidence in the record herein to sustain or support the decision or findings of the court to the effect that the judgment in the case of Rose Rolleri v. Martin Voinich et al. was not obtained by fraud or collusion and was not void."

If the finding of the court that this judgment in action No. 951 was in full force and effect and was not obtained by means of fraud or deceit, then all other issues in the case become immaterial, and the findings thereon

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★Rehearing denied.

are not of any consequence in determining the ownership of the real property involved in this action. This judgment in action No. 951 was rendered on the 8th day of October, 1919, and the present action was instituted on June 4, 1923, and defendant's cross-complaint was filed on September 30, 1924. At the time of the commencement of this action, or at the time of filing said cross-complaint, sufficient time had not elapsed, therefore, since the rendition of the judgment in action No. 951 for the plaintiff in this action to have obtained title to said real property by adverse possession, even if she had been in the open and notorious possession thereof and had paid all taxes thereon during the time intervening between the date of said judgment and the commencement of this action or the filing of defendant's cross-complaint.

By the evidence in this case it appears that said action No. 951 was instituted by the defendant in this action, the said Rose Rolleri, against Martin Voinich, the husband of Pave Voinich, the plaintiff in the present action, Nick Voinich, Mitchell Voinich, and First Doe, Second Doe, etc., as defendants. The plaintiff, Pave Voinich, was not in her own proper name made a party thereto. An attorney by the name of Will A. Dower, who, it was admitted at the trial of this action, was regularly admitted to practice law in the state of California, appeared in said action and filed a demurrer to the complaint in said action on behalf only of the defendants designated by their true names in the said complaint. This demurrer was overruled, but, nevertheless, the plaintiff therein filed an amended complaint in said action, in which the name of the said Pave Voinich was inserted among the names of the defendants therein as follows: "Pave Voinich, sued herein as First Doe." This amended complaint was not personally served on Pave Voinich, but was served on the said Will A. Dower, who admitted service thereof in writing as "attorney for defendants." Later on the said Will A. Dower filed a separate answer in said action on behalf of Mitchell Voinich, and also a separate answer therein on behalf of Pave Voinich, signing his name to this last-named answer as "attorney for defendant Pave Voinich." Martin Voinich, one of said defendants and the husband of Pave Voinich, and Nick Voinich, another of said defendants, through their said attorney, Will A. Dower, filed a joint disclaimer to any interest in the real property involved in said action. The verification to the answer of Pave Voinich purported to be signed by her and sworn to before Will A. Dower, a notary public.

[2] At the trial, Pave Voinich testified that the signature to said verification was not her own. In this testimony she was corroborated by others. And as we have before said, she testified that she never authorized the said Will A. Dower or anybody else to appear for her in said action, or to file any answer therein, and that she knew nothing of said answer being filed, or that she was a party to said action until after judgment had been rendered in said action. There was no evidence, however, that the said attorney did not act in perfectly good faith in filing said answer for the said Pave Voinich, nor that he did not honestly believe he was authorized to defend said action in behalf of the said Pave Voinich. "The act of the attorney in entering the appearance of a defendant, carries with it a presumption of due authority upon his part to do so." Garrison v. McGowan, 48 Cal. 592, 600. After judgment was entered in said action No. 951 the said attorney served and filed a notice of intention to move for a new trial. This notice was filed October 20, 1919. Thereafter, and on February 9, 1920, the said attorney Will A. Dower died. After his death Pave Voinich joined with her codefendants in said action in the substitution of Joe Huberty as their attorney in said action instead of Will A. Dower, deceased. This substitution was signed by each of said defendants, including the said Pave Voinich. Later on the said Joe Huberty, as attorney for said defendants Mitchell Voinich and Pave Voinich, filed notice of appeal from the judgment in said action, and notice to the clerk for a reporter's transcript and also for a clerk's transcript in said action. These two defendants also filed a bond on appeal. For some reason the clerk of the court refused to prepare and file a transcript as notified so to do by said defendants, and they instituted an action in the superior court of said county of Calaveras for a writ of mandate to compel said officer to prepare such a transcript. The petition for said writ was signed and sworn to by said Pave Voinich, as well as by her codefendant, Mitchell Voinich, who were the petitioners therein. In said petition it is alleged:

> "That on the 1st day of February, 1917, a complaint wherein Rose Rolleri was plaintiff and petitioners herein were defendants, was filed. * * * That under said complaint process was duly issued and served upon the petitioners hereto; that the cause in which Rose Rolleri was plaintiff and petitioners herein were defendants came on for trial * * * and Will A. Dower, Esq., now deceased, appearing as attorney for defendants, petitioners herein."

In the fourth paragraph of said petition it is alleged that the notice of entry of judgment was served "on Will A. Dower, Esq., now deceased, who was then attorney in the aforesaid action for the petitioners herein." Similar allegations are made throughout said petition, including one stating that nothing was done in said action after the death of Will A. Dower "until the 8th day of June, 1920, when Joe Huberty, Esq., accepted the substitution of himself as attorney for petitioners herein, in the place and stead of Will A. Dower, deceased."

[3] This evidence on behalf of the verity of said judgment and to refute the testimony of the plaintiff herein that the attorney appearing and acting for her in action No. 951 had no authority to represent her in said action, was proof of the highest character and offered ample justification for the trial court's decision adverse to the contention of plaintiff. The allegations of the petition for a writ of review were not only deliberately made by the plaintiff herein in a pleading filed in a judicial proceeding, but they were verified by her oath, and were entitled to be given great weight by the trial court. They were made only a few months after the trial of said action, and when the events to which they relate were fresh in the mind of plaintiff, and under circumstances that afforded little if any chance of mistake or misunderstanding. The allegations of this petition in themselves afforded ample evidence to support the finding of the court of plaintiff's appearance in said action No. 951, and of the validity and binding effect of the judgment rendered therein. By said judgment the defendant herein, the said Rose Rolleri's title to the real property described in the complaint in the present action, was quieted against all interest or claims of the plaintiff herein. This judgment therefore was a complete answer to plaintiff's cause of action and justified the decision and judgment in the present action, irrespective of any other issues made by the pleadings.

Judgment affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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203 Cal. 335

In re CLARY'S ESTATE. (Sac. 3928.)

Supreme Court of California. Feb. 6, 1928.

1. Judgment 🔑715(1)—Opinion that accounting to testator's estate by deceased executor's representative cannot be had on distribution held not res judicata in surviving executor's proceeding for accounting (Code Civ. Proc. §§ 1447, 1639).

Opinion of Court of Appeal that accounting for moneys due testator's estate from estate of deceased executor, under Code Civ. Proc. § 1447, by latter's personal representative, cannot be had on distribution of testator's estate, nor in suit in equity, but that proceeding by surviving executor, under section 1639, is exclusive remedy, *held* not res judicata in such proceeding.

2. Executors and administrators 🔑513(9)—Personal representative's account is final only as to matters adjudicated.

Account of deceased's personal representative, adjudicated on appeal, or not appealed from, becomes final as to all matters adjudicated, but not as to nonadjudicated items.

3. Executors and administrators 🔑75—One qualifying as executor becomes voluntary trustee for devisees and legatees.

One qualifying as executor of will becomes voluntary trustee of property and assets of testator's estate, and holds them for benefit of devisees and legatees under terms of will.

4. Limitation of actions 🔑102(2)—Limitations do not run while parties occupy fiduciary relationship, as of executor and heirs.

The statute of limitations does not run where parties occupy a fiduciary relationship toward each other, as in case of executor and heirs, so long as such relationship is not repudiated.

5. Limitation of actions 🔑102(4)—Executor's duty to account is continuing one, never barred by limitations.

Executor's duty to account is a continuing one, never barred by statute of limitations, irrespective of whether such statute may be pleaded as against an action on the debt itself.

6. Executors and administrators 🔑294—Deceased executor's distributive share of testator's estate may be retained or set off against moneys due latter from executor's estate; his heirs taking residue only after payment of debts (Code Civ. Proc. § 1447).

As heirs of deceased executor would take residue of his estate only after administration thereon, payment of debts, etc., his distributive share of testator's estate can be retained or set off against moneys due from his estate to that of testator, under Code Civ. Proc. § 1447.

7. Executors and administrators 🔑464—Filing of claim against deceased executor's estate by surviving executor is not prerequisite to proceedings for accounting (Code Civ. Proc. §§ 1447, 1639).

Filing of claim against deceased executor's estate by surviving executor is not prerequisite to institution of proceedings by latter for accounting by deceased executor's personal representative, under Code Civ. Proc. § 1639, for amount due testator's estate under section 1447.

8. Executors and administrators 🔑463—Each executor must account for all moneys in their hands, irrespective of coexecutor's like obligation (Code Civ. Proc. §§ 1622–1639).

Under Code Civ. Proc. §§ 1622–1639, it is duty of each executor to account for all moneys coming into their hands and all moneys and property with which they are chargeable, irrespective of like obligation on coexecutor.

9. Executors and administrators 🔑88—Probate court must charge executors with their debts to estate, irrespective of cause of their omission from account or method of bringing them to court's notice (Code Civ. Proc. §§ 1447, 1639).

Under Code Civ. Proc. § 1639, it is duty of probate court, which is guardian of decedent's estates, and controls person appointed to administer it, subject to review, as provided by law, to charge either or both executors with debts owed estate under section 1447, and omitted from account, irrespective of causes of omission of method of bringing indebtedness to court's notice.

10. Executors and administrators ⚷464—Executor owed duty to apply commissions to payment of his indebtedness to estate, failing in which his personal representative, on his death, became liable therefor (Code Civ. Proc. §§ 1447, 1639).

It was executor's duty to report to probate court his indebtedness to estate, under Code Civ. Proc. § 1447, and apply commissions earned to payment thereof, failing in which his personal representative, on his death, became liable to testator's estate for such commissions under section 1639.

In Bank.

Appeal from Superior Court, Yolo County; Ernest Weyand, Judge.

Proceeding by E. F. Clary, executor, to enforce an accounting by the representative of the estate of Charles M. Clary, deceased, for property and moneys belonging to the estate of Abraham Everstine Clary, deceased. From an order fixing the indebtedness, the representative appeals. Affirmed.

Griffin & Boone and Edward T. Taylor, all of Modesto, for appellant.

Grant & Bailey, of Woodland, for respondent.

SEAWELL, J. Upon the petition of appellant for a hearing by this court of this cause after decision by the District Court of Appeal, Third Appellate District, Plummer, J., writing the opinion (253 P. 778), an order of transfer was duly made, and the cause is now before us for decision. We have given further consideration to the opinion and decision rendered by said District Court of Appeal, and have become satisfied that its decision correctly interprets and applies the law by which cases of this character must be ruled. We therefore adopt practically the entire opinion as prepared by the said District Court of Appeal as our opinion, adding thereto brief observations which seem pertinent in view of the arguments contained in the petition for a hearing filed in this court. The opinion follows:

"This matter is before us upon an appeal from an order of the superior court, made and entered in the matter of a proceeding had and taken in said estate, as authorized and provided for in section 1639 of the Code of Civil Procedure, requiring the personal representative of Charles M. Clary, deceased, to account to the estate of Abraham E. Clary, deceased, for the balance due upon a promissory note made and executed by Charles M. Clary to Abraham E. Clary.

"It appears from the record that on or about the first day of August, 1918, Charles M. Clary made, executed and delivered to Abraham E. Clary his promissory note for the sum of $3,000, due one day after date; thereafter, and while this note was uncollected, the said Abraham E. Clary died testate in the county of Yolo, and Charles M. Clary and E. F. Clary, pursuant to the last will and testament of said Abraham E. Clary, were appointed, and on the 6th day of December, 1920, qualified as the executors of the estate of Abraham E. Clary, deceased; thereafter, and on or about the 4th day of April, 1921, the said Charles M. Clary died intestate in the county of Monterey, state of California. Certain payments were made upon said promissory note by the said Charles M. Clary, and, upon the accounting taken and had in the superior court of Yolo county, the sum of $2,965.91 was found to be the remainder due upon said note, against which sum, the distributive share of $1,257.50 otherwise coming to the estate of Charles M. Clary, deceased, from Abraham E. Clary, deceased, was ordered retained as an offset and payment pro tanto of the moneys due from the estate of Charles M. Clary, deceased, to Abraham E. Clary, deceased.

[1] "This matter was before this court upon a previous appeal, wherein it was sought to adjudicate questions relative to the indebtedness of the estate of Charles M. Clary to Abraham E. Clary, upon distribution in the estate of Abraham E. Clary, deceased. Estate of Clary, 71 Cal. App. 22, 234 P. 851. Upon that appeal it was held by this court that the court had no jurisdiction to hear and determine the matter of an accounting on the part of the personal representative of the estate of Charles M. Clary, deceased, for moneys due the estate of Abraham E. Clary, deceased, upon distribution, and thereupon to order a set-off or retainer of the distributive share of the estate of Abraham E. Clary, deceased, which would otherwise be due and payable to the estate of Charles M. Clary, deceased, as payment pro tanto of the indebtedness of Charles M. Clary, deceased, to the estate of Abraham E. Clary, deceased; that section 1639 of the Code of Civil Procedure specified the procedure which must be taken in such cases, and that such procedure is now the exclusive remedy; that such an accounting cannot be had upon distribution, nor can such an accounting be had in a suit in equity. The portion of the decree of the superior court sitting as a court of probate purporting to adjudicate these matters was reversed. As we read the opinion of the Estate of Clary, supra, no other questions were adjudicated and determined upon the former hearing of this cause, and therefore there is no basis for the plea of res adjudicata urged by appellant upon this hearing. It is further specifically pointed out in the opinion to which we have referred that the procedure provided by section 1639 of the Code of Civil Procedure is the one to be followed by the executor of the estate of Abraham E. Clary, deceased, in order to compel the desired accounting. The language of the opinion is, 'the proceeding for such accounting must be inaugurated under said section of the Code of Civil Procedure,' and then concludes that, as the court did not follow such procedure, the action taken by it was without jurisdiction. The opinion referred to does cite a number of authorities in which it is held that assets cannot be collected upon distribution, but there is nothing in the opinion which prohibits, or in any way tends to prohibit, the superior court of Yolo county, on the going down of the remittitur, from proceeding, if proper pleadings were filed therefor, under section 1639 of the Code of Civil Procedure, to enforce the desired accounting.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"Upon the going down of the remittitur, after the prior hearing of this cause, the surviving executor of the estate of Abraham E. Clary, deceased, instituted proceedings under and in accordance with the provisions of section 1639 of the Code of Civil Procedure to enforce an accounting by the representative of the estate of Charles M. Clary, deceased, of the amount of property and moneys in his hands belonging to the estate and constituting a part of the estate of Abraham E. Clary, deceased, at the time of the death of said Charles M. Clary, deceased, and upon this accounting an order fixing the indebtedness as we have herein stated, was made in the probate court of Yolo county.

"The proceedings had in the first instance, leading to the first appeal and the proceedings had in the appeal now before us, were and are both based upon section 1447 of the Code of Civil Procedure, under the terms of which all moneys due from the executor to a testator at the time the executor qualifies as such become assets of the estate of the testator in the hands of the executor, and hence renders the executor liable for the same as if so much money was in his hands. The note in this case was due at the time of the qualification of Charles M. Clary as executor of the estate of Abraham E. Clary, deceased, but against this note the statute of limitations had not yet run. This period would not have expired until some eighteen months after the death of Charles M. Clary, deceased. The exact dates are immaterial. No accounting was ever made or rendered by Charles M. Clary, as executor of the estate of Abraham E. Clary, deceased, of the amount due upon said note or of what the Codes specify shall be considered as so much cash in his hands, nor was any accounting ever made or had thereof by the personal representative of Charles M. Clary, deceased, until the institution of the proceedings herein. The surviving executor of the estate of Abraham E. Clary filed an account of his administration of said estate, called a 'final account,' and also a report therewith. In the account, termed a 'final account,' the surviving executor, E. F. Clary, made no mention of the promissory note herein referred to, but did attempt, as we have herein stated, to make collection of the same upon distribution as therein prayed for.

[2] "Upon this appeal it is urged that the whole matter presented herein was and is res adjudicata; also that the proceeding is barred by the statute of limitations. A number of cases are cited upholding the finality of a final account, from which no appeal has been prosecuted, or which has been adjudicated upon appeal, in addition to urging that the questions involved herein have once been passed upon by this court, which we have just stated to be without merit. That an account becomes final as to all matters adjudicated, the authorities abundantly establish, but it is also true that it is not final as to nonadjudicated items. The text-writer in 24 C. J. p. 1029, § 2484, thus states the rule: 'A final settlement is conclusive as to all matters, the proper subject of account, included in such a settlement or necessarily involved therein; but it is not conclusive as to matters not included or necessarily involved therein, or as to matters not within the jurisdiction of the court. The settlement is not conclusive as to assets not accounted for in such statement or received thereafter, but as to such assets the personal representative may be required to make a further settlement.' In the Matter of Estate of Ross, 179 Cal. 358, 182 P. 303, the Supreme Court, having before it this same question, there said: 'The settlement of an account is not conclusive, "except as to such items as are included in it and actually passed upon by the probate court."' See, also, Estate of Adams, 131 Cal. 415, 63 P. 838, where the same holding is had.

[3-5] "When Charles M. Clary, on the 6th day of December, qualified as an executor of the last will and testament of Abraham E. Clary, deceased, he became a voluntary trustee of the property and assets of the estate of Abraham E. Clary, deceased, holding the same for the benefit of the devisees and legatees, under the terms of the last will and testament of Abraham E. Clary, deceased. Thus, as pointed out in 16 California Jurisprudence, p. 420 et seq., sections 30 to 37, the rule is that the statute of limitations does not run where the parties occupy a fiduciary relationship toward each other, so long as such relationship is not repudiated. Thus, a guardian may not acquire title by adverse possession against his ward, nor an agent against his principal, nor an executor against the heirs. As to the latter, the rule is stated in this language: 'Pending the administration of an estate, the possession of an administrator is not adverse to that of an heir; he cannot acquire an adverse title by possession for the statutory period.' In MacMullan v. Kelly, 19 Cal. App. 700, 127 P. 819, the court, having before it the question of the running of the statute of limitations where one occupied the position of a voluntary trustee, thus announced the rule: 'It is a rule of law in this and other jurisdictions that the statute of limitations does not begin to run in favor of a defendant chargeable as the trustee of an express trust during the life of the trust. In order to set the statute in motion it is necessary that such a trustee, by some act or declaration, positively and unequivocally repudiate the trust, and that notice of such repudiation be brought home to the beneficiary. This rule is so well settled and so generally recognized that no argument is necessary to support its reiteration.' The court then cites a number of cases supporting the rule. The same rule is set forth in the case of Taylor v. Morris, 163 Cal. 717, 127 P. 66. In the case of Elizalde v. Murphy, 163 Cal. 681, 126 P. 978, the court had before it the consideration of a plea of the statute of limitations against requiring the representative of a deceased person to account for funds belonging to the estate, and held as follows: 'The action was simply an action for an accounting—an action to compel the personal representative of a trustee after his death, and the sureties upon his bond as such trustee, to give an account of the property held by the trustee, and of his administration of the trust, to have that account audited and settled by the court, and a balance struck,' citing Osment v. McElrath, 68 Cal. 466, 9 P. 731, 58 Am. Rep. 17. 'The duty of the administrator to account is a continuing duty, and does not become barred. Estate of Sanderson, 74 Cal. 199, 15 P. 753; Cook v. Ceas, 147 Cal. 614, 82 P. 370.' It was held in that case that an accounting does not depend upon any questions of fraud or malversation. It was simply a duty of the administrator or executor, while alive, to account for the trust funds in his hands, and, upon his death, the duty of the personal representative so to do.

"In behalf of their plea, appellants cite the case of Minifie v. Rowley, 187 Cal. 481, 202 P. 673, and refer to the following language contained in the opinion: 'The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.' Code Civ. Proc. § 1447. As a necessary consequence, if defendant Forrest S. Rowley owed the ten thousand dollars here in controversy on June 3, 1915, when he became executor, he became chargeable with that sum as for so much money in his hands and continued liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity.' From this it is argued that the statute of limitations has run against the note involved in this action, and therefore that an accounting cannot be had. The language quoted, however, holds exactly the contrary. As we read it, it means that, irrespective of the lapse of time which would ordinarily bar an action upon the note, the executor, by reason of his fiduciary capacity, becoming chargeable with the note in his hands as so much money, is in that capacity, precluded from pleading the bar of the statute, and therefore, so long as the trust relation continues, the statute does not run. The duty to account is a continuing one, as stated in Elizalde v. Murphy, and devolved upon Charles M. Clary until the date of his death, and immediately devolved upon his personal representative, and, applying the reasoning of the court in the case of Minifie v. Rowley, the fiduciary relationship of the parties stops the running of the statute and precludes reliance upon such plea, irrespective of whether the statute might or might not have been pleaded as against an action on the note itself.

[6] "Likewise, the facts in the case of Schaeffer, 53 Cal. App. 493, 200 P. 508, render it readily distinguishable from the case at bar. In the Schaeffer Case the note against which the right of retainer or set-off was claimed was barred by the statute of limitations before the death of the testator, and hence there was neither right nor remedy existing at the time of the appointment of an executor or administrator. Furthermore, in the Schaeffer Case, no relationship of trust or confidence had been created prior or subsequent to the running of the statute. In the case at bar there was a subsisting and enforceable obligation, both at the date of the death of the testator and upon the qualification of Charles M. Clary as an executor, nor does the question of retainer or set-off strictly arise in this case as against the heirs of Charles M. Clary, deceased. Under our procedure and the law of this state, whatever portion of the estate of Abraham E. Clary, deceased, should or may finally reach the possession of the heirs of Charles M. Clary, deceased, does not affect the rule applicable here, as distribution of the estate of Abraham E. Clary, of the portion, if any, distributable to Charles M. Clary, deceased, would not and could not be made to his heirs, but only to his estate, to be taken possession of by his personal representative, administered upon, and then distributed. Under the rule announced in Estate of Pina, 112 Cal. 14, 44 P. 332, followed in Estate of Strong, 119 Cal. 663, 51 P. 1078, and, also, the case of Galvin v. Mutual Savings Bank, 6 Cal. App. 402, 92 P. 322, the heirs of Charles M. Clary, deceased, would take the residue of his estate only after administration had thereon, payment of debts, etc., and the ascertainment of who the heirs of Charles M. Clary are. The right of retainer or set-off is recognized as applicable upon distribution in this state. Estate of Gamble, 166 Cal. 253, 135 P. 970; Estate of Angle, 148 Cal. 102, 82 P. 668. In states where the law and procedure concerning the devolution, administration, and distribution of estates are different from that which prevails in California, and the remote heirs take directly and not from their immediate ancestor, it is held that children stand in the same position as the father when the question of the right of retainer or set-off of a debt due by the father to the estate of the grandfather of the children is involved. Adams v. Yancey, 105 Miss. 233, 62 So. 229, 419, 47 L. R. A. (N. S.) 1026; note to Stenson v. H. S. Halvorson Co., Ann. Cas. 1916D, 1294; Wilson v. Channell, 102 Kan. 793, 175 P. 95, 1 A. L. R. 987, and extended note beginning on page 991. See, also, Woods et al. v. Knotts et al., 196 Iowa, 544, 194 N. W. 953, 30 A. L. R. 768, and annotations thereto beginning on page 775. In many of the cases cited in the annotations to the cases referred to, debts barred at the time of the death of the testator are allowed to be set off. It may be stated that there are some decisions cited in the notes holding that the right of retainer or set-off does not exist as to remote heirs, who succeed directly, and not from the immediate ancestor, but the great weight of authority is to the contrary, and the cases which hold that the right of retainer or set-off cannot be exercised as against remote heirs, have no application in this state, for the reasons which we have stated, that they are only entitled to the residue of the estate coming to the immediate ancestor after payment of his debts, as ascertained upon administration of the immediate ancestor's estate.

[7] "Appellants further object that no claim was ever filed by the surviving executor of the estate of Abraham E. Clary, deceased, against the estate of Charles M. Clary, deceased, citing the case of In re Smith, 108 Cal. 115, 40 P. 1037. This case, however, has been overruled and the procedure adopted by the surviving executor which we have been considering, is held to be the proper procedure. In re Philbrook, 47 Cal. App. 683, 191 P. 77; Estate of Randall, 188 Cal. 329, 205 P. 118, hold that the filing of a claim is not prerequisite to instituting proceedings for an accounting under section 1639 of the Code of Civil Procedure.

[8] "Under the various provisions of article 2 of chapter 10 of title 11 of the Code of Civil Procedure, it is the duty of an executor and coexecutor to account for all moneys coming into their hands and for all moneys and properties with which they are chargeable, and this duty was incumbent upon Charles M. Clary, deceased, irrespective of a like obligation which rested upon his coexecutor, E. F. Clary.

"The proceeding before us is one for an accounting, and is not one involving collection of assets upon distribution, as was the case upon the prior appeal in the Estate of Clary, 71 Cal. App. 22, 234 P. 851, and, as we have said, the cases there relied upon and necessitating a reversal are not applicable here, save and except in so far as they hold that the proceeding now before us is the one that should have been taken in the first instance."

[9] There can be no doubt that some of appellant's contentions are given more than a mere show of color by certain earlier decisions of this court, especially those rendered prior to the enactment of section 1639, Code of Civil Procedure, by the Legislature of 1905 (St. 1905, p. 216), which provides for the settlement of a deceased executor's accounts by the personal representative of such deceased executor. "Formerly," as stated by the code annotations, "there was no way of settling such accounts except by suit in equity, which is expensive, unnecessary and less expeditious" than the mode proposed by said amendment. It is the trend of recent decisions to extend the jurisdiction of the probate court over such matters as are essentially involved in the probate and settlement of estates, especially where the subject-matter has been in said court contested by all parties in interest. Bauer v. Bauer (Cal. Sup.) 256 P. 822. The amendment of 1905 (section 1639, Code of Civil Procedure) illustrates the tendency of the Legislature to extend the jurisdiction of the probate court over controversies where no legal right is curtailed by so doing, rather than to send the parties into a court of equity at much sacrifice of time and expense. The probate court "'is the guardian of the estates of deceased persons and has control of the person appointed by it to administer the estate subject to review as provided by law. * * * It is the duty of the court carefully to scrutinize the account and reject all claims of the executor illegal in themselves or unjust in fact.'" Estate of Randall, 188 Cal. 329, 205 P. 118. By parity of reasoning it would be its duty to charge either or both executors with debts which they owe the estate and which have been omitted from the account irrespective of the causes of omission or the method by which such indebtedness may be brought to its notice.

[10] The Estate of Walker, 125 Cal. 242, 57 P. 991, upon which appellant relies as an authority nullifying the provisions of section 1447, Code of Civil Procedure, does not do so. That case prescribes the formula as to the kind of judgment that should be rendered in case an administrator is a debtor of the estate he is administering. It does hold, however, that he "should be charged with the entire sum, including the debt due from himself, and the decree should then show what portion of that amount consisted of debts due from the administrator which he reported as cash on hand. Of course, if it appears that he actually has the money, this formula would be unnecessary" In the instant case, the executor, C. M. Clary, deceased had earned a portion of his commission as an executor, which was due him from the estate. As Clary could not sue himself, and as it was "his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed the duties of his trust according to law. * * *" Estate of Walker, supra. It was C. M. Clary's duty to report his indebtedness to the probate court and to have paid it, if it was possible for him to have done so. The commissions earned by him could, and should have been applied to his indebtedness. The fact that he died pending the administration of the estate did not affect the situation in any sense. Estate of Walker really supports respondent. All other points raised by appellant seem to be sufficiently disposed of by the opinion of the District Court of Appeal.

The order and decree appealed from are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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203 Cal. 291

MARTIN v. PACIFIC GAS & ELECTRIC CO.

(Sac. 3696.)

Supreme Court of California. Jan. 31, 1928.

1. **Appeal and error ⚷1064(1)—Holdings that complaint charged negligence in maintaining electric power wire, as well as in failure to remove wire after it broke, held not prejudicial to defendant.**

Holdings of trial court that complaint charged negligence in maintaining electric power wire, as well as in failure to remove it from sidewalk after it became broken, *held* not prejudicial to defendant, where it was fully aware that plaintiff contended for such construction and it had fair opportunity to meet charge. (Per Preston, Seawell, and Langdon, JJ.)

2. **Electricity ⚷19(2)—Evidence of negligence in maintenance and in failing to remove electric power wire after it broke held admissible under pleading.**

Evidence to show both negligence in maintenance of electric power wire and in failing to remove it from sidewalk after it became broken *held* admissible, where complaint charged both acts of negligence and defendant admitted only latter act of negligence. (Per Preston, Seawell, and Langdon, JJ.)

3. **Trial ⚷55—Evidence of negligence held not inadmissible because inflammatory, where otherwise admissible.**

Evidence to show negligence respecting electric power wire *held* not inadmissible because it would be inflammatory or tend to unduly arouse the jury, where otherwise admissible. (Per Preston, Seawell, and Langdon, JJ.)

4. Appeal and error 🔑1064(1)—Reading of pleadings is not prejudicial, though legal effect has been admitted.

Reading of pleadings to jury is not prejudicial error, even though legal effect of them has been admitted. (Per Preston, Seawell, and Langdon, JJ.)

5. Appeal and error 🔑230—Objections to testimony held not available on appeal where witnesses had testified fully upon subject.

Objections to testimony as to injuries *held* not available in Supreme Court where witnesses had testified fully upon subjects before any objections were made. (Per Preston, Seawell, and Langdon, JJ.)

6. Appeal and error 🔑1052(5)—Admitting evidence of negligence respecting electric power wire, where negligence was conceded, held harmless error, where verdict was not excessive.

Admitting evidence that electric power company was negligent as to charged wire which caused personal injuries, where such negligence was conceded, *held* harmless error, where verdict was not excessive. (Per Shenk, J., and Waste, C. J.)

7. Appeal and error 🔑1052(5)—Admitting evidence of negligence as to electric power wire, if error, because negligence was conceded, held harmless where verdict was not excessive.

Admitting evidence that electric power company was negligent respecting charged wire which caused personal injuries, if error, because such negligence was conceded by it, *held* harmless where verdict was not excessive. (Per Curtis, J.)

Richards, J., dissenting in part.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action for personal injuries by Henry Alan Martin, a minor, by and through P. R. Merrill, guardian of his estate, against the Pacific Gas & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal in 255 P. 284.

Thos. J. Straub and Charles E. Finney, both of San Francisco, and Carr & Kennedy, of Redding, for appellant.

Jesse W. Carter and Carter & Smith, all of Redding, for respondent.

PRESTON, J. [1] This is an action for damages for personal injuries sustained by plaintiff, a minor, when between 8 and 9 years of age. He had judgment for $25,000, and defendant has appealed.

On December 24, 1922, at Cottonwood, Shasta county, plaintiff was injured by coming in contact with a highly charged power line owned, maintained, and operated by defendant in serving a nearby pumping plant with electric energy. A wire of said power line had broken and fallen across the sidewalk area of a street in said town and had remained on the ground, unguarded and charged with electricity, for several hours, to wit, from some time in the early morning until after plaintiff was injured, about 10 o'clock a. m.

Appellant sets forth its reasons for a reversal under eight subdivisions, but we do not see the necessity of considering these contentions separately. With one or two exceptions, all the important grounds urged for reversal of the judgment are answered by the boundaries which we place upon the issue of negligence tendered by the pleadings and the admissions by the defendant in connection therewith. A difference between the parties as to the proper interpretation of this issue forms the basis of practically all the errors claimed by appellant.

Paragraph V of the complaint is as follows:

> "That on or about the 24th day of December, 1922, and for several months prior thereto, the said defendant carelessly and negligently had constructed, kept, maintained, and operated the said electric power line through the limbs and branches of a tree situated on the sidewalk on said Chestnut street, near the southeast corner of the yard fence of the 'Ogburn residence,' in said town of Cottonwood; that said electric wire power line was so constructed, kept, maintained, and operated through the limbs and branches of said tree that the wires thereof came in contact with the limbs, branches, and leaves of said tree and caused the same to arc, burn, rub, and cut said limbs, branches, and leaves; that for approximately three weeks continuously prior to the said 24th day of December, 1922, some of the limbs and branches of said tree had broken and fallen over said wires, causing the same to droop, sag, and break, thus greatly endangering the life and limb of persons passing under said tree and said electric wire power line on said sidewalk; that as a result of said wires coming in contact with the limbs and branches of said tree and the limbs and branches thereof falling and bearing upon said wires, and said wires, arcing, burning, rubbing, and cutting said limbs and branches, one of said wires broke and fell to the ground, and remained thereon at or near said sidewalk from about 6 o'clock a. m. until 12 o'clock m. on the said 24th day of December, 1922; that said wire remained connected on one end with the said electric wire power line and was, during all of said time, heavily charged with electricity, which said charged wire was so exposed and unguarded as to permit pedestrians to come in contact with it, all of which the said defendant well knew; that said broken wire lying on the ground near said sidewalk, as aforesaid, was at all of said times owned by and under the control of said defendant."

This is followed by paragraph VIII, which reads as follows:

> "That said plaintiff, Henry Alan Martin, suffered and received said injuries hereinabove mentioned, wholly by reason of the carelessness

and negligence of said defendant in permitting said electric power line to remain upon the ground at the time and in the manner aforesaid."

At the trial, and after the impanelment of the jury and when plaintiff's counsel was about to make his opening statement, the defendant, desiring the court to limit the issue of negligence, tendered the following admission:

> "Before proceeding with the trial of the case, we desire to make the following admission. The Pacific Gas & Electric Company desires to admit that on the morning of December 24, 1922, one of its wires fell, and that the defendant thereafter negligently permitted the wire to remain on the ground until the time alleged in the complaint, and that Henry Alan Martin, the plaintiff in this action, was injured as a result of such negligence. We have made this admission in the interest of shortening the trial of the case, believing that the circumstances justify it; and we will then go to the jury with the sole issue as to the nature and extent of the injuries, and the amount of just compensation to which the plaintiff is entitled."

This admission was predicated upon the contention that paragraph VIII, above quoted, limited the allegations of paragraph V to one ground of negligence, to wit, negligence arising not from the maintenance of said electric power wire, but negligence arising solely from neglect or failure to sooner discover and remove from the sidewalk area, where plaintiff was injured, this dangerous instrumentality. Counsel for defendant, having taken this position of weakness, undertook with great skill to turn it into a position of strength. For example, objection was repeatedly and emphatically made to any reference at all by plaintiff's counsel in his opening statement to the jury to the alleged negligent acts which caused the wire to break and fall to the ground. Objection was also strenuously urged even to the reading of portions of said paragraph V of the complaint in the presence of the jury. Objection was also time and again urged to the introduction of proof upon this issue or upon any issue of negligence. Again, repeated and determined opposition was asserted to reference to such alleged acts of negligence or to the question of negligence at all in the argument of counsel. Over and over again his words in this behalf were assigned as misconduct. This same issue arose again on motion for new trial, where the acts and conduct of plaintiff's counsel with respect to its particular subject-matter were set forth in an affidavit, the court striking said references from said affidavit and thereafter denying the motion for new trial.

The meaning of this pleading and the acts and conduct of both parties with respect thereto become, therefore, an important consideration at the outset. The said amended complaint was filed on June 22, 1923. On July 12, 1923, a general and special demurrer thereto was filed, but nothing is found therein urging ambiguity or uncertainty between the allegations of paragraphs V and VIII thereof. But pending the hearing on this issue of law, a motion to strike out certain portions thereof was made. This motion was denied and the demurrer overruled on September 7, 1923. A portion of said motion was directed to paragraph V of the amended complaint, but even had it prevailed it would have left the following allegations in said paragraph relating to the cause of the falling of said wire:

> "That on or about the 24th day of December, 1922, * * * that as a result of said wires coming in contact with the limbs and branches of said tree and the limbs and branches thereof falling and bearing upon said wires, and said wires, arcing, burning, rubbing, and cutting said limbs and branches, one of said wires broke and fell to the ground, and remained thereon at or near said sidewalk from about 6 o'clock a. m. until 12 o'clock m. on the said 24th day of December, 1922; that said wire remained connected on one end with the said electric wire power line and was, during all of said time, heavily charged with electricity, which said charged wire was so exposed and unguarded as to permit pedestrians to come in contact with it, all of which the said defendant well knew; that said broken wire lying on the ground near said sidewalk, as aforesaid, was at all of said times owned by and under the control of said defendant."

The denial in toto of this motion to strike certainly put defendant on notice that plaintiff was relying upon all of the acts of negligence set forth in said paragraph V without limitation of any kind. Defendant answered said paragraph and also paragraph VIII specifically, and apparently experienced no trouble in that behalf, for said answer makes specific denial of each of the causes alleged to have contributed to the injury of plaintiff. Finally, answering said paragraph VIII, there is no intimation of doubt about its reference to all of paragraph V, the answer in this connection being:

> "Answering the allegations contained in paragraph VIII of said complaint, said defendant denies that said plaintiff suffered or received the said alleged injuries, or any of them, wholly or at all, by reason of the alleged carelessness or negligence, or any carelessness or negligence, of said defendant in permitting said electric power line to remain upon the ground at the time or in the manner alleged in said complaint, or otherwise, or at all; and in this connection said defendant denies that said plaintiff was ever injured by reason of any careless or negligent act or omission on the part of said defendant with respect to the management or control of its said power lines, or any of them, or at all."

In this portion of the answer, we find a clear interpretation of said pleading as putting forth the issue:

> "* * * Careless or negligent act or omission on the part of said defendant with respect

to the management (and) or control of its said power lines. * * *"

This paragraph VIII, standing alone, would not be a sufficient allegation of negligence, reference to paragraph V being necessary for the gravamen of the charge. If we go there for the allegations of negligence which defendant admitted, why may we not be referred to said paragraph also for all other allegations there found? Why may not it be held that the pleader intended said words "at the time and in the manner aforesaid" to refer to all the contributing causes set forth in said paragraph V? The most that may be said of said allegations is that as between the two paragraphs an ambiguity arises. The demurrer, however, as above stated, took no form which permitted the raising of this question. The motion to strike, as above noted, really did not fully and fairly raise it.

Moreover, it must be noted that plaintiff from the beginning of the trial to its close was insisting that he was standing on paragraph V as the specific acts of negligence relied upon, and was contending also that the meaning thereof was in no way limited or qualified by said paragraph VIII. The trial court, as above noted, sustained plaintiff in this construction of the pleading. The defendant had an answer on file consonant with that construction. The defendant at no time subsequent to September 7, 1923, when the motion to strike was denied, could have been in doubt as to the construction of the pleading contended for by plaintiff. Defendant enjoyed every right it would or could have had, had paragraph VIII been eliminated as surplusage or been amended to harmonize perfectly with paragraph V. Upon no reasonable hypothesis can it be said that defendant has or could have suffered any legal injury arising from this situation. The effect of the action of the court was as though it had struck out paragraph VIII or had amended it so as to fully obviate any cause for the claim that paragraph V was in any way impaired by it. Defendant had a fair opportunity from every standpoint to meet the charge, and in fact attempted to do so as best it could when the plaintiff placed the employee responsible for the maintenance of the wire upon the witness stand. The language of Bergen v. Tulare County Power Co., 173 Cal. 709, 715, 161 P. 269, 271, is here applicable:

> "The order overruling the demurrer to the complaint was a proper one. The case was tried upon a well-defined theory, and even if the complaint had contained the defects of which the demurring party complained, that litigant was not misled because the controversy was fairly determined upon its merits. Bank of Lemoore v. Fulgham, 151 Cal. 234–237, 90 P. 936; Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Irrgang v. Ott, 9 Cal. App. 440–442, 99 P. 528."

See, also, Grossetti v. Sweasey, 176 Cal. 793, 795, 169 P. 687; Ingalls v. Monte Cristo Oil, etc., Co., 176 Cal. 128, 133, 167 P. 857; and Stein v. United Railroads, 159 Cal. 368, 370, 113 P. 663.

[2] With this construction of the pleading on the issue of negligence, practically all of the contentions of appellant, one by one, must fail. For example, the admission indulged by it, which undertook to limit the proof, becomes an admission of only one of the two or more specific acts of negligence alleged to have proximately contributed to plaintiff's injuries. Such an admission not only did not authorize the court to limit the evidence, but in reality it would have been error if the court had undertaken to so limit it. Williamson v. Atlas Powder Co., 212 App. Div. 68, 208 N. Y. S. 301. This construction of the pleading makes also free from error the act of counsel for plaintiff in referring to all the issues on negligence in his opening statement. This same observation is true with reference to the marshaling and introduction of evidence to prove each of the specific acts of negligence alleged in said paragraph. This holding renders harmless also the argument of counsel referring to the evidence upon this subject. This same observation is again true as to the objections made to the instructions of the court outlining the legal principles applicable to all the allegations of negligence contained in said paragraph V. This also renders harmless any act of the trial court in striking from the affidavit used on motion for new trial those references to the alleged misconduct of counsel in arguing the features of the evidence relating to the allegations of said questioned paragraph. Indeed, it never has been the law that it was or could be error to prove even admitted allegations of the pleadings if the patience of the trial court would permit it.

"It does not lie in the power of one party, however, to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the Presiding Justice in his discretion deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts, to present to the jury a picture of the events relied on. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances." 26 R. C. L. § 40, p. 1036; Dunning v. Maine Cent. Ry. Co., 91 Me. 87, 39 A. 352, 64 Am. St. Rep. 208.

[3] The fact that the evidence admitted might, as an incidental feature thereof, be inflammatory or have a tendency to unduly arouse the jury does not render such evidence inadmissible. In Mohn v. Tingley, 191 Cal. 470, 491, 217 P. 733, 742, it is said:

> "The chief objection to all the evidence of which complaint is made is that it served to stir up the prejudice of the jury and arouse sympathy in respondent's favor. But the evidence

being admissible, its effect upon the jury would furnish no reason for its rejection."

[4] Likewise no prejudicial error can be committed by reading the pleadings to the jury, even though the legal effect of them has been admitted. Knight v. Russ, 77 Cal. 410, 414, 19 P. 698.

We therefore hold that the said attempt of counsel to limit the proof was abortive and the trial court committed no error in its rulings in respect thereto.

[5] The only other assignments of error necessary to notice are two: First, that it was error for the court to admit evidence of existing curvature of the spine, chorea, and endocarditis as results of the injury, and likelihood of cancer in the future, because these ailments were not specifically pleaded; and, second, that the verdict was excessive as the result of passion and prejudice.

The plaintiff's injuries may be described as follows (testimony of Dr. Thompson):

> "The first injury was on the back of his head. The burn there caused the external area of the skull to die, and it had to be curetted away about a half inch in diameter, and the external plate had to be removed; the electric current entered the body through the right hand, and his two fingers and thumb were very badly burned, and the little finger was partially removed, that is, about one-third of the bone; the little finger is somewhat pressed in toward the other finger, and a portion of it and the muscles are dead from the effects of the burn. The second finger was entirely destroyed to the knuckle joint and had to be removed to that joint; the first finger was destroyed down almost to the joint; the thumb was removed at the last joint; the wire evidently came in contact with this hand through the body and went out through the head and where the boy's body came in contact with the ground; the next injury was a spot right in the left shoulder blade, about two inches long, where it went through the skin; the next burn was about four inches long on the left side, and some of the tissues underneath were destroyed; we took some skin off the leg and covered that over; you can still see the outline of the scar; at the point where this burn occurred the muscles extending to the arm where the electricity entered the body, the upper part of the arm is about half an inch smaller than the left arm, and in the forearm it is about a quarter of an inch smaller than the left arm; the boy was formerly right handed; the measurements of the boy's chest disclose that the muscles on the right side seemed to be three or four inches smaller than the muscles on the left side of the chest; the tendency of the muscles on the left side of the chest, being injured and drawn toward the spine, is to pull the muscles to the left of the vertebræ, causing a curvature of the spine about half an inch at the widest place; there was also a spot on the left shoulder blade about two inches in length."

The evidence also showed the boy to have been in robust health and between the age of 8 and 9 years when the injury was received. With these injuries, emphasis was also made by plaintiff's testimony of the presence of a pronounced case of chorea, commonly known as St. Vitus dance, a nervous affliction causing a systematic contraction of various muscles, sometimes causing spasms of face and neck and a twitching of the eyes. The presence of endocarditis was shown, this being a disease of the muscles of the heart, which is found in about 80 per cent. of the cases of chorea. It is described as a chronic inflammatory trouble of heart muscles and, like any other heart trouble, it is a serious affliction. Testimony was also given to the effect that there was some danger of a cancerous growth arising because of poor circulation to and the tender condition of large scars on the body of plaintiff as the result of the burns received at the time in question. Speaking of this situation, one of plaintiff's witnesses said:

> "I would say there are a certain number of cases of this character where injurious results occur later in life. I would not say that they are certain to appear, but in a certain number of cases they do appear."

A second expert testified to the same effect.

The two experts testifying for defendant, after a full and fair examination of plaintiff, gave a similar opinion, one saying:

> "I don't agree with the doctor in that respect. Cancers do occur in the skin in cases of scarred tissues, but the percentage of cancer that develop in scars is very, very small."

And the other:

> "There is always a possibility of anything in medicine and surgery. The probability of a malignant growth in this case is very remote."

It should be here carefully noted that as to curvature of the spine, presence of chorea, and endocarditis, the facts were made known to the experts of defendant when they met prior to the trial, and had ample opportunity to examine and did examine plaintiff. The evidence, however, as to the danger from cancerous growth was apparently not discussed at the time of said examination. But it should be noted that this apprehension of danger was considered by all the witnesses as more or less remote. It should also be carefully noted that objections to the testimony upon all these subjects were belated and came entirely too late to avail defendant here. The physicians, and particularly Dr. Thompson, testified fully upon all these subjects before objections of any kind were made. If all that occurred after objections were given full weight, it would add little, if anything, to the testimony that had already entered the record.

Moreover, the court adequately limited the issue in this particular and instructed the jury as follows:

"You are therefore instructed that the amount plaintiff may recover in this action is limited to such damages as are the effect of the injuries complained of in his complaint, or reasonably certain to result therefrom. You are instructed that, in estimating the amount of compensation to be awarded plaintiff for the future consequences of the injuries complained of in his complaint, he may only recover such damages as by the evidence it is reasonably certain he will suffer in the future as a direct and necessary result of his injuries. This does not mean such future disability, pain or mental anguish, as the evidence may show is 'reasonably probable,' and does not mean you may estimate prospective damages upon what you 'believe' might be the plaintiff's future suffering. Such damages may only be awarded for injury or suffering reasonably certain to result in the future."

An examination of the amended complaint shows that the damages contended for might have been defined in clearer language. Nevertheless, we believe that paragraph VII thereof is broad and general enough to admit all this testimony and to make operative the rule stated in Samuels v. Cal. St., etc., Co., 124 Cal. 294, 296, 56 P. 1115, as follows:

"The complaint averred that Mrs. Samuels, by reason of the accident, 'was rendered unconscious for a long period of time, and received great bodily injury, and was made sick, sore, lame, and disabled for a long period of time, to wit, from thence hitherto, during all of which time she thereby suffered great pain, and was thereby then and there hindered and prevented from attending to her business and domestic affairs, and has ever since remained and continued sick, sore, lame, and disabled, and has suffered, and still continues to suffer, great pain of body and anguish of mind, and is informed and believes that said injuries are of a permanent nature.' Under this averment evidence was admitted of a uterine trouble brought upon Mrs. Samuels by the accident. Such evidence was admissible under the general averment of bodily injury and resulting damage. Treadwell v. Whittier, 80 Cal. 574 [22 P. 266, 5 L. R. A. 498] 13 Am. St. Rep. 174; Montgomery v. Lansing, etc., Ry. Co., 103 Mich. 46 [61 N. W. 543, 29 L. R. A. 287]; Denver, etc., Ry. Co. v. Harris, 122 U. S. 597 [7 S. Ct. 1286, 30 L. Ed. 1146]."

This rule is an amplification of the rule earlier announced and clearly stated in Treadwell v. Whittier, 80 Cal. 574, 579, 22 P. 266, 5 L. R A. 498, 13 Am. St. Rep. 174. The allegations of the complaint do not confine the result of the injuries solely to a disabled arm and hand, but in other respects declare that by reason of said injury and burns plaintiff suffered and still suffers great and excruciating pain, and has been maimed and disfigured and will continue to suffer great and unusual pain and mental anguish for a long time to come. These allegations were broad enough at least to admit testimony as to any affliction that had already developed from said injury. Other interpretations of the above rule may be found in the following cases: Kuhns v. Marshall, 44 Cal. App. 588, 186 P. 632; Worden v. Central Fire Bldg. Co., 172 Cal. 94, 97, 155 P. 839; Lauder v. Currier, 3 Cal. App. 28, 84 P. 217; Campbell v. L. A. Traction Co., 137 Cal. 565, 70 P. 624.

This conclusion also disposes of the contention that the court erred in refusing to peremptorily instruct the jury to disregard all evidence respecting curvature of the spine, chorea, endocarditis, and danger of cancer.

The only other contention to be considered is the claim that the verdict is as a matter of law excessive. This contention, in view of what has been said above, requires no discussion. As we understand counsel, they really predicate their claim of excessive damages in this respect upon alleged prejudicial matters hereinabove discussed, particularly the reception of evidence, the instructions of the court, the conduct of counsel, and failure of the court to limit or prevent the admission of evidence of negligence. Being unable to agree with learned counsel for defendant that any prejudicial error was committed in that respect, this assignment of error spends its entire force. There is nothing tangible found in the record to authorize us, as a matter of law, to declare the verdict the result of passion or prejudice.

The judgment is affirmed.

We concur: SEAWELL, J.; LANGDON, J.

SHENK, J. [6] I concur in the judgment. Paragraph VIII of the amended complaint alleged the negligence of the defendant which was the proximate cause of the injury, namely, that the defendant negligently permitted the electric power wire "to remain" upon the ground. The concluding phrase of the allegation, to wit, "At the time and in the manner aforesaid," should be held to refer only to such portions of the allegations of paragraph V as related to the negligence of the defendant in permitting the wire "to remain" on the ground. The admission of the defendant at the commencement of the trial constituted an admission of the negligence alleged in paragraph VIII as so construed and as such was an admission of the negligence that proximately caused the injury. Assuming that this belated admission should not have operated to prevent the plaintiff from proving his allegations of negligence under this material issue, if the court should so permit, it is clear to me that proof of the other allegation of negligence should not have been allowed if the same tendered an immaterial issue. Whether the defendant was negligent in the maintenance of the unbroken wire at or near the scene of the accident, as alleged in paragraph V, was, in my opinion, immaterial. I am not satisfied, however, that the error of the court in permitting proof on the immaterial issue resulted in a miscarriage of justice, as it cannot be said, in view of the seriousness of the injuries inflicted on the minor, that the verdict was excessive. In order so to declare it must appear to this court that the judgment is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83; Mohn v. Tingley, 191 Cal. 470, 492, 217 P. 733. I am not prepared so to declare.

I concur: WASTE, C. J.

CURTIS, J. [7] I concur in the judgment. While it may have been error for the trial court to have admitted evidence of the defendant's negligence after the admission of its counsel at the commencement of the trial that the plaintiff sustained the injuries complained of by reason of the negligence of the defendant, I am not satisfied the defendant was seriously prejudiced by the introduction of such evidence. By this admission of defendant's counsel the sole issue left to be tried by the jury related to the nature and extent of plaintiff's injuries and the amount of compensation to which plaintiff was entitled by reason thereof. The evidence upon this issue is fully set out in the main opinion. It shows that the plaintiff, a boy in robust health, and of the age of 8 or 9 years at the time of his injury, was left by reason thereof a helpless cripple, to spend the remainder of his life in pain and suffering, unable to earn a bare existence, and, by reason of his afflicted condition deprived of enjoying any, of the pleasures or even comforts of life. With such evidence as to the extent and seriousness of plaintiff's injuries the jury would have been warranted in finding the verdict which they rendered against defendant, and in the absence of any of this evidence of negligence, I am not satisfied that the result of the jury's deliberation would have been different from the verdict which we are now asked to set aside. There has been no miscarriage of justice, and whatever error was committed by the court in the admission of evidence showing defendant's negligence did not result in any prejudice to the defendant.

RICHARDS, J. I dissent from that portion of this opinion wherein it is held that the trial court was not in error in permitting the plaintiff to introduce a large amount of highly prejudicial evidence upon matters which were no longer at issue on the trial of the cause. The defendant's offer to go to trial upon the sole issue "as to the nature and extent of the injuries, and the amount of just compensation to which the plaintiff is entitled" could not be otherwise interpreted than as a withdrawal of every denial of negligence in its answer upon which an issue of negligence could be predicated, and hence upon which evidence could be producible. Had the defendant's answer contained no denials of the defendant's alleged negligence, but only denials as to the extent of the plaintiff's injuries, could it be contended that the plaintiff would nevertheless be entitled to present a large amount of inflammable evidence upon the subject of the defendant's past and proximate acts of negligence, the obvious purpose of which could be only to arouse resentment and prejudice in the minds of the jurymen? If so, this judgment is correct. If not, it should be reversed.

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ERDEVIG v. MARKET ST. RY. CO.★

(S. F. 12106.)

Supreme Court of California. Feb. 9, 1928.

Rehearing Denied March 8, 1928.

1. Street railroads ⟾112(1)—Pedestrian, suing street railway company for injuries from operation of car, was required to prove defendant's negligence proximately causing injury.

Pedestrian, suing street railway company for injuries, was required to prove negligence on part of defendant in operation of its car, and that such negligence proximately caused injury.

2. Street railroads ⟾111(1)—Street railway company, sued by pedestrian for injuries, had burden to plead and prove contributory negligence.

Contributory negligence was affirmative defense to be alleged and proved by street railway company, sued by pedestrian for injuries resulting from operation of street car.

3. Negligence ⟾136(26)—Trial court was required to grant motion for nonsuit, if injured plaintiff's own evidence convicted her of contributory negligence as matter of law.

If plaintiff, in endeavoring to prove negligence on part of the defendant, gave evidence from which contributory negligence on her part could have been reasonably inferred, court was under duty on motion for nonsuit to consider such evidence, and to grant defendant's motion, if testimony showed plaintiff was guilty of contributory negligence as matter of law.

4. Street railroads ⟾114(10)—Evidence of street railroad's operation of street car at rapid rate and without warning past safety zone and car on adjoining track held to make prima facie case of negligence in pedestrian's action for injuries.

Evidence of street railroad's negligence in permitting operation of street car at rapid rate of speed and without warning past safety zone at intersection and past car on adjoining track *held* sufficient to make prima facie case of negligence in action for injuries by pedestrain, who, while passing in front of car which had stopped to take and unload passengers, was struck by another car proceeding in same direction.

★Rehearing denied.

5. Street railroad 🔑85(4)—Pedestrian has at least equal right with street car to use of crossing.

Pedestrian has at least as much right to use of street crossing at intersection as has passing street car.

6. Street railroads 🔑117(21)—Contributory negligence of pedestrian passing in front of street car at intersection and coming into contact with moving street car on adjoining track held for jury.

Contributory negligence of pedestrian proceeding in front of one street car, which had stopped at intersection, and coming into contact with rapidly moving car on another track which was claimed to have approached without warning, *held* question of fact for jury in action for injuries.

7. Trial 🔑142—Question on which reasonable minds might differ is for jury.

Question on which reasonable minds might differ is one of fact for jury, and not question of law for determination of court.

8. Street railroads 🔑98(6)—Pedestrian passing in front of street car at regular pedestrian's crossing could assume persons in charge of car on adjoining track, which car was obscured from view, would give warning signal.

Pedestrian passing in front of street car at intersection at regular pedestrian's crossing had right to rely on those in charge of car on adjoining track to give warning or signal of approach, especially where view of pedestrians was obstructed on account of car which had stopped.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Josine Erdevig against the Market Street Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Max Schmulowitz, Oliver B. Wyman, A. D. Duncan, and C. M. Booth, all of San Francisco, for appellant.

Wm. M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco, for respondent.

CURTIS, J. This action was brought by appellant to recover damages for injuries sustained by her in being knocked down by an electric car owned by respondent, and operated at the time of the accident by respondent's employees. The trial court granted a nonsuit and the plaintiff has appealed. The evidence shows that the appellant was, at the time she was struck by respondent's car, in the act of crossing Market street, in the city of San Francisco, at its intersection with Franklin and Twelfth streets. Just prior to the accident the appellant had walked from the northerly curbstone of Market street to the safety zone contiguous to the tracks of the Municipal Street Railway on the northerly side of Market street. A Municipal car had stopped opposite and parallel to this safety zone upon appellant's arrival at the safety zone. This car, before it stopped, had been traveling in a westerly direction, and the front or westerly end thereof was about even with the westerly end of the safety zone. Appellant walked in front of the standing Municipal car, intending to cross Market street at the intersection crossing to the safety zone on the opposite or southerly side of said street for the purpose of taking a car which would cary her in an easterly direction down Market street. We now quote from appellant's testimony:

"The Market Street Railway tracks are about six feet from the Municipal tracks. I saw no car on the Market Street Railway tracks. Just as I cleared the Municipal car a Market Street Railway car knocked me to the pavement. I did not hear any gong or bell.

"Q. Did you see the street car before it struck you? A. No; I did not; it was instantaneous.

"Q. Do you know what portion of the car struck you? A. The front corner, as near as I know.

"Q. Which front corner, or which side? A. The right. * * * The car struck my left thigh. My back, in the bumping around, was wrenched badly, and also bruised, and within the course of being bumped around my knees were bruised and my elbows also. My back had to be taped. The buttons were all torn off my clothes and my stockings were in shreds. The first I recollect after the accident was being back in the safety zone that I had just left. The Market Street Railway car that struck me stopped quite a little distance ahead of the safety zone after I was struck."

On cross-examination the appellant testified as follows:

"Q. The only time that you saw the Market Street Railway Company's car that was involved in the accident was the instant that it came in contact with you? A. I knew nothing; it was instantaneous; just when I cleared the Municipal car—just the instant I had cleared it I was struck.

"Q. Did you see the Market Street Railway Company car at all? A. No.

"Q. And, as you crossed in front of the Municipal Street car, was there anything to obstruct your view to your east, that is, to your left, or to your right, on Market street? A. Well, the instant I cleared the track—all the while—why, I put my gaze ahead.

"Q. You were looking straight ahead? A. And to the side as I crossed, and the instant I cleared the Municipal track I was struck.

"Q. When you crossed in front of the Municipal Street car, did you look to your left? A. Yes, sir.

"Q. Was there anything to obstruct your view in an easterly direction, toward the Ferry, on Market street, at the time you looked to the left? A. No.

"Mr. Booth: I don't suppose, Miss Erdevig, that you know how far these cars extend out from the tracks and into the space between the tracks? A. Well, I can't say exactly, but it is quite a little ways from the tracks that they extend."

A Mrs. Foard, a sister of appellant, testified on cross-examination that:

> "I saw my sister walk in front of a standing Municipal car and the next thing after she passed in front of the standing Municipal car she was knocked down by a Market Street car. She was never on the track in front of the Market Street car."

It was also in evidence that the tracks of both the Municipal Street Railway and the Market Street Railway were standard gauge and that the distance between the two rails of each track was four feet eight inches, and that the distance between the Municipal Street Railway track and the Market Street Railway track was six feet four inches. There was no evidence as to the exact distance the cars extended out from or overhung the tracks on which they are operated.

[1-3] In order for the appellant to have made out a case which would entitle her to have the merits thereof passed upon and decided by the jury, it was necessary for her to prove negligence on the part of the respondent in the operation of its car which proximately caused her injury. The burden of proving contributory negligence on the part of the appellant is an affirmative defense and must be both alleged and proven by respondent. But if appellant, in endeavoring to prove negligence on the part of the respondent, gave evidence from which contributory negligence on her part could have been reasonably inferred, it was the duty of the court, upon the motion for a nonsuit, to give consideration to such evidence, and if it were sufficiently strong as to show as a matter of law that appellant was guilty of contributory negligence which proximately caused the injury sustained by her, then it was the duty of the trial court to grant such motion. Therefore appellant's evidence must have shown negligence on the part of respondent proximately causing her injury without showing that appellant was guilty of contributory negligence, and unless it possesses both these characteristics the plaintiff failed to make out a case for the jury and a nonsuit was proper.

[4-7] Let us first ascertain whether the evidence of appellant made out a prima facie case of negligence against respondent. The place where the injury was sustained was at a street intersection. From this fact we think we can reasonably infer that it happened at a point in the street where pedestrians were not only accustomed to cross, but where in most communities they are required to walk in going from one side of the street to the other. The evidence shows that a safety zone was established at this point and that cars stopped there to take on and unload passengers. The Municipal car had stopped for that purpose just before appellant walked in front of it. The Market Street Railway car was traveling in the same direction as this Municipal car at the time it struck appellant and was obscured from appellant's sight by the Municipal car. We think the only reasonable conclusion to be drawn from the evidence is that the car of respondent approached this crossing without stopping, and that at the time it was traveling at rather a rapid rate of speed, as the evidence of appellant was that after it hit her it went some distance beyond the safety zone before it was stopped. Appellant testified that she heard neither bell nor gong sounded by those operating the car, and from this evidence we must infer that no warning was given as the Market Street Railway car approached the crossing. We think this evidence establishes beyond question that the respondent was negligent in the operation of its car at the point where it struck and injured appellant. Respondent was therefore responsible to the appellant for the injuries sustained by her unless appellant was guilty of contributory negligence. As we have already seen, the distance between the two car tracks was six feet four inches. The cars of each company extended out or overhung the tracks some little distance, and this would diminish the space between the car on the Municipal Street Railway track and the car on the Market Street Railway track when abreast of each other to the extent that the two cars extended out over their respective tracks. Whatever this space was (and from the evidence it must have been materially less than six feet four inches, the distance between the two car tracks) it represented the distance the appellant traveled after passing in front of the Municipal car before she was struck by the car of respondent. Her testimony was that:

> "Just when I cleared the Municipal car—just the instant I had cleared it I was struck."

We might reasonably infer from this evidence that appellant took but a step or two after clearing one car before she was struck by the other. As we have already seen, her view of the Market Street Railway car was obscured by the presence of the Municipal car, and it would continue to be obscured until she had passed beyond the Municipal car. She was looking straight ahead and to her left. She was using the street crossing, which she, as well as other pedestrians, had at least an equal right with respondent to use. Whether under these circumstances she was guilty of contributory negligence in walking in front of respondent's car, as it neared the crossing without giving any warning of its approach, we think was a question which should rightly be left to the decision of the jury. It was a question upon which reasonable minds might differ and was, therefore, one of fact for the jury, and not one of law for the court. Driscoll v. Cable Railway Co., 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203; Hennesey v. Bingham, 125 Cal. 627, 58 P. 200; Babcock v. Los Angeles, etc., Co., 128 Cal. 173, 60 P. 780; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 62 P. 308, 64 P. 993; Schneider v. Market Street Railway Co., 134 Cal. 482, 66 P. 734; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677.

The facts in this case are quite similar to those in Driscoll v. Cable Railway Co., supra. In this latter case this court said:

> "Under these circumstances—the appellant being in default for not giving the proper warning—we think that the question whether deceased was guilty of contributory negligence was a proper one for the jury; that deceased cannot be held, as a matter of law, to have been so guilty; and that there was sufficient evidence to warrant the jury in finding that he was not. Counsel for appellant, in his very thorough and able brief, has cited a number of cases in which it was held that the plaintiff could not recover, because he had not exercised sufficient caution in attempting to cross a railroad track. Those were cases, however, where the accidents occurred on ordinary steam railroads running through the country at comparatively long intervals of time; and the rule there laid down can hardly be applied in all its strictness to street railroads in crowded cities, where a car that can be speedily stopped passes a crossing every two or three minutes, and where people necessarily cross the streets frequently and hurriedly. * * * Of course, if all people exercised the greatest care and caution in approaching and crossing railroad tracks, such accidents as the one here involved would rarely, if ever, occur; but the law does not expect or require such extreme care."

[8] The appellant had a right to rely upon those in charge of respondent's car, in the event they were approaching the crossing then being in regular use by pedestrians, that they would give some warning or signal of the approach of the car, especially when their view of pedestrians passing in front of the Municipal car was obscured by the presence of the Municipal car. This principal was enunciated in the case of Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677, and has never to our knowledge been departed from by this court. In that case Mr. Justice Shaw, speaking for the court said:

> "The foot passenger or driver of a horse has a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others. * * * In a crowded street it is often necessary and not inconsistent with reasonable prudence for a person to cross the street in front of street cars, in motion or at rest, at a point so near that it would be prima facie an act of negligence, if attempted at another place where the streets are less crowded and the cars usually run faster."

Respondent has cited a number of cases in support of its contention that appellant was guilty of contributory negligence as a matter of law. The difference between the facts in those cases and the facts in the present case, in our opinion, renders these authorities inapplicable to the present action.

Judgment reversed.

We concur: PRESTON, J.; SEAWELL, J.

203 Cal. 365

PALMER et al. v. FIX et al. (L. A. 10254.)

Supreme Court of California. Feb. 9, 1928.

Appeal and error 🔑458(2)—On appeal from judgment dismissing cross-complaint, defendants held entitled to have judgment stayed and attachment preserved upon giving sufficient stay bonds.

Defendants who interposed cross-complaint and levied attachments, and appealed from judgment dismissing cross-complaint, were entitled to have judgment stayed and to have attachment preserved pending appeal upon giving good and sufficient stay bonds in form and manner required by law, plaintiffs being entitled, however, to good and sufficient undertakings.

In Bank.

Action by Fred Palmer and others against M. J. Fix and others in which defendants filed a cross-complaint. Judgment for plaintiffs on the original and cross-complaint, and defendants appeal. On defendants' application for writ of supersedeas, prayed to be directed to the superior court to stay execution on giving of proper undertakings. Writ granted.

Verge & Cooney and Harold F. Collins, both of Los Angeles, for plaintiffs.

John A. Jorgenson, C. H. Tyler, and Chas. H. Sherrick, all of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and S. V. O. Pritchard, Deputy County Counsel, both of Los Angeles, for respondents.

RICHARDS, J. This is an application for a writ of supersedeas. Plaintiffs commenced an action against the defendants in the superior court, in and for the county of Los Angeles, to recover from the defendants the sum of $3,571, with interest and costs, claimed to be due under a certain contract. The defendants filed an answer denying said indebtedness and also filed a cross-complaint, in which they alleged the breach of said contract by plaintiffs, and sought to recover therefor in the sum of $30,000. At the time of filing said cross-complaint the defendants caused an attachment thereon to be issued and levied upon certain real estate belonging to one of the plaintiffs. Upon the trial of the cause the court, on or about October 10, 1927, rendered and entered its judgment in favor of the plaintiffs for the sum of $3,571.88 and costs, and against the defendants on their cross-complaint, which judgment ordered a dismissal thereof. On October 11, 1927, the defendants and cross-complainants filed with the county clerk a notice of appeal, and also and in connection therewith an undertaking to stay execution on said judgment, and also an undertaking to keep in force pending said appeal the attachment which had theretofore issued and been levied in said action.

Thereafter, between said last-named date and November 7, 1927, a certain series of proceedings occurred in the trial court and also in the District Court of Appeal, in and for the Second appellate district, affecting the matter of the sufficiency of the defendants' and cross-complainants' undertaking to stay execution and preserve the lien of their attachment upon their said appeal, which finally resulted in the making of an order by the trial court purporting to disapprove the said undertaking or undertakings on account of the alleged failure of the sureties to justify thereon. It was and is the contention of the appellants herein that the trial court was not justified in making said order, in view of the proceedings already had in said court having to do with the justification of the defendants' sureties upon their said undertakings on appeal. We do not deem it necessary to state in detail the nature and effect of said proceeding, nor shall we attempt to disentangle the snarl into which the court and the parties have apparently become enmeshed in consequence thereof. The plaintiffs are entitled to good and sufficient undertakings to stay execution upon this appeal. The defendants are entitled to have the judgment against them upon this appeal stayed, and also to have their attachment theretofore procured preserved pending their appeal upon giving good and sufficient stay bonds in the form and manner required by law.

It is therefore ordered that a writ of supersedeas issue herein staying execution upon the judgment in favor of the plaintiffs herein upon their original cause of action, and also for the preservation of the rights of the cross-complainants acquired by virtue of the attachment heretofore issued and levied herein upon their cross-complaint, upon the giving by the appellants of an undertaking or undertakings effectuating the foregoing purposes, and each or either of them, in the form and amount required by law, said undertaking or undertakings to be approved by the presiding judge of the superior court, in and for the county of Los Angeles, and filed in this court within 30 days from the date of this order.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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88 Cal. App. 664

BOULENGER v. MORISON. (Civ. 3373.)★

District Court of Appeal, Third District, California. Jan. 26, 1928.

Hearing Denied by Supreme Court March 25, 1928.

1. Principal and agent ⚷48—Agent's obligation to principal demands strictest integrity, good faith, and faithful service.

The law requires perfect good faith on the part of agents not only in form, but in substance; the obligation of an agent to his principal demanding the strictest integrity, good faith, and most faithful service.

2. Brokers ⚷34—Real estate agent must disclose to principal fact of contracting to sell for greater sum than originally agreed to with principal (Civ. Code, § 2330).

Where a real estate agent procured exclusive right to sell certain real estate for $30,000, but subsequently entered into a contract to sell it for a greater sum, *held*, that, under Civ. Code, § 2330, he was required to disclose to principal the fact of increased price for which property was to be sold.

3. Principal and agent ⚷70—One cannot be agent of both buyer and seller without their consent.

One cannot be the agent of both buyer and seller without consent of both.

4. Brokers ⚷100—Secret agreement by brokers for profit in addition to commission payable by owner rendered contract between purchaser and owner, while still executory, voidable at owner's option.

If brokers had secretly engaged with another to sell property in their hands for sale so as to receive a profit by them in addition to commisson payable from owner for making the sale for him at stated price, this rendered contract between purchaser and owner, which was still executory, voidable at option of owner.

5. Specific performance ⚷117—To obtain specific performance, plaintiff must allege and prove that contract was just and reasonable and consideration adequate (Civ. Code, § 3391).

The law is well established that before the court of equity will decree specific performance of a contract, the plaintiff must, because of Civ. Code, § 3391, allege and prove that it was just and reasonable, and that consideration was adequate.

6. Specific performance ⚷49(2)—"Adequate consideration," to warrant specific performance, is fair and reasonable price (Civ. Code, § 3391, subd. 1).

Adequate consideration, as used in Civ. Code, § 3391, subd. 1, without which specific performance will not be decreed, does not necessarily mean the highest price obtainable, but a

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★Hearing denied by Supreme Court.

price that is fair and reasonable under the circumstances; it always being peculiarly a question of fact for the trial court to determine in the light of all facts and circumstances of the particular case.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Adequate Consideration.]

7. **Specific performance 🔑121(8)—Evidence of higher offers held proof of inadequacy of price offered by purchaser, so as to preclude specific performance.**

Where a landowner had placed realty in hands of agent to sell for $30,000, but agent received offers of $35,000 and $36,000 for the property, which offers he did not communicate to his principal but proceeded to enter into contract to sell the land to plaintiff for $30,000, *held*, in suit for specific performance, that the fact of such higher offers for the land was proof of inadequacy and unfairness of the purchase price of $30,000, so as to preclude purchaser's obtaining specific performance.

8. **Specific performance 🔑28(1)—Contract cannot be specifically enforced unless terms are clear, definite, and certain (Civ. Code, § 3390, subd. 6).**

A contract cannot, because of Civ. Code, § 3390, subd. 6, be specifically enforced unless its terms are clear, definite, and certain, and if they are not so, a court of equity will leave the party seeking specific performance to his remedy at law.

9. **Specific performance 🔑99—Purchaser's failure to deposit part of purchase price within time provided precluded his obtaining specific performance of land purchase contract (Civ. Code, § 3392).**

Where purchaser of realty sought specific performance of the contract, *held*, that, under Civ. Code, § 3392, his failure to make a deposit of part of purchase price within time provided by contract precluded his obtaining specific performance.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action for specific performance by A. E. Boulenger against D. Morison, wherein Catherine Elizabeth Morison, executrix of the estate of Donald Morison, was substituted as defendant on defendant's death. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert F. Shippee, Henry I. Broulett, Broulett & Shippee, and J. M. Stevens, all of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

PRESTON Justice, pro tem. This is an appeal by plaintiff, A. E. Boulenger, from a judgment rendered against him in an action wherein he sought to enforce specific performance of a contract for the sale of real estate.

The facts are briefly these: On October 8, 1923, Donald Morison and his wife, Catherine Elizabeth Morison, owned certain real estate in the city of Los Angeles, which was community property. "Terry & Co." were real estate brokers and are the successors of another real estate firm known as "Wheeler & Terry," and were operating in Los Angeles. The plaintiff, A. E. Boulenger, is the father-in-law of Terry, but appears to have no connection with the firm of Terry & Co., other than hereinafter mentioned. On the said 8th day of October, 1923, Donald Morison gave Wheeler & Terry an exclusive right and option to sell the property in question at any time within 30 days for the sum of $30,000, out of which Wheeler & Terry were to receive $1,000 as commission for making the sale.

The plaintiff contends that he purchased the property from Terry & Co. under this option on October 8, 1923, for the sum of $30,000, and paid Terry & Co. a deposit thereon of $200. The defendant contends, and the court found upon conflicting evidence, that nothing was done under the option until October 12, 1923, when a Mrs. Ransdell entered into an agreement with Terry & Co., the successors of Wheeler & Terry, by which she was to buy the property in question for $35,000, and made a deposit of $200 thereon. Mrs. Ransdell testified that Terry & Co. had told her that they thought they could get the owner to sell for $35,000; "that he was an old sick man living in Hollywood." The person referred to was shown to be Mr. Morison. At that time, it must be remembered that the plaintiff, Boulenger, was claiming to be the owner of the same property, through purchase from Terry & Co. on October 8, 1923. On October 13, 1923, the next day after the agreement with Mrs. Ransdell, Mr. Fellows, the admitted agent and representative of Terry & Co., went to the residence of Mr. Morison and procured his signature to an agreement dated *October 12, 1923*, wherein Morison agreed to sell to plaintiff the property in question for $30,000, and agreed to pay Terry & Co. $1,000 commission. On October 15, 1923, Morison placed in escrow with the bank, in conformity with the contract, deeds executed by himself and wife to the plaintiff, with certain escrow instructions. The plaintiff also filed with the bank his escrow instructions. After this was done, and on the 17th of October, one Schleyn offered Terry & Co. $36,000 for the property, whereupon Terry & Co. returned to Mrs. Ransdell her deposit of $200, and wrote her a letter in part as follows:

> "We regret very much that we were unable to get the owner to accept your offer of $35,000. * * *"

Upon receipt of this letter, Mrs. Ransdell called upon Mr. Morison and informed him of her negotiations with Terry & Co. for the property. This was the first information Mr. Morison had received as to the negotiations carried on by Terry & Co. with Mrs. Ransdell and Mr. Schleyn.

After the agreement of sale, deed, and instructions had been placed in escrow, and before receiving the call from Mrs. Ransdell, a controversy arose between Morison and plaintiff relative to the title and certain setbacks and restrictions affecting the property, which continued until November 19, 1923, when the defendant, Morison, withdrew from the escrow and so notified plaintiff. The plaintiff never placed in escrow at any time any money called for in the contract. Thereafter, on December 15, 1923, the plaintiff sought to waive all objections to the title and to the setbacks and restrictions, etc., and so notified Morison, but Morison refused to proceed further with the transaction and withdrew his deed from escrow. Thereafter, and on the 4th of March, 1924, this action for specific performance was instituted.

The answer, in addition to denying the material allegations of the complaint, sets up the special defense of fraud, practiced upon the defendant Morison by his own agent, Terry & Co.

The case was tried by the court, sitting without a jury, and the court found that plaintiff was not entitled to enforce specific performance of the contract and rendered judgment accordingly. Since the trial the defendant Morison has died, and Catherine Elizabeth Morison, executrix of his estate, has been substituted as defendant and respondent herein.

Many reasons are set forth in appellant's brief why the judgment should be reversed, and equally as many are set forth in respondent's brief why it should be affirmed.

The principal contention made in support of the findings and judgment of the trial court is that plaintiff and his agent, the latter also being the agent for the defendant, did not exercise the utmost good faith, and concealed from the defendant, Morison, the fact that the property was being sold for $35,000 or $36,000 instead of $30,000.

Section 3391, Civil Code, provides that specific performance cannot be enforced against a party to a contract in any of the following cases:

> "(3) If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or, (4) If his assent was given under the influence of mistake, misapprehension, or surprise. * * *"

[1] It is admitted that Terry & Co. was the agent of the defendant Morison. The law requires perfect good faith on the part of agents, not only in form, but in substance. Indeed, the obligation of an agent to his principal demands of him the strictest integrity, good faith, and the most faithful service. Lem v. Wilson, 27 Cal. App. 512, 150 P. 641; Ritchey v. McMichael, 4 Cal. Unrep. 384, 35 P. 151; Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 P. 39; 1 Cal. Jur. 709.

[2] Section 2330, Civil Code, provides:

> "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."

Therefore, any profit or advantage that Terry & Co. might make out of the transaction should have been disclosed to the defendant Morison.

[3] The law is well settled that Terry & Co. being the admitted agent of Morison, the seller, they could not at the same time be the agent of the purchaser without the consent of both seller and purchaser; the double agency is a fraud upon the principal, and he is not bound. Gordon v. Beck, 196 Cal. 773, 239 P. 309, and cases there cited; Glenn v. Rice, 174 Cal. 269, 162 P. 1020.

[4] The defendant, Morison, was entitled to receive, and had the right to expect, absolute fidelity and loyalty to his interests on the part of his agent, and their secret engagement with Mrs. Ransdell to sell the same property to her for $35,000 and receive a profit of $5,000, in addition to a commission of $1,000 from Morison for making the sale for him at $30,000, rendered the contract between plaintiff and Morison, which was still executory, voidable at the option of Morison. Gordon v. Beck, supra.

An agent cannot serve two masters. In Mechem on Agency, p. 301, this language is found:

> "Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. This doctrine, to speak again in the beautiful language of another, has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation but deliver us from evil,' and that caused the announcement of the infallible truth that, 'A man cannot serve two masters.'"

[5] Irrespective of the question of fraud, it is contended by respondent that plaintiff's action must fall because there is no proof that the contract was just and reasonable and the consideration adequate. The law is well established that before a court of equity will decree specific performance of

a contract, the plaintiff must allege and prove that the contract was just and reasonable and the consideration adequate. Section 3391, Civ. Code; White v. Sage, 149 Cal. 613, 87 P. 193; Gibbons v. Yosemite Lumber Co., 172 Cal. 714, 158 P. 196; Bishop v. Barndt, 43 Cal. App. 157, 184 P. 901; Joyce v. Tomasini, 168 Cal. 237, 142 P. 67; Ehrhart v. Mahony, 43 Cal. App. 448, 184 P. 1010; O'Connell v. Fowler, 46 Cal. App. 466, 189 P. 322; Morgan v. Dibble, 43 Cal. App. 116, 184 P. 704; Salisbury v. Yawger, 184 Cal. 795, 195 P. 682; Herzog v. Atchison, Topeka & Santa Fé R. R. Co., 153 Cal. 496, 95 P. 898, 17 L. R. A. (N. S.) 428; Stiles v. Cain, 134 Cal. 171, 66 P. 231; Magee v. Magee, 174 Cal. 276, 162 P. 1023.

[6] "Adequate consideration," as used in section 3391, subd. 1, Civil Code, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances; it is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case. Morrill v. Everson, 77 Cal. 114, 19 P. 190; Wilson v. White, 161 Cal. 465, 119 P. 895; Cummings v. Roeth, 10 Cal. App. 144, 101 P. 434. No witness testified as to the market value, or the reasonable value of the property in question at the time the contract was entered into, and the court found on this point as follows:

> "The said price of $30,000 for said property was neither just, nor fair, nor reasonable, nor adequate as to said D. Morison, also known as Donald Morison, and there is not sufficient proof to find that said sum of $30,000 was a fair market value of said property at the date of said agreement."

We think this finding is amply supported by the evidence.

[7] There is sufficient evidence to show that the price was not fair and adequate under all the circumstances. No better proof of the inadequacy of the consideration, under all the circumstances, could be produced than the fact that two other persons were, at the time Morison entered into the contract with appellant, anxious to purchase the property, one for $35,000 and another for $36,000, and both proposed purchasers offered just as favorable terms as those offered by appellant.

[8] For still an additional reason we think the court's conclusion in denying specific performance was correct: The terms of the contract are so uncertain and indefinite as to be incapable of being specifically performed. A contract cannot be specifically enforced unless its terms are clear, definite, and certain. Agard v. Valencia, 39 Cal. 292; Magee v. McManus, 70 Cal. 553, 12 P. 451; Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; Monsen v. Monsen, 174 Cal. 97, 162 P. 90; Magee v. Magee, supra; section 3390, subd. 6, Civ. Code; Klein v. Markarian, 175 Cal. 37, 165 P. 3; Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610.

In a case where the contract is thus so uncertain a court of equity will not decree specific performance, but will leave the party to his remedy at law. Agard v. Valencia, supra; Prince v. Lamb, 128 Cal. 128, 60 P. 689; Watson v. Fisher (Cal. App.) 250 P. 577; Allman v. Rich, 76 Cal. App. 601, 245 P. 439; Wood v. Anderson, 199 Cal. 440, 249 P. 862.

[9] If it be conceded that the contract is sufficiently definite and certain to be specifically enforced, still the court found that appellant did not comply with its terms by depositing $4,800, the balance of the cash payment of $5,000 called for in the contract, and that there was nothing in the contract, or the evidence, that excused him from prompt performance. There is ample evidence in the record to sustain this finding and this fact alone affords a sufficient answer to appellant's demand for specific performance. Mr. Morison's duty to carry out the terms of the contract in good faith was at an end upon the failure of appellant to deposit the $4,800 within the time provided by the contract. Dunne v. Colomb, 192 Cal. 740, 221 P. 912; section 3392, Civ. Code.

Other points are presented by the briefs, but under the view we have taken of the case, we deem it unnecessary to discuss them in detail.

We have examined the record with care, and we are fully convinced that the trial court's conclusions are sustained by the evidence, and that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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88 Cal. App. 698

SISTRUNK et al. v. TEXAS HOLDING CO.
(Civ. 6176.)

District Court of Appeal, First District, Division 1, California. Jan. 30, 1928.

1. Appeal and error 🔑930(1)—On appeal, facts supporting verdict and sufficiently supported by evidence will be taken as established.

On appeal for action for personal injuries, facts which sustain verdict and are sufficiently supported by evidence will be taken as established, and conflicts will be disregarded.

2. Explosives 🔑8—Evidence held to sustain verdict against oil company for negligence causing explosion.

In action for personal injuries sustained when explosion and fire occurred on property of defendant oil company, evidence *held* sufficient to sustain verdict for defendant against oil company for negligence.

3. Explosives 🔑8—Res ipsa loquitur doctrine held applicable to explosion on oil company's property.

Res ipsa loquitur doctrine *held* applicable in action against oil company for injuries sustained when explosion and fire occurred on company's property, where there was testimony that fire actually started on defendant's premises, notwithstanding contention, unsupported by evidence, that fire started on adjoining property, and explosion resulted from fire coming into contact with gasoline on plaintiff's truck.

4. Trial 🔑260(8)—Instruction, in personal injury action, on subject fully covered in court's charge, held properly refused.

In action for injuries sustained from explosion and fire on defendant oil company's property, instruction concerning defendant's duties and liabilities as to ordinary care and negligence *held* properly refused, where court's charge fully covered such subjects.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Clarence D. Sistrunk and Shaffer & Best, a copartnership consisting of L. N. Shaffer and H. G. Best as members thereof, against the Texas Holding Company, an unincorporated association. From a judgment for plaintiffs and the denial of a new trial, defendant appeals. Affirmed.

Oliver O. Clark and Charles R. Nelson, both of Los Angeles, for appellant.

Newlin & Ashburn and R. L. Haight, all of Los Angeles, for respondents.

PARKER, Justice pro tem. This is an appeal by defendant from a judgment rendered in favor of plaintiffs, following verdict of a jury. Included in the appeal is the order of the court below denying appellant's motion for a new trial.

The action is to recover damages resulting from injuries sustained by plaintiff Sistrunk through the alleged negligence of defendant. The plaintiffs Shaffer and Best are the employers of plaintiff Sistrunk, and joined with him as such. No question is presented as to the rights of the employers in the event it is concluded that the employee is entitled to recover. Therefore, for the purposes hereof, the case will be treated as though the action had been commenced and prosecuted by the plaintiff Sistrunk alone.

[1] The facts necessary to the determination of the questions presented are in the main undisputed. However, in outlining the case as made, we do not mean that all of the facts stated are admitted. Our statement here necessarily takes as established the facts, sufficiently supported by evidence, which sustain the verdict, disregarding any conflict.

The plaintiff Sistrunk, on February 24, 1923, was employed as a truck driver, engaged at his employment near Huntington Beach in Los Angeles county. About 8 o'clock p. m. of that date, after having delivered a load of pipe, he had withdrawn from the place of delivery, and was with his trucks upon a public street or highway known as Crystal avenue in Huntington Beach. Suddenly without warning an explosion occurred, accompanied with flames of burning oil, enveloping the immediate vicinity. Before Sistrunk could remove himself, his clothing took fire, and he sustained the injuries here complained of.

At this point it becomes necessary to outline to some extent the general situation with reference to the territory named. The Huntington Beach oil field is located on property subdivided into town lots. The leases are small, and wells are numerous and close together. The property of defendant was and is surrounded by other leases, wells, and drilling outfits owned and operated by persons and companies other than the defendant. The area of each lease was approximately 300 feet by 145 feet, and some smaller. In the one city block here concerned there were operating five oil leases on one side of the street and three explorations on the other side.

The Texas Holding Company operated three of the leases, though here we are concerned with but one, and hereafter such reference as may be made to the property of that company will be exclusive of all but the one; namely, the one adjoining what is called hereinafter the Moore lease. The Moore lease is another town-lot oil well, and immediately adjoins the property of defendant on the north.

On the property of defendant Texas Holding Company, at a point some 30 feet south of the Moore lease, there had been erected, and were standing at the times here in point, two large oil tanks, and also an open sump. There was oil in both the sump and the tanks, and the oil in the tanks either had been, or was being, heated at the time. Further the evidence disclosed the premises of defendant to have been maintained in a careless manner, with rubbish, old lumber, waste, etc., scattered about. In addition, the ground around the tanks and sump was oil saturated, and here and there near the highway were formed small pools of oil lying on the surface.

Coming, then, to the night in question, it is in evidence that there was an open fire on the Moore lease some 50 feet from the sump and tanks, and that this fire was wholly without the control of defendant Texas Holding Company, and not on property owned by it. About 10:30 on that night the fire occurred, and the testimony of many witnesses is in accord to the effect that there was a sudden flare of light, and an almost instantaneous explosion, followed by fire in all directions. The explosion occurred upon defendant's premises; the fire started on defendant's premises; the oil was seen by several of the witnesses to have run directly from the tanks in question, which were being maintained upon defendant's land, across the road, and on to and under the truck in which plaintiff was sitting, and which truck was then on the public highway. The testimony further shows that oil was thrown by the explosion from the tanks of defendant into the adjoining street, setting fire to the clothing of plaintiff as aforesaid.

As indicated hereinbefore, a conflict exists as to just where the fire started, and as to just how long afterwards the explosion resulted. However, there is abundant testimony establishing the fact that the fire started right at or between the tanks, and that the fire and explosion were practically simultaneous.

On this state of facts appellant contends: (1) That the verdict and judgment stand unsupported by the evidence; (2) that the verdict is contrary to the evidence and the law; (3) that the court erred in giving certain instructions to the jury; (4) that the court erred in refusing to give certain instructions requested by defendant.

[2] 1. The testimony taken as a whole shows that the defendant's oil storage tanks were maintained in close proximity to the boundary line of defendant's premises, and immediately adjoining a public highway on which plaintiff's trucks were standing; that there was also maintained on defendant's property a large open sump next to the storage tanks, and directly opposite and within a short distance of an open fire on the Moore property; that the storage tanks and sump contained quantities of crude petroleum; and that the manholes of these storage tanks were uncovered. Also the evidence disclosed that crude petroleum, when exposed to the air, emits quantities of gas explosive in character. It was shown further that the night in question was foggy, with a wind velocity of about twelve miles per hour, and that a fog tends to hold gas close to the ground, and that such gas will travel with the wind. It is further disclosed by the record that the fire and explosion took place first upon the premises of defendant, and that the spread of this fire caused the injuries to plaintiff.

We deem these facts ample to sustain the verdict. We content ourselves with thus stating the conclusion reached without citation at this place, for the reason that all of the claims of appellant center around practically the same theory, and as we progress with the discussion, ample authority will support these first conclusions.

2. The appellant claims the verdict is contrary to the evidence and the law. The basis of this contention appears to be that it was incumbent upon the plaintiff to have introduced evidence of what would have constituted the exercise of ordinary care on the part of the defendant, and then to have shown wherein defendant fell short of such standard. Plaintiff, in answer to this, urges the doctrine of res ipsa loquitur. As this very same question is presented in the attack upon the instructions given on the subject, we may pass this branch of the case for the moment and take up the questioned instructions.

[3] 3. Error in giving instructions. The court instructed the jury as follows:

> "When a thing which causes injury is shown to be wholly under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. The effect of the doctrine when applied to this case is that proof of the injuries to the plaintiff, provided such injuries are shown to have been caused through the explosion or ignition upon the defendant's property of crude petroleum located thereon, which property and which petroleum were under the exclusive management and control of the defendant, created a prima facie case or presumption of negligence on the part of the defendant, which it is called upon to meet or rebut. This presumption that the injury or damage was caused by the negligence of the defendant is itself a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence, and in the absence of contributory negligence, necessitates a verdict in favor of the plaintiff."

Two other instructions along the same lines are attacked by appellant, but the one quoted is deemed the one most objectionable by appellant, and it is unnecessary to here go into the others.

Appellant contends that the doctrine of res ipsa loquitur is not applicable to the present case, and urges many reasons for its contention. It is urged that, to apply this doctrine, it must first be shown that the thing causing the accident is under the exclusive control of the defendant. And it is further argued that, where the facts attending the injury are disclosed by the evidence, the doctrine of res ipsa loquitur does not apply.

It is claimed that the real cause of the fire and explosion was the open fire under the boiler on the Moore lease, concededly not under the control of defendant, and not on the premises of defendant. The obvious answer to this is that the record does not disclose this to be the fact. Throughout the trial of the case it was generally assumed that this open fire might in some way have caused the oil in the tanks to ignite, and as another theory it was possible that the gas lying close to the ground was carried over to this open flame, and thus became ignited, and, spreading to the tanks, caused the explosion and general conflagration. This is but a theory in the case. The plaintiff's witnesses all seem to be in accord on the point that the fire started among the tanks, and the defendant's testimony was to the effect that the fire started out in the middle of the road near the truck of plaintiff, and that the explosion following was the result of the fire coming into contact with gasoline on plaintiff's truck. Nowhere in the record is there a single fact to indicate that the fire started on the Moore lease, or that the fire on the Moore lease had the slightest connection with it. A careful reading of the entire testimony leaves the origin of the fire in darkest doubt. Several theories present themselves, but all in the face of testimony that the fire actually started between the tanks on the defendant's premises.

There is abundant testimony to establish the fact that conditions existing on the property of defendant were in themselves dangerous, as evidenced by the cautionary signs and warnings posted about the workings. There was always a constant menace from escaping gas, and the process of refinement or clarifying was such that gas was freely and often in quantity emitted from the tanks, and that this gas was highly inflammable and susceptible to explosion. In addition to this, there was the express testimony of expert witnesses called by defendant to the effect that an accident of this sort could happen only as a result of the act of God or the negligence of some person. The accident is not attributed to an act of God, as the phrase is generally employed. We think it to be a case where the doctrine of res ipsa loquitur has its true application. We content ourself here with a citation of authority, omitting quotation therefrom for a reason to be hereafter stated. Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Rathburn v. White, 157 Cal. 248, 107 P. 309; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286; Hallawell v. Union Oil Co., 36 Cal. App. 672, 173 P. 177.

[4] The last point urged by appellant is error of the trial court in refusing certain instructions offered by appellant. At the trial appellant was permitted to introduce the testimony of expert witnesses on the subject of the general practice, usage, and custom among oil operators in the maintenance of their leases and appliances, equipment, and instrumentalities used in the production of oil for the purpose of showing that the defendant's properties were maintained and operated in a careful and prudent manner. In line with such testimony defendant requested specific instructions to the effect that, if defendant adopted in its operation of the oil wells in question the same standard of equipment, tanks, pipes, etc., as was in common use in the Huntington Beach oil field, then such fact might be considered by the jury in determining whether or not defendant exercised ordinary care. Without detailing further the instructions requested and refused, the principle contended for is that, if it had been shown that there was a general custom, practice, and usage amongst others engaged in the same business in the same locality, then such custom, practice, and usage constituted in themselves a standard of ordinary care and prudence, and in themselves would negative any inference of negligence.

We think the trial court committed no error in refusing to give these instructions. The jury were elsewhere sufficiently instructed on the subject. The duty and liability of defendant were in great detail explained to the jury, and nothing could be added to the court's charge by the instructions refused. This in itself is an all-sufficient answer to appellant's contention. This practically disposes of the grounds urged here for a reversal of the judgment. There remains, however, one most important matter worthy of notice here.

This case was for the damages resulting to plaintiff while engaged in his employment as a truck driver. The owners of the trucks upon which plaintiff was employed at the time instituted a separate action to recover for the loss of the trucks. This action, to be accurate, was maintained by the insurance carriers, and was entitled Phœnix Assurance Co. v. Texas Holding Co. On practically the identical facts the plaintiff recovered, and appeal was taken. The District Court of Appeal affirmed the judgment, and the case is reported in 252 P. 1082. However, for the reason that throughout the opinion the district court assumed that the boiler and fire on the Moore lease were on the property of defendant and under its control, we have given the instant case independent consideration. In a petition for a hearing before the Supreme Court appellant pointed out this erroneous assumption of fact on the part of the district court, and went fully into the questions presented here; indeed, in many respects the briefs of appellant here are but copies of the authorities filed in the Supreme Court in the petition for a hearing before that court. The petition was denied; and so, therefore, to a great extent, irrespective of the fact taken against the record, the case now cited, viz., Phœnix Assurance Co. v. Texas Holding Co., 252 P. 1082, concludes our further inquiry here.

As indicated hereinbefore, we have dismissed with little quotation of authority those points discussed in the previous case.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

88 Cal. App. 591

PEOPLE v. WINTHROP. (Cr. 1414.)

District Court of Appeal, First District, Division 1, California. Jan. 25, 1928.

1. Indictment and information 🔑161(3)—Trial amendment of information for forgery and uttering fictitious checks by substitution of name of person for that of corporation held not abuse of discretion (Pen. Code, § 1008).

In prosecution for passing fictitious checks and forgery, permitting information to be amended on day of trial on motion of district attorney under Pen. Code, § 1008, so that name of corporation which through inadvertence had been placed in instrument where name of person should have appeared was corrected, not affecting defendant's substantial rights, *held* not abuse of discretion, in view of section 1008.

2. Criminal law 🔑1186(4)—Mere technical errors in pleading or procedure are not to be employed to defeat justice (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, mere technical errors in either pleading or procedure which do not in any way affect substantial rights of parties are not to be employed to defeat justice.

3. Indictment and information 🔑149—Denying motion to file demurrer after jury had been impaneled and amendment to information filed not affecting defendant's substantial rights held proper (Pen. Code, §§ 990, 1003).

After amendment to information charging uttering of fictitious checks and forgery, not affecting defendant's substantial rights, after jury had been impaneled, motion made by defendant's attorney for permission to file demurrer, denial of motion *held* proper, under Pen. Code, §§ 990, 1003.

4. Forgery 🔑47—Evidence that fictitious check was uttered in certain county entitles state to go to jury on question that it was forged there.

In absence of other proof, evidence that fictitious check was uttered in certain county is strong proof that it was forged there and is sufficient at least to entitle state to go to jury on that question and to sustain a verdict that crime was there committed.

5. Criminal law 🔑1167(2)—Defendant convicted under information charging same offense under four counts, where judgment ran on four counts concurrently, held not prejudiced (Pen. Code, §§ 470, 476).

Where information contained four counts, but clearly showed that matters set forth thereunder were one and same offense and prosecution was had for forgery and for making fictitious check, under Pen. Code, §§ 470, 476, and district attorney in opening statement to jury informed that body that charge related to one particular check, and judgment on four counts ran concurrently, *held* that defendant suffered no prejudice.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

J. B. Winthrop (true name, C. E. Weston) was convicted of passing fictitious checks and forgery, and he appeals. Affirmed.

Myron Harris, of Oakland, and Leon A. Sullivan, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was prosecuted and convicted upon four counts contained in an information charging a felony. The first alleged a violation of section 476 of the Penal Code relating to the making, passing, or uttering of fictitious checks; the second, third, and fourth charges a violation of section 470 of the same Code relating to forgery. The charging parts of the information read, in substance, as follows: First count: That J. B. Winthrop violated section 476 of the Penal Code, in that he did, at the county of Alameda, state of California, knowingly and fraudulently, make, pass, utter, and publish a fictitious check, with intent to defraud the Central National Bank of Oakland, a corporation, the First National Bank of Minnesota, a corporation, and the B. F. Nelson Manufacturing Company, a corporation, and each of them. The check was set out in hæc verba, and reads as follows:

"No. 16652 S. 795.
"Minneapolis, Minn., July 27, 1926, 192—
"The B. F. Nelson Mfg. Co.
"Pay to the order of J. B. Winthrop $750.00
Dollars The B. F. Nelson Mfg. Co.
"By Robt. E. Little
"Vice President & Treasurer
"To First National Bank
"Minneapolis, Minn. 17-2"

The nonexistence of the individual Robert E. Little was then alleged and that defendant knew this fact, and also knew that at the time the check was passed that it was fictitious. Second count: That J. B. Winthrop violated section 470 of the Penal Code, in that he did, at the county of Alameda, state of California, willfully, unlawfully, and with intent to defraud Central National Bank of Oakland, a corporation, First National Bank, Minneapolis, Minn., a corporation, and the B. F. Nelson Manufacturing Company, a corporation, and each of them, sign the name of "Robt. E. Little" to the check in count 1 set forth (the check again follows in hæc verba), and that said name was known by defendant to be then and there the name of a fictitious person and that he had no authority to do so. Third count: That J. B. Winthrop violated section 470 of the Penal Code, in that he did, at the county of Alameda, state of California, with intent to defraud the Central National Bank, a corporation, First National Bank, Minnesota, a corporation, and the B. F. Nelson Manufacturing Company, a corporation, and each of them, willfully, feloniously, and falsely make, alter, and forge and counterfeit the check in count one of the information referred to (the check is again set forth). Fourth count: That J. B. Winthrop violated section 470 of the Penal Code, in that he did, at the said county of Alameda, willfully, unlawfully, and feloniously, utter, publish, and pass to said Central National Bank of Oakland, a corporation, as true and genuine the check in count 1 of the information referred to (check set out in detail), and that said check then and there was and known by said J. B. Winthrop to be false, altered, forged, and counterfeit, and was uttered, published, and passed with intent to prejudice, damage, and defraud the Central National Bank of Oakland and other corporations named and each of them.

As above indicated, all four counts were based upon the single particular check. Defendant pleaded not guilty to each count. He was tried by a jury and found guilty upon all four counts. A motion for a new trial was made and denied and defendant was sentenced to the state prison for the term prescribed by law. The offenses being one transaction, the judgment declared that the sentences run concurrently. Defendant appeals from the order and judgment. So much of the evidence as is necessary to a consideration of the points urged for a reversal show that defendant visited the Central National Bank and consulted the manager for space in the building. At the conclusion thereof he proceeded to the bank proper and was introduced by the manager to the assistant cashier. At this time he opened an account in the bank, depositing $100 in currency. He returned a few days later and presented to the cashier a check for $1,000 made out to the G. F. Nelson Manufacturing Company. Defendant represented to the bank that he was a representative of that company. The bank received the check on deposit. Defendant thereupon presented another check for $750 and asked that it be and it was cashed. This check was the one upon which the information is based. To prove intent the prosecution showed that about the same time defendant visited the Gilchrist Furniture Company and made the same representations to that company concerning his position with the Nelson Company. He selected a rug of the value of $56 and tendered a fictitious check for $150 and received the difference in change. He also under the same misrepresentations cashed a check of like character with the Maxwell Hardware Company for $187.50. During his operations he visited the Broadway-Grand Branch Bank of Italy and interviewed the assistant cashier. He also informed him that he was the representative of the Nelson Company and desired to bank with his institution and requested a statement of the bank's affairs so that he could forward it to his company. He returned a little later with two envelopes bearing air mail marks. From the first one he extracted a check for $1,500 payable to the Nelson Company and deposited it to the credit of that company. He then opened the other letter and drew therefrom a check made payable to himself for $750. He informed the cashier that he needed funds with which to purchase office furniture and the cashier advanced him $550 on the check, the balance being placed to his credit. An inspector of the Oakland police department testified that he had gone to Texas with extradition papers to bring defendant back to California, from which state he had fled, and that during their return trip defendant had discussed his acts with him and had admitted that he had first "operated" in Oakland after leaving Salt Lake City and should be returned to that place. Certain incriminating evidence concerning his activities were found in his possession. Defendant had admitted upon his preliminary examination that he had written the check and had passed it and received the money and that the name "Robert E. Little" was a fictitious person. Further recital of the evidence is unnecessary.

Appellant presents four objections. He claims the trial court erred in the decisions of questions of law; that the information does not charge a public offense. He also claims the verdict is contrary to the evidence and that there is a variance between the pleadings and the proof. On the day of the trial and just prior to the time of the impaneling of the jury the district attorney moved to amend the first count of the information. He claimed that the name "B. F. Nelson Mfg. Co." had, through inadvertence, been placed in the instrument at a point where the name "Robert E. Little" should have appeared. The motion was granted and the words "such bank, corporation, copartnership Nelson Mfg. Co., a corporation" were stricken out and the information made to read, "whereas in truth and in fact there was then and there no such individual as Robert E. Little in existence" at the time the check was made, etc. It is argued that the information as amended charged an entirely different offense as far as the defendant is concerned. There is no merit in the claim. It is perfectly apparent that the name of the corporation had through inadvertence been recited in the information where the name "Robert E. Little" should have appeared.

[1-3] As pointed out by counsel for respondent the check was set out in hæc verba in the information and the B. F. Nelson Company was referred to as the corporation which appellant intended to defraud. The denial of the existence of the corporation, later on, shows plainly that it was a mere clerical error. Section 1008 of the Penal Code, which permits an amendment to be made to an information after the defendant

has pleaded, is in accordance with section 4½ of article 6 of the Constitution and with the rule that mere technical errors in either pleading or procedure which do not in any way affect the substantial rights of the parties are not to be employed to defeat justice. People v. Clawson (Cal. App.) 255 P. 552. The amendment in question did not affect the substantial rights of the defendant, and the court, therefore, did not abuse its discretion in permitting it. Moreover, the record discloses the fact that the attorney had knowledge, prior to the case being called for trial, of the intention to amend the information and had agreed thereto. After the amendment and when the jury had been impaneled, defendant's attorney sought permission to file a demurrer. The motion was denied, the court using the following language:

> "Let the record show that after the impanelment of the jury the demurrer was filed, and the court called attention to the fact the time had expired within which to file a demurrer, and the court does not grant leave to file the demurrer, but takes the position that there is no right to file a demurrer at this time. Furthermore, let the record show, even if the demurrer was permitted to be filed, and was filed, the court would overrule it."

Section 1003 of the Penal Code provides that both the demurrer and plea must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose. See, also, section 990, Pen. Code. A discussion of this question is unnecessary, as there is no merit therein. The court in effect overruled the demurrer and properly so. In this connection appellant urges his objection that the information as amended, charged an entirely separate and distinct offense from that originally charged, and he should have been permitted to file his demurrer. As above stated, it is plainly apparent that the error was one of inadvertence, the correction of which did not in any manner prejudice the rights of the defendant. People v. Carroll, 39 Cal. App. 654, 180 P. 49.

[4, 5] It is further urged that the record fails to show that appellant either made the check in Alameda county or the state of California, or that he wrote the fictitious name "Robert E. Little" thereon. As above recited there was evidence that defendant admitted that he had written the check, passed it, and received the money. In the absence of other proof evidence that a fictitious check was uttered in a certain county is strong proof that it was forged there, and is sufficient at least to entitle the state to go the jury on that question, and to sustain a verdict that the crime was there committed. 26 C. J. 975; State v. Forbes, 75 N. H. 306, 73 A. 929, Ann. Cas. 1912A, 302. Something is said in appellants' brief concerning the charging of the same offense under four different counts. The information clearly shows that the matters set forth thereunder was one and the same offense. A prosecution for forgery for making a fictitious check may be had under either sections 470 or 476 of the Penal Code. People v. Lucas, 67 Cal. App. 452, 227 P. 709. Moreover, the district attorney in his opening statement to the jury informed that body that it was a charge of one particular check. Then, again, the judgments on the four counts run concurrently. It is therefore clearly manifest that appellant suffered no prejudice because of any conflict between sections 470 and 476 of the Penal Code. There is no merit in the appeal.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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88 Cal. App. 716

DROVERS' NAT. BANK v. BROWNE.★
(Civ. 5791; L. A. 8632.)

District Court of Appeal, Second District, Division 1, California. Jan. 30, 1928.

Hearing Denied by Supreme Court March 29, 1928.

1. Guaranty ⚷16(4)—Renewal of note without indorsement held sufficient consideration for continuing guaranty by former indorser covering indebtedness represented by note.

In action on instrument guaranteeing indebtedness of defendant's company to plaintiff bank, evidence that defendant indorsed note, thereby guaranteeing payment of own obligation as well as that of maker of note, and induced bank to renew note without his indorsement by giving continuing guaranty securing payment of indebtedness represented by note, without which note would not have been renewed, showed sufficient consideration for guaranty and authorized judgment for plaintiff.

2. Guaranty ⚷16(1)—Whether there was consideration for guaranty should be determined by court in light of circumstances under which guaranty was accepted.

In determining whether there was consideration for guaranty sued on, court should consider matter in light of circumstances under which guaranty was accepted.

3. Bills and notes ⚷430—Obligation evidenced by notes of company indorsed by president held not paid or extinguished by renewal notes.

Obligation of company to bank, evidenced by promissory notes on which president of company was indorser, was not paid or extinguished by renewal of notes, but same debt still existed.

4. Guaranty ⚷16(2)—Consideration supporting promise of guarantor generally is consideration passing between maker and payee of note guaranteed.

Though promise of guarantor must be supported by consideration generally consideration supporting promise is consideration passing between maker and payee of note guaranteed.

★Hearing denied by Supreme Court.

5. Bills and notes ⚷94(1)—Surrender of valid note furnishes consideration for making of new note.

Surrender of valid note will furnish consideration for making of new note.

6. Guaranty ⚷16(4)—Guarantor of indebtedness represented by note renewed without guarantor's indorsement could not complain because guaranty was executed 5 days before maturity and renewal of note.

In action on instrument of guaranty of indebtedness represented by note on which guarantor was indorser, made in consideration of renewal of note without guarantor's indorsement, guarantor could not complain that guaranty was executed 5 days before maturity and renewal of note.

7. Guaranty ⚷16(4)—Express agreement not to sue on note renewed on defendant's giving guaranty securing payment of note held unnecessary to hold guarantor, in view of implied contract (Civ. Code, § 1621).

In action on guaranty of payment of indebtedness represented by note indorsed by guarantor, which guaranty was given to obtain renewal of note without guarantor's indorsement, it was unnecessary to hold guarantor liable that express language should be used establishing agreement by plaintiff to forbear bringing suit on note which was renewed, where parties understood that there should be renewal of note and there was implied contract not to sue, under Civ. Code, § 1621.

8. Trial ⚷404(2)—Allegation of no consideration for guaranty sued on held allegation of conclusion of law, and hence, like finding, is but conclusion of law.

General averment that contract sued on was executed without consideration is but an allegation of conclusion of law, and hence finding of no consideration for instrument of guaranty sued on may be disregarded.

9. Appeal and error ⚷854(2)—Prevailing party need not defend judge's logic; it being sufficient if decision is correct.

It is not incumbent on prevailing party to defend logic of judge; it being sufficient if decision is correct.

Appeal from Superior Court, San Diego County; W. P. Carey, Judge.

Action by the Drovers' National Bank against F. O. Browne. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur F. H. Wright, of San Diego, for appellant.

Eugene Daney, of San Diego, for respondent.

WOOD, Justice pro tem. Defendant was the president and principal stockholder of the National Auto Sales Company, hereafter referred to as the company. On August 18, 1920, the company, a Colorado corporation, borrowed from the plaintiff bank the sum of $10,000 on a 90-day note and on September 10, 1920, borrowed from plaintiff an additional sum of $12,000 on a separate note, making a total loan of $22,000. As these notes matured they were extended on new notes until May 18, 1921, when a single note for $22,000 was given by the company and the old notes were surrendered. This note became due August 15, 1921, and on August 17, 1921, it was renewed by note dated August 15, 1921, and due November 14, 1921. Defendant was the indorser on all of these notes. The fifth finding of the trial court is as follows:

> "That on the 9th day of November, 1921, the defendant, F. O. Browne, called on the plaintiff at its banking house in the city of Denver, Colo., and stated that he was going to California, and for that reason it would be inconvenient for him to be in Denver when the said note or any renewal thereof matured, and was then and there informed by the plaintiff that the said note maturing on the 14th day of November, 1921, would not be renewed without his guaranty, whereupon the said defendant, F. O. Browne, stated to the said plaintiff that he would give the bank a continuing guaranty covering the entire indebtedness of the National Auto Sales Company until it was liquidated, and thereupon delivered to the said bank the guaranty set forth in finding No. 3 hereof. That on or about the 15th day of May, 1922, the said obligation of the National Auto Sales Company to the Drovers' National Bank, the plaintiff herein, was reduced to the sum of $20,000. That at all the times herein mentioned the defendant, F. O. Browne, was, and still is, the president of, and the largest individual stockholder in, the said National Auto Sales Company, and at all the times herein mentioned was the only financially responsible stockholder of said company. That there were only two other stockholders of the National Auto Sales Company; namely, D. R. Platt and W. W. Beeson, each of whom was also at various times an indorser on the several notes herein mentioned, but that each of them was at all of said times financially irresponsible."

The guaranty set out in the third finding is in the following language:

> "November 9, 1921.
>
> "The Drovers' National Bank, Forty-Seventh and Lafayette Streets, Denver, Colo.—Gentlemen: This is to certify that the undersigned will be personally responsible for the indebtedness of the National Auto Sales Company to the Drovers' National Bank to the extent of $22,000.
>
> "Yours truly, F. O. Browne."

The tenth finding is as follows:

> "That the defendant by virtue of delivering, as aforesaid, to the plaintiff the written guaranty set forth in finding 3 hereof, as well as by reason of the statements then and there made to the plaintiff by said defendant, induced the plaintiff to cancel and deliver, at maturity, to the National Auto Sales Company its note maturing on November 14, 1921, on which the said defendant was indorser, and by reason of such guaranty and the repeated statements made by the said defendant to the plaintiff herein,

that he, defendant, was responsible for, and back of, the note of the National Auto Sales Company held by the plaintiff, induced the said plaintiff to accept the various renewals thereof, some of which were without the indorsement of the defendant, owing to the fact that the said defendant was out of the state of Colorado at the dates of the respective maturity of the notes upon which he was not an indorser."

All of the findings heretofore mentioned are amply sustained by the evidence. The note of the company maturing November 14, 1921, was renewed from time to time, sometimes with and at other times without the indorsement of defendant, depending upon the presence or absence of the defendant at the time of renewal. On May 15, 1922, the indebtedness was reduced to $20,000 and thereafter renewal notes were given by the company for this amount until November 23, 1923, when the last renewal note was delivered to plaintiff. This note was made payable 30 days from its date. Plaintiff seeks to recover the principal sum of this note, with interest thereon. Defendant was absent from Denver on November 23, 1923, and his name does not appear as an indorser on the note.

The eleventh finding is as follows:

> "That by reason of the foregoing facts the defendant is estopped from denying his liability to the plaintiff on the said guaranty set forth in finding 3 hereof, although the court also finds that there was no consideration for said guaranty set forth in finding 3."

[1-3] The trial court correctly concluded that plaintiff was entitled to judgment. It is apparent, however, that judgment was based upon the ground of estoppel since there was a finding of failure of consideration. We agree with the final conclusion reached by the lower court that defendant is liable, but are of the opinion that there was sufficient consideration for the guaranty of defendant, and that the judgment should be based on that ground. In determining whether there was a consideration for the guaranty the court should consider the matter in the light of the circumstances under which the guaranty was accepted. The obligation of the company to the bank, evidenced by the promissory notes on which defendant was an indorser, was not paid or extinguished by the renewal notes. The same debt still existed. In Savings & L. Soc. v. Burnett, 106 Cal. 514, 530, 39 P. 922, 925, the court uses this language:

> "It is the general rule that one executory contract does not extinguish another. It is also the rule that there must be an express agreement or understanding to that effect before another note, bill, or check extinguishes and satisfies the indebtedness evidenced by an earlier one."

See, also, Dellapiazza v. Foley, 112 Cal. 386, 44 P. 729, where it is said:

> "Without the intention, and an express agreement of the parties, that the making and acceptance of the note should operate as payment or satisfaction of the original debt, to secure which it was given, it did not so operate, though it may have suspended the right of recovery until the maturity of the note."

Since defendant was an indorser on the $22,000 note, which matured November 14, 1921, he was guaranteeing the payment of his own obligation as well as that of the maker of the note when he gave the guaranty on November 9, 1921. As an indorser he could have been sued on the note which was then in the possession of the plaintiff. Defendant induced the bank to renew the note which fell due November 14, 1921, without his indorsement only because it had already secured his guaranty of the payment of the indebtedness represented by the note. Without the guaranty the note would not have been renewed.

[4, 5] While the promise of the guarantor must be supported by a consideration, in most cases the one which supports the promise is the one which passes between the maker and the payee of the note. Howland v. Aitch, 38 Cal. 133. That the surrender of a valid note will furnish the consideration for the making of a new one is well settled. In Mahana v. Van Alstyne, 179 Cal. 725, 178 P. 853, the defendant and her husband had, on November 5, 1914, executed to plaintiffs a note and trust deed covering the separate property of defendant, the note being given for the personal debt of the husband. Thereafter, on April 17, 1915, plaintiffs, at the request of defendant, canceled said note and trust deed, and defendant executed the note sued on. The lower court decided that this note was only collateral security for the previous debt of defendant's husband and was not supported by any consideration. In reversing the judgment the Supreme Court, speaking through Mr. Justice Shaw, said:

> "The fact that the original note was given for the debt of Guy Van Alstyne and that at no time was there any new consideration running to him other than the several renewals and cancellations, does not aid the defendant. The giving up of the deed of trust and the old note, which were at that time valid obligations, was a sufficient consideration for the note of $2,500 sued on."

See, also, Shoenhair v. Jones, 33 Cal. App. 545, 165 P. 971.

In Brewster v. Baker, 97 Ind. 260, it is said:

> "The surrender of the old note, and the substitution of the new note therefor, certainly constituted a sufficient consideration for the new note, as between the payee and Hisey, the principal therein; and this being so, it must be held, we think, that the consideration of the new note was sufficient to sustain it as against the appellant, the surety of Hisey therein."

In Home Savings Bank v. Shallenberger, 82 Neb. 507, 118 N. W. 76, the court uses this language:

> "It is elementary that the extension of time to a principal debtor is a sufficient consideration to support a guaranty by a stranger for the payment of a new obligation; and the fact that the guarantor is not a stranger to the obligation renewed, but is himself liable for the payment thereof, does not alter the rule."

See, also, Buckner v. T. P. Clark's Executor, 69 Ky. (6 Bush) 168; White v. Western State Bank, 119 Ill. App. 354; Brandt v. Vanderveen, 213 Mich. 121, 182 N. W. 35.

[6] Defendant cannot complain that the guaranty was executed 5 days before the renewal of the note maturing November 14, 1921. In Citizens' Trust, etc., Bank v. Bryant, 53 Cal. App. 735, 200 P. 823, a loan was made and a mortgage by George A. Bryant was given to the bank bearing date October 16, 1915. The bank declined to make the loan on the security offered, but insisted as a condition that defendant, W. J. Bryant, guarantee the note in part. W. J. Bryant executed the guaranty on November 5, 1915, and thereafter the bank paid over the money agreed to be loaned. The court in affirming judgment for plaintiff, said:

> "One of the points made by appellant is that there was no sufficient consideration for the contract of guaranty and that the obligation thereof must fail because it was not entered into at the time of the loan transaction. This contention has not the semblance of any real facts upon which to found it, unless the mere difference in the date of the note and mortgage and that of the contract of guaranty affords such ground. Section 2792 of the Civil Code provides: 'Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist.' All of the evidence, including the terms of the contract of guaranty itself, shows conclusively that there was but one transaction and that the note and mortgage of George A. Bryant was not accepted by the bank until the guaranty was furnished."

And in Howland v. Aitch, supra, this language is found:

> "It is a matter of no moment at what time, relative to each other, the contracts may have been made and delivered, and the consideration may have passed, if they together constituted one transaction."

See, also, Tomanovich v. Casey, 106 Wash. 644, 180 P. 919; 13 Cal. Jur. 101.

[7] It cannot be maintained that it was necessary to use express language to establish an agreement on the part of the bank to forbear bringing suit on the note maturing on November 14, 1921. When we consider the entire transaction in the light of all its surrounding circumstances it is apparent that no such language was necessary, since undoubtedly it was the understanding of the parties that there should be a renewal of the note maturing November 14, 1921. Clearly there was an implied contract to that effect. No other reasonable construction can be given to the conduct of the parties. Section 1621 of the Civil Code provides: "An implied contract is one, the existence and terms of which are manifested by conduct."

[8, 9] It has been held in most jurisdictions, among them California, that a general averment that the contract sued on was executed without consideration "is but an allegation of a conclusion of law." 31 Cyc. 53; 6 Cal. Jur. 137; Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116; Rivera v. Cappa, 29 Cal. App. 496, 156 P. 1016, 1017. The finding of no consideration contained in the eleventh finding of the trial court may therefore be disregarded, since it is a finding of a conclusion of law. The court properly concluded that plaintiff was entitled to judgment and this conclusion is supported by the actual findings made. It is not "incumbent on the prevailing party to defend the logic of the judge. It is enough if the decision be correct." Chabot v. Tucker, 39 Cal. 434.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. The petition for hearing herein is denied.

In denying such petition we withhold our approval from that portion of the opinion of the District Court of Appeal as follows:

> "It has been held in most jurisdictions, among them California, that a general averment that the contract sued on was executed without consideration 'is but an allegation of a conclusion of law.'"

As to that question we express no opinion. We agree with the District Court of Appeal, however, that under the facts as shown and found in this case the eleventh finding of the trial court may be disregarded as being a conclusion of law. The court found the facts surrounding the execution of the written guaranty of November 9, 1921, by the appellant. Whether these facts were sufficient to show a consideration for said written guaranty was purely a question of law.

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88 Cal. App. 597

PAWN v. WALL et al. (Civ. 6123.)

District Court of Appeal, First District, Division 2, California. Jan. 25, 1928.

Innkeepers ⟹11(12)—There being no special contract of storage, action against innkeeper for lost trunk held barred under 90-day statute (Code Civ. Proc. § 341a).

Where departing guest, on payment of bill, requested hotel to store her trunk until she sent for it, there being no special contract of bailment by hotel, her action to recover trunk or value thereof, brought more than 90 days after her departure, was barred by limitation of Code Civ. Proc. § 341a.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Doris Pawn against Harry J. Wall and another, copartners doing business under the fictitious name of the Hotel Gotham. From a judgment for defendants, plaintiff appeals. Affirmed.

Milton M. Cohen and James S. Roche, both of Los Angeles, for appellant.

Clark & Law, of Los Angeles, for respondents.

KOFORD, P. J. By this action plaintiff seeks to recover her trunk or the value thereof, $3,159.50, in case it cannot be returned. The defendants were proprietors of the Hotel Gotham, where the plaintiff had remained for some time as a guest until August 26, 1923. On that day she departed and left her trunk in the care of the defendants, to be sent for later. Defendants failed to redeliver it upon demand subsequently made, and plaintiff commenced this action on February 19, 1924, more than 90 days after her departure from the hotel. The defendants pleaded several defenses based upon Code sections limiting and regulating hotel keepers' liability. The court found these defenses to be good, particularly the plea of the special statute of limitations of Code of Civil Procedure (section 341a) limiting such an action against a hotel keeper to 90 days after the departure of the owner of the trunk from the hotel.

Appellant's argument is an attack upon the sufficiency of each and all of defendants' defenses, but none of them, from the nature of the case, needs be considered if the 90-day statute of limitations is applicable. The court found in effect that the trunk was not left in charge of the defendants as warehousemen, nor as ordinary bailees, nor pursuant to special express agreement, promise or contract, but that it was left in defendants' charge in no other capacity than that of hotel keeper. The validity of the judgment appealed from depends upon the validity of this finding. The court's finding that defendants did not promise to redeliver upon demand must be taken to mean that they made no express promise, as undoubtedly the law will imply a promise, or at least will enjoin the duty of redelivery upon demand.

The part of plaintiff's testimony relied on by the appellant is as follows:

> That on August 26, 1923, she went to the hotel desk and paid her hotel bill, and thereupon told the man behind the counter, admittedly an employee of the hotel, that she wanted to have the trunk stored, that she was going away and did not have time to take it to the storage company, and "would they be so kind as to take charge of my trunk, and they told me they would and it would be perfectly safe"; witness continuing, that they said it would be all right and that they would take care of it and "when I was ready for it they would send it to me. They did not tell me there would be any charge for taking care of the trunk. I did not tell them how long it would be before I would send for the trunk."
>
> "Q. You were still in the hotel at the time you told them to put your trunk in storage? A. I was paying my bill, and after I paid my bill I told them to take care of my trunk.
>
> "Q. You never left the hotel after you paid your bill and then came back and told them to put the trunk in storage? A. No; but I would do naturally like I would with any other hotel, after I paid my bill, tell them what I wanted them to do with my trunk."

The evidence relied upon does not prove a special contract of bailment as contended by appellant. The evidence very well warrants the court's finding to the effect that the transaction represented the ordinary case of a guest departing and at the same time leaving a trunk to be called for later. It is appellant's contention that the evidence shows that at the time she left her trunk in the care of respondents she had ceased to be a guest, because she had just paid her bill, and for that reason the agreement of safekeeping was of a special nature, different from an ordinary case of a guest leaving a trunk in the care of the hotel keeper upon departing. We are unable to agree with this contention. The exact time that one ceases to be a guest of a hotel cannot be in all cases the very time of paying one's bill. Some pay in advance and some after a period of credit greater or less, and it is therefore apparent that such a criterion would lead to absurd conclusions. In the very nature of the case the exact time at which one ceases to be a guest must necessarily depend upon all the facts and circumstances. It has been held that, when a guest departs from a hotel leaving baggage behind, the hotel keeper's liability continues to be that of a hotel keeper for a reasonable time allowed the guest to remove his goods. Authority for this proposition is found in the same citations given by appellant as a part of her argument to the effect that defendants will not escape liability by her claim that their liability is not that of hotel keepers, but that under the facts of this case they would be liable as gratuitous bailees. Beale on Innkeepers and Hotels, §§ 231, 234, 235; Carol v. Monteleone, 139 La. 541, 71 So. 798, L. R. A. 1916F, 234; Oxford Hotel Co. v. Lind, 47 Colo. 57, 107 P. 222, 28 L. R. A. (N. S.) 495, 18 Ann. Cas. 983.

We need not determine whether or at what exact time, after the plaintiff departed, defendants' liability ceased to be that of hotel keepers—depositary for hire (Civ. Code, § 1859)—and commenced to be that of gratuitous bailees. That would only affect the burden of proof and excuse for failure to redeliver. The provisions of Code of Civil Procedure, § 341a, may not be designed to apply to a stranger depositing goods at a hotel, nor to one who, having once been a guest and departed, returns again, not as a guest, but as a stranger, and deposits goods for safekeeping. The relation of guest and hotel keeper existed at the time plaintiff departed. The leaving of her trunk was an incidental part of her departure.

The period of limitation prescribed by Code of Civil Procedure, § 341a, commenced to run when she departed and continued thereafter to completion. To hold otherwise would nullify the section. To hold that it applied only when the goods are left before the guest settled his bill would give it an absurd and uncertain application. There is nothing in the evidence to distinguish this case from the ordinary case of a guest leaving a trunk at the time of departure, to be later called for or sent for, and this is the very situation the section is designed to cover.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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88 Cal. App. 740

ELLET v. LOS ALTOS COUNTRY CLUB PROPERTIES, Inc. (Civ. 6003.)

District Court of Appeal, First District, Division 1, California. Jan. 31, 1928.

1. Corporations 🔑406(1)—Authority of person to execute contract for corporation may be shown by acquiescence of directors in his conduct as agent, and corporation's defense of want of authority is looked on with disfavor.

Authority to execute contract for corporation may be shown by evidence that person does business for it and in its behalf, as agent, with knowledge and acquiescence of its directors, or at their direction, and defense of want of authority to execute contract on behalf of corporation is looked on with disfavor; corporation being held to its contracts in same manner as natural persons.

2. Corporations 🔑397—Corporation is responsible for manner in which it permits its agents to represent it.

Corporation is responsible for manner in which it permits its agents to hold it out to the world, as is the rule with individuals.

3. Corporations 🔑397—Court may, without disregarding theory of distinct corporate existence, look to substance of transaction, and hold corporation liable by implication for acts of its representatives to prevent fraud.

While it must appear in order to cast aside legal fiction of corporate existence that corporation is the conduit of another, and that to recognize it as distinct would perpetrate fraud, court will at the same time look through the form of a corporate transaction to the actual conditions involved, and hold corporation bound by acts of its representatives on implication arising from facts which in themselves might not establish positive and direct authorization.

4. Corporations 🔑519(3)—Evidence held to sustain broker's recovery on corporation's note given for commissions for negotiating transfer of option to persons subsequently forming corporation and taking option in corporation's name.

In action by broker against corporation on note given in settlement of broker's claims for commission based on negotiations for transfer of option to individuals later forming corporation, and then taking option in corporation's name, evidence *held* to sustain plaintiff's recovery, notwithstanding claim of want of consideration and claim that president and treasurer had no authority to execute corporate note.

5. Appeal and error 🔑1060(1)—Counsel's misconduct, unless grossly improper, does not warrant reversal.

Alleged misconduct of counsel on account of improper remark or discussion does not warrant reversal, unless something grossly offending appears.

6. Trial 🔑185—Trial court may state to jury that certain testimony has been given, provided statement is accurate and not misleading.

Trial court may state to the jury that certain testimony has been given in the case, provided it states the same with accuracy, and not in a manner calculated to mislead jury, though comments on evidence are always dangerous, and should be carefully approached.

7. Appeal and error 🔑1170(9)—Judgment is not disturbed for error in giving and refusal of instructions which could not have seriously affected outcome (Const. art. 6, § 4½).

Where errors in giving and refusal of instructions could not have materially prejudiced rights of appellant or seriously affected outcome of trial, judgment will not be disturbed, under Const. art. 6, § 4½.

8. Trial 🔑349(2)—Refusal to submit special issues held within trial court's discretion, where general verdict was sufficient and special issues were misleading.

Refusal to submit special issues to jury *held* within discretion of trial judge, and discretion was not abused where general verdict sufficiently covered the issues, and where some of special issues proposed to be submitted were misleading.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Charles Ellet against the Los Altos Country Club Properties, Inc. From a judgment for plaintiff, defendant appeals. Affirmed.

Mervyn R. Dowd and Charles Reagh, both of San Francisco, for appellant.

Rea & Caldwell, of San Jose, for respondent.

PARKER, Justice pro tem. This is an action to recover upon a promissory note. The case was tried by the court, sitting with a jury, and after a verdict in favor of plaintiff judgment was entered accordingly. Defendant's motion for a new trial was denied. From the judgment so entered this appeal is taken.

Issue was joined on the complaint of plaintiff and the answer and cross-complaint of defendant. It is conceded that the allegations of the cross-complaint are not material on this appeal, and therefore we omit further reference thereto and consider the case on the issues joined by the complaint and answer.

The note sued upon was signed, "The Los Altos Country Club Properties, Inc., L. G. Monroe, Pres., Lawrence F. Miller, Tres.," and bore the seal of the corporation and was made payable to plaintiff herein. Defendant corporation contended in the court below, and likewise contends here, that as far as it was concerned there was no consideration for the execution of the note, or at best a consideration which failed, and that, therefore, the verdict and judgment are against the evidence and contrary to law.

The controversy centers about the purchase of certain lands in Santa Clara county. Much evidence was received, and a detail thereof is here unnecessary. The record before us contains sufficient evidence to support what we will outline as the facts, disregarding entirely any conflict which may exist. Certain real estate brokers, who will be hereinafter referred to as "brokers" (which designation, if not technically accurate, will suffice for identification), had secured an option to purchase these lands. By the terms of the option the time was limited and prompt action was necessary. The plaintiff, Ellet, was a banker and real estate agent in Mayfield, and he entered into the transaction through an arrangement with the brokers whereby he was to secure some person with the necessary cash to carry through the option, and in return for his success he was to receive a share of the profits realized. Plaintiff, Ellet, placed the properties before one L. J. Monroe, and the latter, becoming interested, took the matter to one L. J. Miller, and the negotiations began. Ellet agreed to give Monroe half of whatever might be received through the Ellet agreement with the brokers. The negotiations finally reached a stage where Monroe and Miller entered into a syndicate agreement, Monroe putting $75,000 in cash into the enterprise, and the brokers were to negotiate a loan or otherwise secure the balance of the purchase price, namely, $225,000. As a part of this arrangement the brokers turned over to Monroe and one Smith (the latter furnishing $25,000 under the agreement to purchase) the option held by them.

It was further agreed between the parties that the brokers should have the exclusive selling agency in the property purchased, and also 50 per cent. of all profits realized; it being the purpose of the entire transaction to subdivide the property into lots and tracts. Following the execution of this instrument the brokers gave to Ellet, plaintiff herein, their written promise and agreement to pay to him a percentage approximating one-third of the profits realized by the brokers. It appears that nothing further was done under the so-called syndicate agreement, and it is doubtful if the same was ever fully executed by all of the parties thereto. In any event, the option held by the brokers was not transferred. The events surrounding the syndicate agreement do evidence the stage of negotiations reached. Subsequently Monroe and Miller, together with one Dailey, entered into another agreement with the brokers, by the terms whereof the brokers convey and assign all their right, title, and interest in the option to Miller, Monroe, and Dailey, who agree to form a corporation under the name of Los Altos Country Club Properties, Inc., for the purpose of purchasing and subdividing and selling the property under option. The former agreement with the brokers as to the profits from the enterprise and the giving to them the exclusive selling agency was reaffirmed, and the brokers, as a consideration therefor, were still charged with the obligation of raising the necessary funds to complete the purchase. The corporation, being the defendant herein, was formed with Monroe as president, Miller as treasurer, and Dailey secretary, in which offices each continued up to the time of this action. Monroe and Miller owned 52 per cent. of the stock of the corporation.

It appearing that the brokers were unable to complete their undertaking to finance the purchase of the property, a final agreement was made, whereby the brokers assigned to a firm composed of Monroe and Miller all of their rights in the premises, including the exclusive selling agency and rights to profits, for the sum of $11,250, thus completely eliminating the brokers from the transaction. At the time of this agreement, in which the corporation, through its officers and attorneys, participated, a general discussion arose concerning the rights of the plaintiff herein, Ellet. All seemed to agree that Ellet had some claim that he might assert, though the corporation, then the holder of the option, did not consider anything due him. However, upon the insistence of the brokers and as a part of the transaction the corporation did make and execute and deliver to the brokers a written undertaking as follows:

> "The Los Altos Country Club Properties, Inc., hereby agree to hold you safe and harmless from any and all claims Messrs. A. B. Smith and Charles Ellet may have against you for any contemplated percentages due them as a result of your favorably negotiating a loan of $125,000 or any part thereof."

The brokers accepted this as an indemnity against any and all claims of Ellet, and such was the intention of the agreement. The plaintiff, Ellet, was not a party to any of these negotiations or the agreements resulting therefrom. Thereafter Ellet, learning that the option had been transferred and the brokers compensated, demanded of Monroe that he (Ellet) be compensated. Ellet, Monroe, and Miller then undertook to determine the amount due Ellet. Ellet claimed a sum equal to one-third the amount paid the brokers, which one-third amounted to $3,750. Much discussion was had, and Ellet threatened to withdraw from the controversy and begin suit against the corporation. Thereupon Monroe and Miller, to avoid litigation and by way of compromise, agreed to pay Ellet the sum of $1,875, and as an evidence of the indebtedness Monroe as president and Miller as treasurer of the corporation executed and delivered to Ellet the note sued upon here, no part of which has been paid.

The foregoing details the main facts of the controversy. There are some additional facts and circumstances, minor in themselves, indicating the general idea that the purpose of the formation of the corporation and its conduct was solely for the purpose of handling the option and the lands involved. From this recital the prominent indisputable facts standing out in bold relief indicate clearly the following: That the corporation was created solely pursuant to an agreement with the brokers and as a part of the consideration involving the transfer of their interests; that plaintiff was in privity with the brokers and with the corporation's organizers and a party in interest; that the interest of plaintiff was recognized by all concerned, and all undertook and agreed to compensate him; that when the corporation took over the lands pursuant to the option the plaintiff, Ellet, had a claim against the corporation, even conceding that the corporation might have maintained a valid defense thereto; that by way of adjustment of that claim the corporation, through its president and treasurer, officers authorized to act for the corporation, executed and delivered the note in question under the corporate seal. And beyond this there are facts from which a fair inference might have been drawn by the jury that the directors and attorney for the corporation knew of and authorized the transaction.

[1, 2] On this state of the record appellant contends that the evidence is insufficient to justify the verdict or to uphold the judgment, in that the corporation received no consideration, and that Monroe and Miller had no authority to execute a corporate note. It is the policy of the law and the endeavor of courts to hold corporations as well as natural persons to their contracts. Such defense introduced against a contract which has been executed in whole or in part by the corporation is looked upon with disfavor. Authority of the corporation may be shown by evidence that the person does business for the corporation and on its behalf as agent with the knowledge and acquiescence of its directors or by their direction. Davis v. Pacific Studio Corporation (Cal. App.) 258 P. 440; Blood v. La Serena Land, etc., Co., 134 Cal. 361, 66 P. 317; Commercial S. Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 P. 964. Like individuals, a corporation is responsible for the manner in which it permits its agents to hold it out to the world. San Francisco Gas Co. v. San Francisco, 9 Cal. 462. In 1 Parsons on Contracts, p. 118, we find:

> "In general if a person not duly authorized makes a contract in behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent."

And that this is the recognized law of today is affirmed in Capitol Woolen Co. v. Berger (Cal. App.) 262 P. 351, decided December 12, 1927.

As is said in Sargent v. Palace Café Co., 175 Cal. 737, 167 P. 146:

> "In the matter of consideration as well as that of corporate power the court will equitably look through the mere form to the reality of the transaction."

[3] The law of this jurisdiction is announced in the case of Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 211, 155 P. 986, as follows:

> "And upon a proper showing that the Abbott Kinney Company, a corporation, was but the instrumentality through which Abbott Kinney for convenience transacted his business, by all of the authorities not only equity, looking through the form to substance, but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or, conversely, hold the owner bound by the acts which bound his corporation."

The rule in its strictness is necessarily limited. Courts may not disregard the corporate entity in all cases, and destroy the usefulness or identity of private corporations as such. The rule is as announced in the following cases: Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Hotaling v. Hotaling, 193 Cal. 380, 224 P. 455; Wenban Estate v. Hewlett, 193 Cal. 696, 227 P. 723.

Generally, and without provision for exceptional cases, the rule is that in order to cast aside the legal fiction of distinct corporate existence it must appear that they are the business conduit and alter ego of one another, and that to recognize their separate entities would aid the consummation of a wrong. We would not attempt to enlarge upon this rule or to go beyond its limitations. Nevertheless, the spirit of the rule is to permit the fullest inquiry in each individual case, and when it is disclosed that injustice would result or fraud be perpetrated courts are not powerless to sift through mere form and determine the actual conditions. And, consistent with the rule and the spirit thereof, the corporate entity may be recognized and respected and yet be bound by acts of its representatives upon an implication resulting from facts and circumstances which in themselves might not go to the extent of establishing a positive and direct authorization.

[4] In the case at bar there was but an equivocal showing of lack of authority or nonreceipt of benefits. The testimony offered in defense was evasive and uncertain, and the defense urged technical in character. We thus characterize the testimony, not entirely by way of condemnation, but accepting defendant's own estimate of it. We conclude the evidence amply sufficient to support the verdict and judgment.

[5] Appellant next urges misconduct of counsel for plaintiff. We have carefully examined the record in this respect. While it is true that there was at the trial some discussion and reference that might well have been omitted, yet the proceedings below were conducted without prejudice to the rights of either party in this respect. Necessarily in every trial, from time to time, side remarks and allusions creep in, and it would be impossible to prevent this. Unless, upon a review of the particular case, something grossly offending appears, it is idle to bring up this ground of complaint.

[6, 7] The third ground of appeal concerns certain instructions given by the court. We deem it needless to set out in detail all of the instructions complained of. The result would be simply the building up of a theory merely for the purpose of destruction. There is nothing in the contention that involves any new or interesting problem of law such as would establish any doctrine needful to the practice or instruction of the profession or of assistance to trial courts. On the whole the jury were fairly and fully instructed; and while we might and do concede that the language employed in certain instructions was perhaps ill chosen, and perhaps to some extent inapplicable, yet no injury could have resulted therefrom.

We may state, however, that it is always a dangerous practice for trial judges to comment even indirectly upon the evidence, or to even inferentially stress the testimony of any witness or witnesses. It is not error for the trial court to state to the jury that certain testimony has been given in the case, provided it states the same with accuracy and not in a manner to mislead the jury. Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660. It is, however, a delicate task and one that should be carefully approached.

Though it may appear on close analysis that the action of the trial court in the matter of giving and refusing instructions is subject to some of the criticism offered by the appellant, yet a study of the record makes it manifest that any errors appearing could not have materially prejudiced the rights of appellant or seriously affected the outcome of the trial. In other words, we conclude that substantial and even justice resulted irrespective of the errors, and that a trial free from such errors would have the same result. Therefore we are content to leave the judgment undisturbed. Constitution, § 4½, art. 6.

[8] Lastly, appellant complains of the action of the trial court in refusing to submit proposed special issues to the jury. In the brief of appellant it is not disclosed just what issues were offered. We have, however, examined the record in this connection, and can find nothing in the court's action requiring the intervention of this court. The general verdict sufficiently covered the issues and answered the pleadings. Some of the special issues offered were clearly issues of law and were misleading. A separate finding on each of the issues offered would have added nothing, and the special issues presented were confusing, and so phrased that nothing but doubt and uncertainty could have resulted from their submission to the jury. In any event, it was a matter clearly within the discretion of the trial judge, and nothing appears to indicate that the discretion in this instance was abused.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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88 Cal. App. 731

CLOVERDALE UNION HIGH SCHOOL DIST. OF SONOMA COUNTY v. PETERS. (Civ. 3107.)

District Court of Appeal, Third District, California. Jan. 30, 1928.

1. Action 🔑6—Whether complaint for declaratory relief stated cause of action held immaterial, where counterclaim tendered same issues (Code Civ. Proc. § 1060).

Whether complaint for declaratory relief under Code Civ. Proc. § 1060, stated cause of action *held* immaterial, where defendant interposed counterclaim tendering same issues, and judgment thereon was complete adjudication of rights of parties, since defendant, by tendering counterclaim, became a plaintiff in effect, invoked jurisdiction of court, and submitted to it, under section 581, subd. 1.

2. Courts 🔑37(3)—Defendant by counterclaiming becomes a plaintiff, invokes jurisdiction of court, and submits to it (Code Civ. Proc. § 581, subd. 1).

Defendant by setting up counterclaim becomes a plaintiff in turn, invokes jurisdiction of court in same action, and thereby submits to it, under Code Civ. Proc. § 581, subd. 1.

3. Schools and school districts 🔑135(1)—School board cannot employ teacher without meeting and formal action (Pol. Code, § 1607, subd. 1).

Members of school board cannot make valid contract employing teacher without meeting and formal action, under Pol. Code, § 1607, subd. 1.

4. Schools and school districts 🔑135(4)—Where teacher's contract is agreed on at regular meeting of school board, contract may be executed subsequently and officers of board may sign at different times (Pol. Code, § 1607, subd. 1).

Where terms of contract employing teacher are properly agreed upon at regularly convened meeting of school board, contract need not be executed at such meeting, but may be signed and executed subsequently and officers of board may sign at different times, under Pol. Code, § 1607, subd. 1.

5. Schools and school districts 🔑57—That combined vote of high school board and elementary school board was six to four in favor of joint meeting permitted no inference that majority of high school board favored joint meeting.

Fact that combined vote of members of high school board and members of elementary school board was six to four in favor of joint meeting of boards permitted no inference that majority of members of high school board voted in favor of such joint meeting.

6. Schools and school districts 🔑57—High school board cannot delegate to elementary school board power to determine question of joint meeting.

High school board cannot delegate to elementary school board power to determine whether two boards shall have a joint meeting.

7. Evidence 🔑209—Stipulation that three members of high school board would testify that they voted against employment of principal at joint meeting with another school board might be accepted as proof.

Stipulation of parties that three members of high school board would testify that they voted against employment of principal at joint meeting of high school board with elementary school board might be accepted by trial court as proof that they so voted.

8. Schools and school districts 🔑135(1)—High school board cannot delegate to elementary school board power to employ high school principal (Pol. Code, § 1743).

High school board cannot delegate to elementary school board power to employ or participate in employment of principal for high school, though it is intended that he serve also as elementary school principal, under Pol. Code, § 1743, but each board must determine for itself whether or not it will employ same person as principal of both schools and who such person shall be.

9. Schools and school districts 🔑135(1)—Contract employing high school principal, signed by majority of high school board after joint meeting with another board dispersed, held invalid, where not authorized at session of high school board (Pol. Code, § 1743, and § 1609, subd. 5 [a]).

Contract employing principal for both high school and elementary school, signed by majority of high school board and of elementary school board after joint meeting dispersed, *held* invalid as to high school board, where such board neither authorized nor signed contract at session of such board, under Pol. Code, § 1743, and section 1609, subd. 5 (a).

10. Schools and school districts 🔑133—Statute authorizes employment of same person as high school principal and elementary school principal (Pol. Code, §§ 1589c, 1743).

Pol. Code, § 1743, authorizes employment of same person as high school principal and as elementary school principal, rather than section 1589c, which relates to elementary schools, not to high schools, in view of section 1741.

11. Schools and school districts 🔑147—High school principal may not act as elementary school principal without consent of majority of high school board, given in statutory manner (Pol. Code, §§ 1741, 1743).

Principal of high school may not also act as principal of elementary school without consent of majority of high school board, given in manner provided by law, under Pol. Code, §§ 1741, 1743.

12. Schools and school districts 🔑9, 21, 133—Management of public schools is state affair, school districts are state agencies, and act of high school board in employing principal is governmental.

Management of public schools is a state affair, and school districts at most are but state agencies for that purpose, and act of high school board in employing high school principal is not proprietary act, but governmental.

13. Schools and school districts 🔑135(5)—High school district held not estopped to deny validity of contract purporting to employ principal, where it gave timely notice and no services were performed (Pol. Code, § 1743).

High school district *held* not estopped to deny validity of contract purporting to employ principal for both high school and elementary school, under Pol. Code, § 1743, where it gave timely notice before opening of school that his services would not be required, and no services were performed for high school district under contract.

14. Schools and school districts 🔑135(3)—Teacher might rescind contract wtih high school district and elementary school district purporting to employ him as principal of both high school and elementary school, where contract was invalid as to high school (Civ. Code, § 1689, subd. 4; Pol. Code, § 1743).

School teacher had right to rescind contract with high school district and elementary school district purporting to employ him as principal of both high school and elementary school, under Pol. Code, § 1743, where contract was invalid as to high school district, since there was a partial failure of consideration within Civ. Code, § 1689, subd. 4.

15. Appeal and error 🔑1073(1)—Defendant might not complain of portion of judgment enjoining him from claiming employment by plaintiff during year which had passed.

Defendant might not complain of portion of judgment enjoining him from claiming or asserting any employment by high school district during particular school year which was entered after end of such school year, where such injunction could have no possible effect.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action for declaratory relief brought by the Cloverdale Union High School District of Sonoma County against W. J. Peters, who counterclaimed. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellant.

F. W. McConnell, of Santa Rosa, for respondent.

FINCH, P. J. The complaint alleges that during the fiscal year beginning July 1, 1924, the "defendant has repeatedly and falsely claimed and asserted to the said plaintiff and to the members of its board of school trustees, and to the students in attendance at said school, and has made public declaration that he was at all times since July 1, 1924, and is now the regularly employed principal of the said school for the said present school year * * * at a salary of $200 per month; * * * that the said claims and assertions so made * * * have caused and are now causing, and will continue to cause, unrest, disturbance, and confusion in said school and among the students thereof and the citizens of said school district, * * * and does and will continue to interfere with the best interests and welfare of said school and the students in attendance thereat, * * * and since the beginning of the present school year there has existed and now exists an actual controversy between the said plaintiff and its said board of school trustees, with the said defendant, relating to the legal rights and duties of the said respective parties, and particularly relating to the alleged rights and claims of the said defendant herein." The prayer is, in substance, for a judgment declaring the rights of the parties in the premises, "including a determination of any and all questions of construction or validity arising under said defendant's alleged employment and the pretended contract so claimed and asserted by him."

The defendant, as a defense and by way of counterclaim, alleged that he was regularly employed by the plaintiff on May 5, 1924, as principal of the high school for the fiscal year mentioned at a salary of $2,400 a year; that at the opening of school in that year he made demand "that he be allowed to perform his duties as principal of said high school, and that he was present and ready, able, and willing and at all times herein mentioned, and that he is now ready, able, and willing, to assume and discharge the duties of principal of said high school, and that notwithstanding said high school board refused and ever since and still refuses to permit defendant to discharge and perform his duties under said employment." The defendant also alleged that "for more than two years next preceding said 5th day of May, 1924, he has served successfully * * * as joint principal of the Cloverdale Union school and of the Cloverdale Union high school"; and that "there is now due, owing and unpaid from plaintiff to defendant the total sum of $2,400," for which sum the answer prays judgment against the plaintiff.

The complaint was filed December 5, 1924, and the answer June 3, 1925. The trial was had on June 17, 1925, and "the cause as submitted to the court for its decision upon certain stipulated facts and evidence." Judgment was entered in favor of plaintiff, and defendant has appealed. Counsel for the plaintiff stated substantially the following facts at the trial:

During the fiscal year ending June 30, 1924, the defendant was the principal of the plaintiff high school and of the Cloverdale Union elementary school. Each school is governed by a board of five members. May 5, 1924, the members of the two boards met at the same place and separately elected their respective officers for the ensuing year. Thereupon:

> The "following proceedings were had: * * * Grant (a member of the elementary school board) made a motion that we act as a joint board, and Mr. Hall (a member of both boards) seconded it. Then they appointed Burrough (president of the high school board) to act as chairman of the meeting. After a brief discussion, the motion (that they act as a joint board) was put and carried by secret ballot, six voting for and four against. Then motion by Grant, seconded by Hall, that Peters be employed as principal of both high and grammar schools for the ensuing year at the former salary. Then motion was submitted and secret ballot taken, resulting in vote of six for and four against. There was no regular motion or order for adjournment, but after the foregoing the meeting simply dispersed. Thereupon Mr. Grant produced the form of notice of employment for the employment of Peters as principal, and this was then signed as shown by the file in the county superintendent of school's office."

The notice to which counsel referred is in the usual form of notices of employment of teachers which, by the provisions of section 1609, subdivision 5 (a), of the Political Code, trustees are required to give the county superintendent of schools. It was signed by the president and the clerk of the high school board and by one other member thereof and by the president and the clerk and a third member of the elementary school board. In addition to those mentioned, it was signed by Hall as a member of the elementary school board, but not as a member of the high school board. Thereafter the defendant signed the usual form of acceptance appearing upon the instrument. It may be conceded that the instrument so executed was sufficient in form to constitute a valid contract of employment. The important question is whether its execution was authorized. June 3, 1924, the high school board adopted a resolution to the effect that the services of defendant would not be required for the ensuing school year and served notice upon him to that effect.

After counsel for the plaintiff had stated the foregoing facts, together with others which are not deemed material or are otherwise shown, counsel for defendant said: "We will stipulate that this is a correct history." It was further stipulated, subject to all legal objections made by counsel for defendant: "That * * * Peters was not present at the meeting of May 5, 1924, at the time of the signing of the 'notice of employment'; that the minutes of the meeting of the board of trustees of the Cloverdale Union high school district, * * * held on May 5, 1924, contain no reference whatever to the employment of W. J. Peters as principal, * * * nor do said minutes refer in any manner to any employment of Mr. Peters, or to any contract between said board and said defendant Peters"; that three members of the high school board "would each testify that he did not at said meeting on May 5, 1924, vote in favor of employing W. J. Peters as principal; * * * that each of them would testify that no vote was taken of the board of trustees of Cloverdale Union high school district relative to the employment of W. J. Peters, as principal, other than the secret ballot taken in the so-called joint meeting of the two boards; * * * that each of them would testify that he never consented or agreed to the employment of said Peters as such principal, * * * unless the signing of said notice of employment was consent"; and that the defendant would testify that on May 6, 1924, the president of the high school board said to him, "We have signed the contract or paper and have placed it in your desk"; and that three copies thereof were there found on said day.

[1, 2] The action was brought under the provisions of section 1060 of the Code of Civil Procedure, providing for declaratory relief. In appellant's opening brief it is said:

> "Appellant contends that under the plain provisions of the statute, before a party may seek declaratory relief, he must allege and show relationship between himself and the defendant under a contract, will, or other written instrument, or in respect to property, and that this fact is not shown by the complaint, and in fact is expressly negatived."

It does not appear necessary to decide the question thus presented. The defendant's counterclaim tenders the same issues as the plaintiff's complaint. The plaintiff did not demur or in any manner object to the counterclaim, and the defendant was entitled to a trial of such issues, even if the plaintiff had desired or attempted to dismiss the action. Code Civ. Proc. § 581, subd. 1.

[3, 4] In Merchants' Heat & L. Co. v. James B. Clow & Sons, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488, it is said:

> "By setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. * * * The defendant if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. * * * After the cross claim is set up the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown."

The judgment against the defendant on his counterclaim is a complete adjudication of the rights of the parties, and therefore it is immaterial whether the plaintiff had a cause of action under section 1060.

> "Where power to employ a teacher is in a school board, a valid contract with a teacher cannot be made by members of the board without a meeting and formal action." 24 R. C. L. 615; Pol. Code, § 1607, subd. 1; McGinn v. Willey, 6 Cal. App. 111, 91 P. 423; Ryan v. Humphries, 50 Okl. 343, 150 P. 1106, L. R. A. 1915F, 1047, and note. "Where the terms of a contract with a teacher are properly agreed upon at a regularly convened meeting of the school board, it is unnecessary that the contract be executed at such meeting, but it may be subsequently signed and executed by the parties thereto, and it is immaterial that the officers of the board sign at different times." 35 Cyc. 1084.

[5-11] The court was justified in finding from the stipulated facts that the alleged contract is invalid. The high school board did not authorize the alleged joint meeting of the two boards. The members of both boards being together, a secret vote was taken upon the question of organizing as a joint board. Four voted against such organization. In the absence of evidence as to how the members voted, it cannot be inferred from the result of the vote that a majority of the members of the high school board voted in favor of such organization as a joint board, and clearly the high school board could not delegate the power of determining that question to the members of the elementary school board. Webster v. Board of Education, 140 Cal. 331, 73 P. 1070. Upon the question of employing defendant as teacher, the secret ballot against stood six to four, and it was stipulated that three members of the high school board would testify that they voted against such employment. The court was justified in accepting such stipulation as proof that such members so voted. As upon the question of organization as a joint board, the high school board could not delegate to the elementary school board the power to employ or to par-

ticipate in the employment of a principal of the high school, but the law contemplates that each board must determine for itself, in the manner provided for the determination of other questions, whether or not it will agree to the employment of the same person as principal of both schools and who such person shall be. The alleged contract was signed by a majority of the members of each board. Had this been done while such boards were in session it might be argued logically that it was a sufficient compliance with the law, but the contract was "produced" and signed after "the meeting * * * dispersed." It is immaterial whether the time intervening between the dispersion of the meeting and the signing of the contract was short or long. The contract was neither authorized nor signed at a session of the high school board and therefore it was not valid or binding on the plaintiff. The case has been argued upon the theory that the authority of a high school board and an elementary school board to unite in the employment of a principal is given by section 1589c of the Political Code, which reads as follows:

> "Whenever in their judgment it may be deemed advisable, the board of trustees for any union or joint union school district may unite with the trustees of any other school district, single, union or joint, in the employment of a supervising principal, who shall devote such time to the supervision of instruction in the several school districts and shall receive such compensation from each board of trustees as may be agreed upon by them."

It will be observed that the provisions of the section quoted relate to elementary, not to high, schools. Section 1741, in article 14, relating to high schools, provides:

> "Except as in this article, or in article XV of this chapter, otherwise provided, the powers and duties of high school boards shall be such as are now or may hereafter be assigned by law to boards of education or boards of school trustees in school districts."

Section 1743 in the same article 14 provides:

> "The principal of any high school may act as principal of any elementary school situated in said high school district; or as supervising principal of two or more elementary schools situated within said high school district, without regard to the number of teachers employed in each of said elementary schools, if so desired by the trustees of said elementary school district or districts and the high school board of trustees."

Authority to employ the same person as principal of a high school and an elementary school is given by this section rather than by section 1589c, and it is clear, from the provisions of section 1743, that a principal of a high school may not act as principal of an elementary school without the consent of a majority of the high school board, given in the manner provided by law.

[12] Appellant contends that the respondent is estopped to assert the invalidity of the alleged contract. This contention is based on the assertion that "the act of employing a principal is a proprietary or private act and not a governmental act." Attention has not been called to any private act in which a school district may engage. "The management of the public schools is a state affair, and school districts at most are but a state agency for that purpose." Board of Education v. Davidson, 190 Cal. 162, 168, 210 P. 961, 963.

[13] Appellant relies on the case of McCormick Lumber Co. v. Highland School District, 26 Cal. App. 641, 147 P. 1183, where it is said:

> "The question presented is as to whether, admitting the informalities of notice in the calling of the meeting and advertising for bids for the construction of the building, the school district, having received and appropriated the benefit of the labor and materials supplied by the contractor, is estopped from maintaining a defense based upon the irregularities noted. We think, under the circumstances of this case, the contractor, or his assignee, was entitled to recover."

[14] It has been held that where a teacher renders services under an informal contract, "the district will not be permitted to avail itself of the fruits of his labor and then refuse to pay for it." 24 R. C. L. 615; Scott v. Williamstown School District No. 9, 67 Vt. 150, 31 A. 145, 27 L. R. A. 588. The facts herein are wholly unlike those in McCormick Lumber Co. v. Highland School District, supra, or in the Scott Case. The defendant was given timely notice, long before the opening of the school, that his services would not be required during the ensuing year. He performed no services whatever for the plaintiff under the alleged contract. One of the considerations for the defendant's agreement to act as principal of the elementary school was that he was also to be employed by the plaintiff as principal of the high school, a fact which the elementary school board knew. The purported agreement of the high school to employ him being invalid, there was such a partial failure of consideration as entitled him to rescind his agreement to act as principal of the elementary school. Civ. Code, § 1689, subd. 4. It is simply a case of an invalid contract with a public agency of the state, under which no services were performed. None of the cases cited by appellant hold that a public agency is estopped under such circumstances.

[15] Appellant complains of the part of the judgment which enjoins him from "claiming or asserting any employment by plaintiff * * * during said school year beginning July 1, 1924." Judgment was entered Decem-

ber 30, 1925. This was long after the end of the fiscal year for which the defendant claims that he was employed. The other parts of the judgment completely dispose of the case against him. The part to which objection is made, therefore, is of no possible effect and adds nothing to the judgment.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

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88 Cal. App. 724

SUTHERLAND v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE. (Civ. 4876.)★

District Court of Appeal, Second District, Division 2, California. Jan. 30, 1928.

Hearing Denied by Supreme Court March 29, 1928.

1. Insurance ⚷622(3)—Cause of action on automobile indemnity policy did not accrue until appeal was decided against person indemnified, although he had paid judgment before decision (Code Civ. Proc. § 1049).

In view of Code Civ. Proc. § 1049, cause of action on automobile indemnity insurance policy *held* not to have accrued until appeal of action against person indemnified had been decided, although he had paid judgment before the decision of the appeal, especially where payment was forced because of failure of attorneys for indemnity company, who were defending suit, to file a stay bond to prevent execution pending appeal.

2. Insurance ⚷665(4)—Evidence held to support finding that plaintiff was insured under automobile indemnity policy describing insured as Sutherland's Tia Juana Stages (Civ. Code, § 2591).

In action on indemnity insurance policy, evidence *held* to support trial court's finding that plaintiff was insured, within Civ. Code, § 2591, providing that, when the description of the insured is so general that it may comprehend any person, plaintiff must prove policy was intended to include him, under policy describing the insured as Sutherland's Tia Juana Stages.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Fred A. Sutherland, doing business under the name and style of Sutherland's Tia Juana Stages, against the California Highway Indemnity Exchange, an unincorporated interinsurance association. Judgment for plaintiff, and defendant appeals. Affirmed.

B. P. Gibbs and W. I. Gilbert, both of Los Angeles, and E. L. Seavey, of San Diego, for appellant.

Haines & Haines and Sample & Harden, all of San Diego, for respondent.

VALENTINE, Justice pro tem. This is an appeal taken from a judgment for the respondent, Fred A. Sutherland, against the California Highway Indemnity Exchange, an unincorporated interinsurance exchange, upon a liability insurance policy issued under date December 11, 1919, by the appellant to "Sutherland Tia Juana Stages."

The action was brought to obtain reimbursement for the amount of a judgment with interest, recovered by Annie Powers et al. against said Fred A. Sutherland and Mariana Gear impleaded as doing business under said name of Sutherland Tia Juana Stages, in operating an automobile stage line for the carriage of passengers between San Diego, Cal., and Tia Juana, Mexico; it being alleged in that action (referred to herein as the Powers Case) that, in the operation of said auto stage line, the stage in which one Frank Powers was being transported overturned, causing his instant death. The judgment recovered in favor of Powers was enforced by execution against Fred A. Sutherland, and was paid by him prior to the commencement of this action.

The two principal questions raised by appellant on this appeal are: (1) That there is a complete failure of proof upon the part of plaintiff that he was ever at any time an assured or ever had any right or beneficial interest in said policy of indemnity; and (2) that the condition in the alleged policy of indemnity, providing that no recovery shall be had thereon unless suit be brought within "ninety days after the right of action accrues therein," is a complete bar to plaintiff's cause of action, suit not having been commenced by him within such ninety days.

[1] Considering these two questions in their inverse order, the clause in the policy of indemnity, relied upon by appellant as limiting the time within which plaintiff could bring this action, is contained in paragraph 13 of the general agreements of said policy, and provides that no action shall be brought on said contract "unless brought * * * for moneys actually paid by him in satisfaction of a judgment after trial of the issue in a suit instituted within the period limited by the statute of limitations, *and in no event shall any action lie unless brought within ninety days after the right of action accrues as herein provided.*" (Italics ours.)

This action was commenced April 23, 1923. Appellant contends this was ten months and eight days after respondent paid the judgment in Powers Case, and that that was when the cause of action accrued. Respondent contends that his right of action did not accrue until the final determination of the appeal in the Powers Case, 190 Cal. 487, 213 P. 494, by the Supreme Court on February 24, 1923.

The facts are as follows: One Frank Powers was killed while riding as a passenger in an auto stage alleged to have been operated by Sutherland Tia Juana Stages. The heirs at law of said Frank Powers filed an action

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★Hearing denied by Supreme Court.

seeking damages for his death in the superior court of San Diego county against "Sutherland Auto Stage Company, Sutherland Tia Juana Stages, Mariana Gear, sometimes known as Marianna Gear, and Fred Sutherland, doing business as Sutherland Auto Stage Company and Sutherland's Tia Juana Stages." Trial of that action resulted in a judgment against the defendants in the sum of $3,930. An appeal was taken from this judgment to the Supreme Court of the state of California. The California Highway Indemnity Exchange, defendant and appellant herein, through counsel engaged for that purpose, conducted the defense of said Powers action pursuant to the terms and provisions of that portion of the general agreements of said alleged policy of indemnity, which reads as follows:

> "If thereafter any suit, even if groundless, is brought against the subscriber to enforce a claim for damages on account of an accident covered by this contract, the subscriber shall immediately forward to the office of the exchange every summons, notice, or other process as soon as the same shall have been served upon him, and the exchange will, at its own cost, defend such suit in the name and on behalf of the subscriber, or settle same."

The attorneys for the exchange also conducted the appeal to the Supreme Court. While said appeal was pending, and because of the failure upon the part of the attorneys for the defendants to file a stay bond, an execution was issued and levy thereunder made by the sheriff of San Diego county upon property of the defendant Fred A. Sutherland. Had a stay bond been filed, Sutherland would not have been obliged to pay the judgment until after its affirmance by the Supreme Court, and there could have been no question that this cause of action did not accrue until then.

According to the allegations of the amended complaint herein, this plaintiff (respondent), who was one of the defendants against whom said judgment was recovered, acting under an alleged duress of said execution, paid said judgment, including interest and costs, in full, amounting to the sum of $4,131.10, *on June 15, 1922*. This action, to recover from defendant and appellant herein the sum so paid, was commenced in said superior court April 23, 1923. The aforesaid judgment was affirmed by the Supreme Court on February 24, 1923, and the record shows that the remittitur was dated March 30, 1923, and was filed in the trial court April 17, 1923.

In other words, appellant contends that plaintiff's cause of action arose at the time of the payment and satisfaction of said judgment, although the appeal therefrom to the Supreme Court was still pending and undetermined, and respondent contends that its limitation of ninety days did not begin to run until the affirmance of the judgment by the Supreme Court on February 24, 1923, which subsequently became final.

There is no dispute as to the fact that plaintiff and respondent paid the judgment in the Powers Case after execution had been issued and a levy on his property made thereunder, nor that such payment was a necessary preliminary act before suit could be brought. But we believe respondent's contention is correct that this was only preliminary, and that his complete cause of action did not accrue, and that he could not have brought this action, until he could also allege and prove that a final determination of the rights of the parties had been had, and this he could not do pending the review of the judgment of the trial court upon the appeal to the Supreme Court. Code Civ. Proc. § 1049; 2 Cal. Jur. § 177, pp. 412, 413, and cases cited.

In Illinois Tunnel Co. v. Gen. Acc. F. & L. Ins. Co., 219 Ill. App. 251, relied upon by appellant, the court held, in construing the effect of a limitation period in a policy of insurance, that the judgment must be actually satisfied and suit brought within 60 days (in that case) *from final judgment rendered* in action against the assured. (Italics ours.)

In the instant appeal the period of limitation was ninety days, and the action was begun within ninety days from final judgment rendered.

We have considered it more logical to dispose of appellant's second contention first, for the obvious reason that, if appellant's point as to the time limitation had been well founded, it would have been unnecessary to consider any other point.

[2] In support of the other contention, appellant cites section 2591 of the Civil Code:

> "When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him."

And it is argued that there is no evidence to support the trial court's finding that the policy was intended to include said plaintiff respondent Fred A. Sutherland.

It appears that the trial was had upon the issues joined by the plaintiff's amended complaint and the answer thereto of the defendant, California Highway Indemnity Exchange, and that no evidence was introduced by defendant, which also waived argument. The findings of the trial court are too voluminous to quote in full, but, in substance and effect, it finds that the plaintiff, with one Mariana Gear, were subscribers to the defendant appellant, California Highway Indemnity Exchange, under the fictitious name and style of Sutherland's Tia Juana Stages, and that "at all times herein mentioned up to and including the time of the accident hereinafter and in the amended complaint mentioned plaintiff, Fred A. Sutherland, was, together with a certain Mariana Gear, engaged under the name Sutherland's Tia Juana Stages in conducting, in conformity with the law, an automobile stage line between the city of San Diego, Cal., in the United States of America, and Tia Juana, in Lower California, in the republic of Mexico, whereby passengers were and are transported for hire by automobile stage between said places, that plaintiff, Fred A. Sutherland, has, subsequent to the occurrence of said accident, acquired the interest of said Mariana Gear in said business and all of the assets thereof, and has ever since been and now is the full owner of said business and all of the assets of the same, and that no other person has any interest therein, and that plaintiff has complied with the provisions and requirements of sections 2466 and 2468 of the Civil Code of California, and at all times mentioned in the amended complaint resided and still resides in the county of San Diego, state of California."

Plaintiff introduced in evidence the judgment roll in the case of Anna Powers v. Mariana Gear and Fred A. Sutherland, as doing business under the fictitious name Sutherland's Tia Juana Stages (the Powers Case), from which it appears, among other things, that a summons upon the amended complaint was issued to Fred Sutherland, one of the defendants in that case; that an answer to the amended complaint was prepared by the attorneys for the exchange who represented the defendants in the Powers Case; that such answer was sent by such attorney to Fred A. Sutherland, who verified the same, and that such answer was interposed on behalf of the defendants in that case; that the court found in the Powers Case, among other things:

> "That defendants Mariana Gear and Fred Sutherland at all times hereinafter mentioned were doing business under the fictitious name and style of Sutherland Auto Stage Company and Sutherland's Tia Juana Stages. That at all times mentioned herein said defendants were the owners of and conducted and operated an automobile stage line between the cities of San Diego, state of California, and Tia Juana, Mexico, consisting of a number of passenger carrying automobiles for hire, which said automobiles were owned, operated, and controlled by said defendants at all times hereinafter mentioned, and that, at the date and time hereinafter mentioned, said defendants were engaged in carrying passengers for hire in said automobile in the county of San Diego, state of California, and between said cities of San Diego and Tia Juana."

And, as conclusions of law, the court finds that plaintiffs are entitled to recover from defendants the sum of $3,930 and costs, and rendered judgment accordingly; also, under the same exhibit number appears the record of the entire proceedings on appeal to the Supreme Court, which affirmed the judgment. Appellants admit that Sutherland Tia Juana Stages was its subscriber, and that it conducted the defense in the Powers Case, but, as to Fred A. Sutherland's status as one of the defendants in that action, appellant states:

> "The defendant exchange was obliged to defend its subscriber Sutherland Tia Juana Stages, one of the defendants, in any case, and it was a matter of indifference to said exchange that other defendants were included."

It may pertinently be asked why, if Fred A. Sutherland was not "included" or "comprehended within the group" insured as the Tia Juana Stages, did the attorneys for the exchange select him as the defendant to verify the answer and interpose the answer verified by him on behalf of their admitted subscriber? It seems obvious without further discussion that appellant at that time recognized respondent as its insured, but, when it was called upon to make good its obligation, tried to reverse its position.

Plaintiff also introduced in evidence the bill of sale from Mariana Gear to Fred A. Sutherland, dated March 4, 1920, conveying to the latter her interest in the business known as the Sutherland's Tia Juana Stages.

Appellant argues that, because this bill of sale conveys "all" the business of the Sutherland's Tia Juana Stages to Fred A. Sutherland, instead of using the language "all her interest" in the business, it follows that she owned all the business and Fred A. Sutherland owned none of it, and therefore was not a subscriber nor one of its insured. But the evidence and the court's findings in the Powers Case completely negative this argument.

In view of appellants' admissions, referred to above, that Sutherland's Tia Juana Stages was its subscriber, we think it unnecessary to further discuss the evidence, as from the above it appears that there is no ground for appellants' contention that there is a complete failure of proof on the part of plaintiff that he was ever at any time an assured or ever had any right or beneficial interest in said policy of indemnity, but, on the contrary, it appears that there was ample evidence to sustain the court's findings and judgment.

We believe the foregoing also sufficiently answers and disposes of appellants' specific assignments of error.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

88 Cal. App. 691

Ex parte SANTOS. (Cr. 1016.)

District Court of Appeal, Third District, California. Jan. 28, 1928.

1. Municipal corporations 🔑597—Application of police power is coextensive with preservation of health of municipalities.

Application of police power of a city must be held coextensive with increased necessities for preservation of health of municipalities.

2. Municipal corporations 🔑605—That garbage had value as food for hogs did not limit police power of municipality to direct disposal.

That garbage in question may have had some value as food for hogs did not limit police power of municipality to direct by ordinance that garbage be disposed of in certain manner.

3. Constitutional law 🔑278(4)—Ordinance providing for disposal of garbage and its transportation only by authorized persons held not to deprive of property right without due process.

Ordinance providing for disposal of garbage and its transportation through streets of city only by duly authorized persons, and defining garbage as "dead animals, of not more than ten pounds weight each, and of every accumulation of animal, vegetable, and other matter that attend the preparation, consumption, decay or dealing in, or storage of, meats, fish, fowls, birds, fruits or vegetables. The term 'garbage' does not include dish water or waste water"—*held* not invalid as depriving private person of property without due process of law.

Application by G. Santos for writ of habeas corpus, to be directed to the chief of police of the city of Sacramento to secure release of the petitioner from custody following conviction of unlawfully transporting garbage. Writ denied, and petitioner remanded.

Robert H. Schwab and Will J. Carraghar, both of Sacramento, for petitioner.

R. L. Shinn, City Atty., of Sacramento, for respondent.

PLUMMER, J. The petitioner was tried and convicted of unlawfully transporting garbage through the streets of the city of Sacramento in violation of Ordinance No. 146, Fourth series, of said city, and filed his application herein for a writ of habeas corpus, and as a reason for his discharge alleges that section 1 of said ordinance is unconstitutional in that it deprives a private person of his property without due process of law.

The ordinance in question provides for the disposal of garbage and its transportation through the streets of the city of Sacramento only by duly authorized persons. The different provisions of the ordinance specify the containers in which garbage shall be kept and also the manner of its transportation through the streets of the city of Sacramento to insure against the escape of noxious odors or fumes.

We need consider only section 1 of the act in question, as all the other provisions are merely regulatory. That section reads:

> "Section 1. Garbage, as the said word is made use of in this ordinance, consists of dead animals, of not more than ten pounds weight each, and of every accumulation of animal, vegetable and other matter that attend the preparation, consumption, decay or dealing in, or storage of, meats, fish, fowls, birds, fruits or vegetables. The term 'garbage' does not include dish water or waste water."

While not in the exact language of the ordinance under consideration in the case of In re Zhizhuzza, 147 Cal. 328, 81 P. 955, the section just quoted is in substance the same as the definition of "garbage" there set forth. For the purposes of definition, "garbage," in the Oakland ordinance involved in said action, reads as follows:

> "Garbage shall be held to include and mean kitchen and table refuse and offal, swill, and also every accumulation of animals, vegetable and other matter that attends the preparation, consumption, decay or dealing in, or storage of, meats, fish, fowls, birds, fruits or vegetables."

It does appear, however, that in the upholding of the Oakland ordinance, the Supreme Court did not in its opinion expressly pass upon the question as to whether the ordinance did or did not deprive a person of private property without compensation, and therefore unconstitutional. That question does not appear to have been urged upon the attention of the court. However, notwithstanding there has been some divergence of opinion upon the question presented for our consideration, we will cite leading cases where ordinances almost word for word with that adopted by the city of Sacramento have been upheld and the constitutional question directly passed upon.

In the case of Pantlind v. City of Grand Rapids, 210 Mich. 18, 177 N. W. 302, 12 A. L. R. 280, we find this definition in the ordinance under consideration:

> "Section 3. The words 'garbage' and 'offal,' as used in this ordinance, shall be held to include every refuse accumulation of animal, fruit or vegetable matter, liquid or otherwise that attends the preparation, use, cooking, dealing in, or storing of, meat, fish, fowl, fruit or vegetables."

In the case of Wheeler v. Boston, 233 Mass. 275, 123 N. E. 684, 15 A. L. R. 275, similar language is used, though the form employed in defining the word "garbage," the prohibitive form as to transportation was used, to wit:

> "Ordered, that no person, firm or corporation, other than the city of Boston or the city

contractors or their agents, shall carry, convey or transport through the alleys, streets or public places of the city of Boston any kitchen swill or garbage consisting of any refuse accumulation of meat, fish, fowl, fruit or vegetable matter."

These citations are sufficient to show that the term "garbage," as used in section 1 of the Sacramento Ordinance No. 146, Fourth series, is to all intents and purposes the same as usually employed in ordinances dealing with the subject of garbage.

[1] In Valley Springs Hog Ranch Co. v. Plagmann et al., 282 Mo. 1, 220 S. W. 1, 15 A. L. R. 266, the objections which are urged to the ordinance under consideration were all fully considered. The ordinance of the city of Joplin involved in the Plagmann Case set forth fully and specifically the containers in which garbage should be placed; the vehicles to be used in its transportation, the manner of handling the garbage so that no noxious odors might escape or find their way into the air during such transportation, were fully set forth. Air-tight metallic receptacles were provided for, and also that the garbage should be removed by persons contracting with the city or acting under the authorization of the city. The trial court, relying upon a case decided 36 years previously to the one then being considered, held that the ordinance was void as taking private property without compensation. Upon appeal the judgment of the trial court was reversed, and in reversing the judgment the trial court held, as we must hold here, that the application of the police power of a city must be held coextensive with the increased necessities requisite for the preservation of the health of municipalities, and quoted with approval the following language from the case of Grand Rapids v. De Vries, 123 Mich. 582, 82 N. W. 273:

> "The gathering of garbage is not a trade, business, or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health. The charter provisions recognize the fact that certain matter may be deleterious to public health, and dangerous to persons or property, and thus become a public nuisance; and the charter makes it the duty of the common council to declare any place, thing, or matter which may be deleterious to public health, or dangerous to persons or property, a public nuisance, and the council is given power to abate such nuisance. The ordinance treats garbage or offal as deleterious to public health, and directs the manner of its disposition for the benefit of the public health. It is one of the police regulations of the city for the benefit of the public health."

In the case of California Reduction Works Co. v. Sanitary Reduction Works, 199 U. S. 317, 26 S. Ct. 100, 50 L. Ed. 204, the Supreme Court, speaking of the right to grant an exclusive privilege to collect garbage, said:

> "The exclusive right granted to Sharon, his associates and assigns, was certainly a privilege, and the board of supervisors had power to grant it in order to protect the public health. But independently of the above statutes the board had power, under the Constitution of the state, to make such sanitary regulations as were not inconsistent with the general laws, and that broad power carried with it the power, by contract and ordinance, to guard the public health in all reasonable ways."

In State v. Orr, 68 Conn. 110, 35 A. 771, 34 A. L. R. 279, the subject of granting an exclusive privilege to collect and transport garbage is thus treated:

> "Under these provisions, and the authority of the Special Act of 1895, the board of health might contract with a single person to collect and remove garbage from the entire city, or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to part of the city, or to certain buildings in part of the city, and leave the collection and removal of garbage from other places open to those who obtained from its clerk a proper permit, and provided proper means of transportation. By neither method of procedure would any monopoly be created, by which the common rights of citizenship would be infringed upon."

In the case of Valley Springs Hog Ranch Co. v. Plagmann, supra, the opinion of the Supreme Court in reversing the judgment of the trial court, on the question of taking private property without compensation, held as follows:

> "It is next urged that the ordinance is destructive of property rights. It is true that there may be an ownership of garbage from the kitchen, but the value of the owner's rights therein is so inconsequential that they are absorbed and lost in the greater rights of the state to protect such owner and the public at large from the dire effects of improper methods in the handling and disposition of the same. Garbage if allowed to accumulate and decompose, becomes a public nuisance. * * * But a short time is required to convert the harmless table scrap into a pestilence-breeding nuisance, when it is intermingled with other refuse from the kitchen,"

—and then cites a number of authorities to the following point:

> "The constitutional guaranties that no person shall be deprived of life, liberty or property, without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws were not intended to limit the subjects upon which the police power of a state may lawfully be exerted."

In Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, the Supreme Court of the United States, after referring to what is generally known as the "Slaughterhouse" Cases, in speaking of the police power to regulate the use of private property, held as follows:

> "They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either damnum absque injuria or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

All the authorities agree that the preservation of health of the inhabitants is one of the most important purposes of municipal governments. And the police power in this respect is coextensive with the necessities of the situation. That the collection and removal of garbage is one of these necessities requires no argument. Its disposal within a very limited period of time is of prime importance. Whether it is disposed of by cremation or by other methods is wholly immaterial. Its collection, transportation and removal from the limits of the municipality are the fundamental purposes for the exercise of the police power regulating and requiring the same in order to protect the public health.

[2] That the garbage in question may have some value as food for hogs does not in any wise limit the police power of municipalities. The following statement which we take from the notes in 15 A. L. R. p. 301, is supported by numerous authorities there cited, to wit:

> "In spite of the fact that garbage, after it has been discarded as food for human consumption, has a certain value as food for hogs or for rendering purposes, its value for such purposes is so slight as compared with the danger to the public health, if the owner is allowed to dispose of it without restriction, that the courts have unanimously held that a requirement of the destruction of garbage cannot be regarded as a taking of private property for public use without compensation."

Among the authorities cited are the cases decided by the United States Supreme Court to which we have heretofore referred. In one of the cases cited in the notes to which we have referred we find the following, which is applicable:

> "The mere fact that the defendant was willing to buy garbage and use it for those purposes (feeding to hogs) is not sufficient to remove it from the category of nuisances and settle its character as property. Whilst money value is evidence, and sometimes very strong evidence to that end, it is not of itself sufficient to make a case of unreasonableness or oppression against the law and the regulations under consideration. Some members of the community may be willing to expose their own health to danger through the use of noisome manures, and to eat the flesh of animals fed upon garbage, or to sell such flesh for food to others who may be unaware of its character, but their practices cannot make a rule of community observances. It is against the ignorance, the indifference, the selfishness, the avarice, the willful disregard of just and intelligent public opinion, that the police power must be constantly invoked on behalf of the common safety and advantage."

It is this very fact that makes the regulation of the keeping of containers or receptacles in which garbage shall be placed, and the manner of its collection and disposal, a subject of necessary police regulation. In every city there is more or less ignorance, more or less willful disregard of all health laws, and much avarice which renders police regulations, such as we are here considering, absolutely indispensable, against which the so-called property right must yield to the general good. That such ordinances are not unconstitutional as violating any property rights is distinctly held by the United States Supreme Court in the case of California Reduction Co. v. Sanitary Reduction Co., 199 U. S. 306, 26 S. Ct. 100, 50 L. Ed. 204, and Gardner v. Michigan, 199 U. S. 325, 26 S. Ct. 106, 50 L. Ed. 212.

[3] A few cases decided prior to population becoming so congested in our municipalities took into consideration the slight property value of the garbage involved, but the overwhelming weight of authority is now to the effect that the police power in relation to the question of the collection and disposal of garbage is not limited by any such minor or inconsequential considerations. We find no modern authority which would justify our holding that section 1 of Ordinance No. 146, Fourth series, of the city of Sacramento, is invalid either as invading any property right or for any other reason suggested upon this hearing.

The writ is denied, and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

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88 Cal. App. 755

MONTGOMERY v. OTTOMAN et al. (Civ. 4504.) ★

District Court of Appeal, Second District, Division 2, California. Jan. 31, 1928.

Hearing Denied by Supreme Court March 29, 1928.

Attachment ⟹337—Principal's agreement with creditor providing for installment payment of debt held to release sureties on undertaking for release of attachment (Civ. Code, §§ 2819, 2840).

Where sureties executed undertaking to secure release of an attachment, and subsequently principal without knowledge of sureties entered into agreement with creditor whereby debt was stipulated and terms of payment provided and provision was made for taking of judgment in case of default, and after judgment had been taken and returned unsatisfied action was brought against sureties, *held* that sureties were released by act of party in making agreement, in view of Civ. Code, §§ 2819, 2840.

★Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by F. H. Montgomery against Nathan Ottoman and another as sureties upon an undertaking for the release of an attachment. Judgment for defendants, and plaintiff appeals. Affirmed.

Samuel T. Bush, of San Francisco, for appellant.

A. V. Kaufman and Milton Krug, both of Los Angeles, for respondents.

STEPHENS, Justice pro tem. This is an appeal by the plaintiff from a judgment entered in favor of the defendants, who were sued as sureties on an undertaking given by them to release an attachment. The attachment suit was commenced in the superior court of Los Angeles county on September 7, 1920, by the Collection Service Corporation, as assignee of Montgomery & Mathi Company, against Abrams & Cole, a copartnership, and others, to recover the sum of $1,533.01, alleged to have been due and owing for merchandise sold and delivered. The defendants in the attachment suit demurred to the complaint, and after the overruling of the demurrer filed their answer on October 14, 1920, denying all of the material allegations of the complaint. Before the cause came to trial, however, and on July 27, 1921, the parties to the suit, by themselves and by their attorneys, executed a written agreement, which was thereafter filed as a stipulation in the case. By this stipulation defendants admitted liability in the sum of $1,473.97, and promised to pay the same in installments of $200 on or before August 2, 1921, and $50 the first of each succeeding month, with interest at 6 per cent. Time was expressly made of the essence, and upon failure of any payment it was provided that "plaintiff shall be entitled to enter judgment herein for the unpaid balance of principal and interest upon filing a sworn affidavit setting forth the amount of said principal and interest, the amount, if any heretofore paid under this stipulation, and the amount of balance due, owing and unpaid on principal and interest hereunder," and the clerk of court was authorized to enter a judgment for such balance. The stipulation agreement recites that it does not affect the liability of the sureties on the undertaking releasing the attachment, and that no other proceeding in the action was to be taken unless default should occur. The sureties did not sign this agreement and in fact knew nothing about it.

Payment was made of the installments due under this stipulation up to the 1st of November, 1921, but none were ever thereafter made. The affidavit of nonpayment was filed and judgment entered as follows:

"Upon reading and filing the affidavit of L. P. Wackerbarth, and upon reading the stipulation heretofore filed herein, it appearing to the court that the defendants have not made the payments of fifty dollars ($50.00) per month for the months of January, February and March, 1922, as agreed upon in said stipulation, it is therefore ordered, adjudged, and decreed that judgment be entered for the plaintiff in conformity with said stipulation for the sum of eleven hundred and eleven and 52/100 dollars ($1,111.52).

"Dated this 22d day of March, 1922.

"Frank R. Willis, Presiding Judge."

Execution was issued, returned wholly unsatisfied, demand for payment was made upon the sureties, and payment was refused. This action was brought on the sureties' undertaking, upon these facts.

In their answer respondents admitted all of the allegations of appellant's complaint which recites the foregoing facts and specially pleaded the following defenses, which the trial court found to be true: That the sureties received no consideration for executing the undertaking; that neither of them received any indemnity for the making of the undertaking; that the stipulation above referred to substituted a new obligation with intent to extinguish the cause of action in which the undertaking was given; that a novation was accomplished and the cause of action in the original proceeding was canceled and extinguished; that the issues in the original action were never tried or determined nor judgment entered upon the cause of action therein alleged, and that the judgment entered was not the judgment referred to in the undertaking. Judgment was entered for defendants, with costs.

From the judgment thus entered the appellant has prosecuted this appeal. He urges as grounds for reversal "that the judgment is contrary to and is not supported by law or the evidence, in that it is based upon the alleged accomplishment of a novation, while the evidence fails to establish such novation." We cannot epitomize the issue which we have to determine better than to quote from appellant's opening brief:

"The defendants' entire case rests upon the stipulation made and filed in the attachment suit. It is their theory that by virtue of such stipuation the obligation of the defendants therein was altered and the remedy and rights of the plaintiff in said action were suspended; that there was, in fact, as the result of the making of said stipulation, a substitution of a new obligation for the obligation sued upon, with intent to extinguish the cause of action set forth in the plaintiff's complaint. Upon finding these facts to be true the court concluded that a novation had been accomplished and that the sureties, respondents herein, were thereby discharged from liability on their undertaking."

The trial court was right. By agreement signed by the attorneys and the parties in the form of a stipulation filed in court and acted upon by the court, new circumstances and contingencies were made binding upon the parties which the sureties, defendants below and respondents here, could not have contemplated when they signed the undertaking and to which they never consented. "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto in any way impaired or suspended." Civ. Code, § 2819.

In the case of Fordyce v. Ellis, 29 Cal. 96, a very similar state of facts was considered. A judgment had been entered directly upon the stipulation and suit was brought against the sureties, as in the case at bar. The sureties claimed they had been released by the stipulation and judgment, and the court so found. The Supreme Court said:

> "There is no error in the judgment. It may be conceded that the stipulation for an extension of time for the payment of the sum sued for, does not disclose a contract binding upon the plaintiffs, for the reason that the contract was without consideration. But the stipulation was made an order of court; and, furthermore, the judgment appears to have been entered in pursuance of the terms of the stipulation. If the stipulation did not impede the sureties in their remedies, both the order and the judgment did."

A stipulation providing for entry of judgment and payment thereof in installments was being considered in the cases of Scheeline v. Moshier, 172 Cal. 565, 158 P. 222. The Supreme Court there said:

> "As the stipulation was filed in the action, and the parties acted in pursuance of its provisions for several months thereafter, it cannot be said to be without consideration as a stipulation controlling the proceeding in the action."

It thus will be seen that the stipulation acted upon was a binding agreement.

> "Our Code speaks with absolute finality upon the subject. Section 2819 of the Civil Code provides that a guarantor 'is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect.' See, also, Civ. Code, § 2840, applying the same rule to sureties. Our decisions construing these sections uniformly hold that, if there has been such a change in the contract in any (material) respect, the inquiry there ends and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury." First Congregational Church of Christ v. Lowrey, 175 Cal. 124, at page 126, 165 P. 440, 441.

> "While mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor (Civ. Code, sec. 2823), it is well settled that if he grants the debtor an extension of time within which to pay, under such circumstances as to impair or suspend his right to proceed against the debtor in accord with the terms of the original obligation, we have such an alteration of the original obligation as will release the surety, if the same is without his consent." Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, at page 782, 141 P. 375, 379.

> "The surety is bound only by the terms of his contract, and if these are varied without his consent, it is no longer his contract, and he is not bound by it. The authorities are to the effect that if the time of payment is, without the consent of the surety, extended for a definite period by a binding agreement between the creditor and the principal, the surety is discharged." Daneri v. Gazzola, 139 Cal. 416, at page 418, 73 P. 179, 180.

Appellant's statement to the effect that there were probable delays ahead in the progress of the original action, and that perchance the trial in ordinary course would not have ripened the judgment sooner, may or may not be true. But the cases cited and the statute specifically covering the point unequivocally state that the injury is beside the point. The stipulation extended the time of payment of the indebtedness; authorized entry of judgment in a manner not contemplated by the sureties and not included within the terms of the undertaking entered into by them, to wit, upon failure of installment payments and upon affidavit; provided for an interest on the indebtedness less than the legal rate, and absolutely suspended proceedings in the case until default was made in the performance of the stipulation. This stipulation was filed in court, was breached and judgment entered, not on the original obligation, but, as will be seen by reference to the judgment hereinbefore set out, wholly upon an affidavit made by a stranger to the sureties and filed in conformity to the stipulation. The attempt in the stipulation to forestall the release of the sureties by agreement between the parties without consultation with the sureties was of course abortive.

Judgment affirmed.

We concur: WORKS, P. J; CRAIG, J.

89 Cal. App. 16

CALLAHAN et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 6205.)★

District Court of Appeal, First District, Division 1, California. Feb. 4, 1928.

Hearing Denied by Supreme Court April 2, 1928.

Master and servant 🔑417(7)—Finding of Compensation Commission that disability and death of employee were due to disease, not injury, held conclusive, where evidence seriously conflicted (Workmen's Compensation Act).

Finding of Industrial Accident Commission that condition, disability, and death of employee were due to disease and not to injury, and hence that no compensation was recoverable under Workmen's Compensation Act (St. 1913, p. 279, as amended), *held* conclusive on Court of Appeal, where evidence was in serious conflict.

Proceeding under the Workmen's Compensation Act by Bertha Callahan and another for compensation for the death of Thomas Callahan, against E. L. Younger, employer, and the State Compensation Insurance Fund, insurance carrier. To review an order of the Industrial Accident Commission denying an award of compensation claimants apply for certiorari. Writ denied.

Charles H. Seccombe, of Oakland, for petitioners.

G. C. Faulkner, Frank J. Creede, and Henry G. Sanford, all of San Francisco, for respondents.

TYLER, P. J. Application for writ of certiorari. The petition shows that one Thomas Callahan, husband and stepfather, respectively, of the two applicants herein, died from injuries alleged to have been received while employed by respondent E. L. Younger. The employer's insurance carrier was State Compensation Insurance Fund, and both employer and employee were subject to the provisions of the Workmen's Compensation Act (St. 1913, p. 279, as amended). An application was filed with the Industrial Accident Commission for benefits under the Compensation Act, and, after hearing, it was determined, upon conflicting evidence, that the injury complained of occurred in the course of and arose out of the employment of the deceased, and an award was made in a total sum of $4,151.40. The employer was relieved from liability. The insurance carrier, State Compensation Insurance Fund, petitioned for a rehearing. The application was granted on February 16, 1927. On November 2, 1927, the commission changed its prior award for a death benefit to an award denying such benefit. The case upon both hearings was tried upon two issues of fact: (1) Whether deceased suffered an injury arising out of and in the course of his employment; (2) whether his disability and death was proximately caused by such injury. In its decision on rehearing, the commission made no finding of fact as to whether or not the employee suffered an injury arising out of and in the course of his employment. It did find, however, upon the second issue, to the effect that the evidence did not establish that the condition of the deceased, or his disability or death, were caused by injury arising out of and in the course of his employment. As above stated, there is a decided conflict in the evidence upon the question as to whether the condition of the employee was due to disease or injury. Upon this issue the commission finally determined that it was due to disease and not to injury, and the award denying compensation followed. There being a serious conflict in the evidence, we have no power to interfere. The finding is conclusive here.

For the reason stated, the petition is denied.

We concur: KNIGHT, J; CASHIN, J.

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88 Cal. App. 686

CITY OF MONROVIA v. BLACK, City Clerk. (Civ. 5900.)

District Court of Appeal, Second District, Division 1, California. Jan. 28, 1928.

1. Municipal corporations 🔑917(1)—Statute must be substantially complied with in issuing municipal bonds (St. 1901, p. 27).

In the issuance of bonds by a municipal corporation, under the Act Feb. 25, 1901 (St. 1901, p. 27), the act must be substantially complied with; the authority of the legislative body of a city to issue such bonds arising only after compliance with statute in relation to conditions precedent.

2. Municipal corporations 🔑918(2)—That cost will exceed ordinary income must exist separately as to each improvement, issue of bonds for which must be separately submitted (St. 1901, p. 27, § 2).

Act Feb. 25, 1901 (St. 1901, p. 27) § 2, relative to the issuance of bonds by municipal corporations, clearly requires the fact that the cost will be too great to be paid out of the annual income and revenue to exist separately as to each improvement, the issue of bonds for which is to be separately submitted to the voters.

3. Municipal corporations 🔑918(2)—Absence of statement in preliminary resolution that cost of improvement would exceed ordinary income held not to invalidate bonds voted (St. 1901, p. 27, § 2).

Under Act Feb. 25, 1901 (St. 1901, p. 27) § 2, relative to issuance of bonds by municipal corporations, the absence of a statement in the preliminary resolution of the municipal corporation's legislative body for a bond issue, that the cost of improvement will be too great to be paid from ordinary annual income and revenue, *held* not to affect the validity of bonds voted pursuant to the resolution and ordinance.

★Hearing denied by Supreme Court.

4. Municipal corporations ⊂⊃918(2)—Ballot must contain proposition for each purpose for which municipality proposes to incur indebtedness, showing amount desired for each.

In voter's balloting upon the incurring of indebtedness by the municipal corporation, there must be a proposition on the ballot for each distinct, unrelated, and independent object or purpose for which it is proposed to incur indebtedness, showing separately the amount desired for each one.

5. Municipal corporations ⊂⊃918(2)—Proposition to incur indebtedness for acquisition of lands and construction of water system held single purpose not required to be separately voted on (St. 1901, p. 27, § 2).

The proposition to incur indebtedness, under St. 1901, p. 27, § 2, for acquisition of additional water bearing lands and construction and completion of the reconditioning and rebuilding of the mountain water system of the city *held* single purpose not required to be submitted as separate propositions.

Application by the City of Monrovia, a municipal corporation, for a writ of mandate, prayed to be directed to Lewis P. Black, City Clerk of the City of Monrovia, requiring him to countersign certain city bonds and affix the corporate seal thereto. Writ granted.

Jones, Stephenson, Palmer & Moore and William Fleet Palmer, all of Los Angeles, for petitioner.

Robert C. Wygant, of Los Angeles, for respondent.

SHAW, Justice pro tem. This is an original proceeding in this court for a writ of mandate, by which the city of Monrovia seeks to compel the defendant, as city clerk of said city, to countersign certain proposed city bonds and to affix its corporate seal thereto. The petition sets up the proceedings leading up to the proposed issuance of bonds, and the matter is submitted to us on the petition and the defendant's demurrer thereto.

[1] The proceedings in question were taken under the act of February 25, 1901 (St. 1901, p. 27), providing for the issuance of municipal bonds. This statute must be substantially complied with in the issuance of bonds thereunder. The authority of the legislative body of a city to issue such bonds arises only after a compliance with the statute in relation to conditions precedent. City of Inglewood v. Kew, 21 Cal. App. 611, 132 P. 780.

In this case the board of trustees, which is the legislative body of petitioner, passed a preliminary resolution in which they declared "that the public interest and necessity demand the acquisition, construction, and completion, by said city of Monrovia, of a certain revenue producing improvement," described the improvement, and estimated its costs in three separate parts, each of which was thereafter treated as a distinct improvement. Following this they passed an ordinance, which referred to the preliminary resolution, and its estimates of cost, and submitted to the qualified voters of the city three distinct propositions of incurring a bonded debt to be voted on separately. Except as hereinafter stated, these propositions agreed as to the amount and purpose of the bonded debt with the estimates above mentioned. Pursuant to this ordinance, an election was held, at which each of said propositions received a two-thirds affirmative vote. Thereafter, three ordinances were passed, each providing for the issuance of a separate series of bonds for one of said propositions and requiring the city clerk of said city to countersign the bonds and affix the corporate seal thereto. The defendant has refused to act upon the bond issues based on the first and third propositions, claiming that the proceedings therefor are irregular.

[2] Defendant contends as to each separate proposition that the proceedings are defective because the board of trustees did not in the preliminary resolution declare that the estimated cost of each proposed improvement will be too great to be paid out of the ordinary annual income and revenue of the city. It is clear from the wording of the preliminary resolution above mentioned that the statement on this point therein made applies only to the aggregate cost of all three of the proposed improvements mentioned therein. Section 2 of the above-mentioned statute provides, omitting immaterial parts, that "whenever the legislative branch of any city, * * * shall, by resolution * * * determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement, * * * the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting" order the submission of "the proposition of incurring" a bonded debt "for the purpose set forth in said resolution" to the qualified voters of said city. "The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness." This statute clearly requires the fact that the cost will be too great to be paid out of the ordinary annual income and revenue to exist separately as to each improvement the issue of bonds for which is to be separately submitted to the voters. Petitioner argues, however, that that while the fact must exist, the statute does not require it to be stated in the pre-

liminary resolution, and hence its omission is not fatal to the validity of the bonds. There appears to be no decision on this point, but there are some cases which have a bearing upon it.

In Clark v. Los Angeles, 160 Cal. 30, 43, 116 P. 722, 727, the court said:

> "The objection that the council, before calling the election, did not make an estimate of the cost of the proposed improvement, is not sustained by the record. Section 2 of the Bond Act requires that the ordinance calling the election shall recite 'the estimated cost of the proposed public improvements,' and the provisions of the section authorize a bond issue when the cost of the improvement is too great to be paid out of ordinary annual revenues of the city. Both the original resolution of intention to establish the improvement and the ordinance calling the election declare that the estimated cost of the proposed improvement was $3,500,000. This was a sufficient compliance with the statute. It will be presumed from this recital that the council did previously make the estimate stated."

In City of Inglewood v. Kew, supra, the court held that a proper estimate of the cost is a necessary part of the preliminary resolution, and also said:

> "The right to issue bonds is restricted to instances where such estimated cost exceeds the ordinary annual income. The elector is entitled to know the estimated cost and the necessity which has arisen, and this notice is imparted to him by the election ordinance duly published."

While the point now before us is not precisely the same as that raised in these cases, yet the two points are closely related, being derived from the same sentence of the statute, and the absence from the cases cited of any declaration that the statement now under consideration must be contained in the preliminary resolution or in the election ordinance suggests at least that the courts deciding those cases did not regard it as necessary.

In Cary v. Blodgett, 10 Cal. App. 463, 470, 102 P. 668, 671, the court said:

> "The duty of determining the necessity for the expenditure and the propriety of submitting it to the electors and the particular phraseology in which it shall be expressed is cast upon the trustees, subject to a reasonable and practicable regard for the right and privilege of the electors to be informed as to the purposes and cost of the proposed improvement, that they may exercise at the polls an intelligent and discriminating judgment as to their own interests and the public welfare."

[3] This language suggests a sufficient reason for a distinction between the estimate of cost and the declaration that such cost will be too great to be paid out of the ordinary annual income. The purpose of these preliminary proceedings is to inform the voters of the matters on which they are voting. The mere description of a proposed improvement in general terms such as will comply with the statute does not afford the basis of even an intelligent guess as to its probable cost. An estimate of the cost is within the power of the legislative body alone, who may be supposed to know better than any one else what is the exact nature of the improvement which they propose and how much they expect it to cost. It is therefore necessary to enable the voters to act intelligently that they be told what is the estimated cost of the improvement, and accordingly the Bond Act requires the ordinance calling a bond election to recite "the estimated cost of the proposed public improvement," and several other matters necessary for the same purpose of informing the voters. But the statement that the cost will be too great to be paid out of the ordinary annual income is a mere conclusion based on a comparison of the estimated cost with the annual revenue and the expenditures necessary for other purposes. The amount of the annual revenue and expenses of a city can be ascertained by an examination of its records, which are open to any citizen for that purpose, and there is not the same necessity for informing the voters of these matters as of the cost of the improvement. Accordingly, the statute does not require them or the above-mentioned conclusion to be drawn by comparing them with the estimated cost, to be stated in the ordinance calling the election. Neither does it expressly require the revenue and the expenses or the said conclusion to be stated in the preliminary resolution. We see no greater reason for requiring this conclusion to be stated there than in the election ordinance, and hence do not feel that we are required to read such a provision into the statute by implication. In the absence of any such requirement in the statute, the determination of the legislative body that the fact exists on which their power to act depends is sufficiently indicated by their proceeding to act. People ex rel. Skelton v. Los Angeles, 133 Cal. 338, 342, 65 P. 749; People v. Ontario, 148 Cal. 625, 84 P. 205.

[4] Defendant also contends that the third proposition submitted to a vote violates the rule that there must be a proposition on the ballot for each distinct, unrelated, and independent object or purpose for which it is proposed to incur indebtedness, showing separately the amount desired for each one. This rule is well established, but we think it was not violated in this case. The third proposition describes the improvement contemplated by it as follows:

> "The acquisition of additional water bearing lands and the construction and completion of the reconditioning and rebuilding of the mountain water system of the city of Monrovia."

[5] As far as appears from the proceedings, the two matters thus mentioned are parts of

one improvement and intended for the single purpose of improving the mountain water system of the city. They are therefore properly joined in one proposition. Clark v. Los Angeles, 160 Cal. 317, 116 P. 966; Hartigan v. Los Angeles, 170 Cal. 313, 149 P. 590; Clark v. City of Manhattan Beach, 175 Cal. 637, 166 P. 806, 1 A. L. R. 1532.

For the foregoing reasons, it is ordered that a peremptory writ of mandate issue out of this court directed to the said Lewis P. Black, as clerk of the city of Monrovia, commanding him, as such clerk, to countersign and affix the corporate seal to each and all of the said $175,000 issue of bonds and each and all of the said $20,000 issue of bonds.

We concur: HOUSER, Acting P. J.; YORK, J.

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88 Cal. App. 748

HOLLMAN v. HOLLMAN. (Civ. 6057.)★

District Court of Appeal, First District, Division 2, California. Jan. 31, 1928.

Hearing Denied by Supreme Court March 29, 1928.

1. Words and phrases—"Further" is not word of strict legal or technical import, generally meaning additional, and is equivalent to moreover or furthermore.

Word "further" is not word of strict legal or technical import, and may be used to introduce negation or qualification of some precedent matter, but generally when used as an adverb it is word of comparison, and means "additional," and is equivalent to "moreover, or furthermore, something beyond what has been said or likewise, or also," and in this sense it is frequently used in legal instruments (citing Words and Phrases, "Further").

2. Husband and wife 🔑279(1)—Property settlement between husband and wife providing for cash payment and execution of note, and "further" for monthly payments, required monthly payments in addition to other payments.

Contract between husband and wife fixing property settlement in view of contemplated divorce, providing that husband pay wife $1,500 in cash, and give promissory note for $8,500, and providing "further" that husband was to pay $150 per month in advance until remarriage or death of second party, or payment of sum of $8,500, and "further" that payments of $150 per month shall be reduced pro rata with reduction of payments of sum of $8,500, and entirely cease when said sum has been paid, *held* to mean that parties intended the $150 per month to be in addition to the gross sum of $10,000.

3. Evidence 🔑448—Parol evidence held admissible to aid in construction of contract between husband and wife, though contract was unambiguous (Code Civ. Proc. § 1860).

Parol evidence *held* admissible to aid construction of contract between husband and wife providing property settlement in view of contemplated divorce, though contract was unambiguous under Code Civ. Proc. § 1860, providing that for proper construction of instruments, circumstances under which it was made may be shown.

4. Appeal and error 🔑1012(1)—Appellate court cannot disturb trial court's determination as to preponderance of evidence.

It is for the trial court to determine the preponderance of evidence, and its finding on that question cannot be disturbed on appeal.

5. Appeal and error 🔑1052(5)—Admitting parol evidence to aid in construction of contract, if error, held not reversible, where proper result was reached irrespective of evidence.

In action by wife against husband on promissory note, based on contract involving property settlement between parties, admission of parol evidence to aid in construction of contract, if error, *held* not reversible, where trial court placed proper construction on contract irrespective of evidence.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Eleanor E. Hollman against F. W. Hollman upon a promissory note. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry I. Stafford and Edward A. Cunha, both of San Francisco (Dean Cunha, of San Francisco, of counsel), for appellant.

Charles W. Byrnes and Robert L. McWilliams, both of San Francisco, for respondent.

BURROUGHS, Justice pro tem. This is an action upon a promissory note. Plaintiff recovered a judgment in the sum of $8,500, with also an attorney fee of $500. From said judgment, the defendant appeals.

It is appellant's contention that he was entitled to a credit on said promissory note of $5,350 which the court failed to give him. This claim depends upon the construction of a certain contract entered into by the parties hereto under the following circumstances:

Plaintiff and defendant were husband and wife. July 14, 1921, they entered into an agreement for the purpose of settling and determining their property rights. So far as material to this decision, said agreement recites:

"This agreement made this 14th day of July, 1921, by and between Fred W. Hollman, the party of the first part, and Eleanor E. Hollman, the party of the second part, both of the city and county of San Francisco, state of California, witnesseth:

"That whereas, the party of the second part is about to commence a suit for divorce against the party of the first part, and has employed Charles W. Byrnes as her counsel for that purpose, and the party of the first part has employed Mr. Joseph H. Mayer to represent him in said suit; and

★Hearing denied by Supreme Court.

"Whereas said parties desire to avoid the expense of litigation over any and all questions as to their respective property rights, including the right of said second party to temporary and permanent alimony; and

"Whereas said parties being fully and independently advised by their respective counsel, and each being fully informed, as to his and her rights, duties and obligations growing out of their marriage relation, have come to an agreement as to each and all of said matters:

"Now, therefore, in consideration of the mutual covenants each to the other running, and of other good and valuable consideration each to the other moving, the parties hereto have agreed and do hereby agree as follows, to wit:

"1. That said first party hereby agrees to pay said second party the sum of fifteen hundred dollars ($1,500) upon the execution of this agreement, and the additional sum of eight thousand five hundred dollars ($8,500) within three years from the date hereof. Said sum of $8,500 to be evidenced by a promissory note a copy of which is hereunto annexed and made a part hereof in full and marked Exhibit B. * * *

"2. That the said party of the first part further agrees to pay said party of the second part the sum of $150.00 per month, in advance, beginning with the date hereof, until the remarriage or death of said second party, or payment of said sum of $8,500. It is further understood and agreed that said payments of $150.00 per month shall be reduced pro rata with the reduction by payments of the sum of $8,500, and entirely cease when said sum of $8,500 has been fully paid.

"In the event that said first party fails to pay said monthly payments for three months said party of the second part may, at her option, declare said sum of $8,500 immediately due and payable. That the said second party shall have a lien for the payment of said $8,500, upon the following described property, to wit: * * *

"6. That said parties hereto have settled and do hereby forever settle all their property rights, including the right of the said second party to alimony, support and maintenance from the said first party. * * *"

The trial court held that the contract was ambiguous, and permitted plaintiff to introduce oral evidence for the purpose of ascertaining the true intent and meaning of the language of the contract. This, appellant contends, constituted error in that he claims the contract is clear and certain in its terms and subject to but one construction, that the monthly payments therein provided were to be applied to a reduction of the amount due on the promissory note. Counsel for respondent contends that the only interpretation that can be derived from the face of the contract is that the monthly payments are in no way connected with the amount due on the note, but constitute a separate and independent payment, but through an abundance of caution he offered and the court received the parol evidence, and that, even though erroneously admitted, the court having set the right interpretation upon the contract, the introduction of such evidence was not injurious. This brings us to an interpretation of the terms of the contract.

It is undisputed that appellant obligated himself to pay respondent the gross sum of $10,000, $1,500 thereof to be paid in cash and the promissory note executed in accordance with the terms of the contract made the balance of $8,500. This is all provided for in paragraph 1 of said contract. The note provides that no interest shall be paid. Paragraph 2 of the contract provides for the further payment of $150 per month in advance until the happening of one of three contingencies therein provided, namely, the remarriage of respondent, her death, or the payment to her of the full sum of $8,500. It is further agreed in said paragraph that said monthly payments shall be reduced pro rata with the reduction by payments of the $8,500, and that when said last-named sum shall have been fully paid said monthly payments shall cease. It is further provided in said last-named paragraph that if the appellant fails to make the said monthly payments for three consecutive months, the whole amount of $8,500 shall immediately become due at the option of respondent. Taking this contract by its four corners, and bearing in mind that the first paragraph provides for the payment of a lump sum of $10,000, the second paragraph provides that appellant "further agrees to pay" respondent $150 per month.

[1, 2] The following definition of the word "further" is found in 4 Words and Phrases, p. 3016:

> "The word 'further' is not a word of strict legal or technical import. It may be used to introduce a negation or qualification of some precedent matter, but generally, when used as an adverb, our lexicographers (Webster, Walker, and others) inform us it is a word of comparison; that it means 'additional,' and is equivalent to 'moreover, or furthermore; something beyond what has been said; or likewise or also.' In this sense it is frequently used in statutes or legal instruments." Jones v. Creveling's Ex'rs, 19 N. J. Law, 127, 133.

Also, in the same volume, at page 3017, appears the following:

> "One meaning of the word 'further' is 'additional,' and in a complaint, the second count of which claimed the further sum of $1,990 as damages, implied a sum in addition to the amounts claimed in the former counts. Thompson v. Southern R. Co. [C. C.] (U. S.) 116 F. 890, 891."

We are of the opinion that these definitions are properly applicable to the contract under consideration, and it was intended by the parties that the $150 per month therein provided was to be in addition to the gross sum of $10,000. This conclusion is strengthened by the remainder of the paragraph wherein it is provided that the monthly payments are to cease upon the happening of certain contingencies and the further proviso that the monthly payments are to be reduced pro rata with the reduction by payments of the sum of $8,500.

In appellant's opening brief it is said:

> "It is superplain from the agreement that Hollman was to pay $10,000 in all—$1,500 cash and $8,500 within three years. In the meantime he was to pay on the note not less than $150 a month, and if he did not, what was to happen?
>
> "(1) Mrs. Hollman had the right to foreclose her mortgage lien in the event he failed for three months by declaring the $8,500 immediately due and payable. (Reporter's Transcript, p. 35, lines 21 to 24.)
>
> "(2) On payment of the $8,500 all payments should entirely cease. (Reporter's Transcript, p. 35, line 20.)
>
> "(3) The agreement says that the payments of $150 shall be reduced pro rata with reductions of the payments of $8,500. (Reporter's Transcript, p. 35, lines 12 to 19.)
>
> "It is too obvious for comment that the monthly payments of $150 bore a direct—(pro rata to use the term of the agreement) relation to the $8,500 note or balance."

[3] But the agreement does not coincide with these conclusions of counsel. Nowhere does the agreement say that the monthly payment was to be applied to the reduction of the note. Neither does it say that the note is to be reduced by such payments, but that the payments of $150 per month are to be reduced in proportion to the payments on the note. In other words, if appellant pays one-half of the note, then the monthly payment would be reduced to one-half the amount provided for in the contract. The construction contended for by appellant cannot be reached except by interpolating into the contract language which would change its meaning. It is a further contention of appellant's counsel that because the trial court during the progress of the trial expressed views favorable to appellant's construction of the agreement, it is clearly shown that the admission of parol evidence constituted reversible error, and that without said evidence appellant would have obtained a judgment. But such is not the conclusion to be drawn by the attitude of the trial court. It is evident that the court receded from its previous attitude as to a construction favorable to defendant appearing on the face of the contract because of his allowance of the introduction of parol evidence. However, we cannot conceive of any possible construction that would give the result claimed by appellant, and if we are wrong in the conclusion that the contract is unambiguous we are satisfied that the introduction of parol evidence was proper. The law providing for the admission of parol evidence concerning written instruments is found in section 1860, Code of Civil Procedure, wherein it is provided that:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

In United Iron Works v. Outer H. etc., Co., 168 Cal. Sup. 81, 141 P. 917, it is held that the foregoing section of the Code simply re-enacts the common-law rule that where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said, parol evidence is admissible. In the light of this rule we will review the oral testimony material to the construction of the contract in the case at bar. Joseph Mayer, who was the attorney for the defendant in the preparation of the contract, and present when it was executed, testified in part as follows:

> "Well, Mrs. Hollman was insisting upon receiving from Mr. Hollman $10,000; and Mr. Hollman said he was not in a position to pay $10,000 in cash; that he would pay her $1,500 in cash, and make a note for $8,500. And the question of alimony came up, and Mrs. Hollman was insisting upon $250 per month, and Mr. Hollman took the position that he could not pay $250 per month; that he could pay $150, with the understanding that in the event he paid a certain portion of the note, the amount of alimony should be reduced. That was the substance of the agreement arrived at."

Charles W. Byrnes testified:

> "Mrs. Hollman stated she wanted $10,000 and alimony in the sum of $250 a month. * * * Mr. Hollman said that he was not willing to pay $250 a month, and was willing to pay $150 a month alimony. * * *"

Mrs. Eleanor Hollman testified:

> "Mr. Hollman agreed to give me $150 a month alimony, and I was asking for $250; * * * I wanted interest on the note, and Mr. Hollman would not give me any interest on the note, and said that within four or five months that he would pay me a certain amount on that note, something like $4,500 or $5,000; and at that time when he had given me that money, why then the alimony would be reduced accordingly, but he never gave me the money, and he never gave me any money on the $8,500 note."

May 16, 1922, the appellant wrote a letter to Mr. Charles W. Byrnes, concerning certain properties in which he states that certain contingencies which might have arisen would not have been very gratifying to either the writer or to Mrs. Hollman, "especially if she expects me to pay the $8,500 note which she holds."

[4, 5] As against this testimony we have that of the appellant wherein he says in response to a question asked him as to the application of the monthly payments of $150, that they were to be applied on the $8,500 note.

It must be conceded that if this was a proper case for the admission of parol testimony the trial court was clearly correct in placing a construction on said testimony favorable to the plaintiff herein. In any event, it was for the court to determine the preponderance of the evidence, and its finding on that question cannot be disturbed on this appeal. If, on the other hand, it was not a proper case for parol testimony, then its admission under the case of Provident G. Min. Co. v. Manhattan S. Co., 168 Cal. 304, 142 P. 884, was not reversible error. In the latter case the court admitted parol evidence, but it was held that the contract was not ambiguous or uncertain but, "since the court set the right interpretation upon the contract, the introduction of this evidence was not injurious. The same result would have been reached necessarily without that evidence." We cannot conceive of any construction of the contract that would reach the interpretation placed thereon by counsel for appellant, with or without the aid of the parol evidence.

We believe the judgment of the trial court is correct and must be affirmed. It is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

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89 Cal. App. 43

FERRO v. LOS ANGELES FIRST NAT. TRUST & SAVINGS BANK.

(Civ. 4872.)

District Court of Appeal, Second District, Division 2, California. Feb. 6, 1928.

1. Appeal and error ⟹731(5)—Appellate court must accept findings of fact as true, in absence of specification of insufficiency of evidence.

Where there is no specification of particulars on which evidence was insufficient to sustain findings, appellate court must accept findings of fact as true.

2. Trial ⟹395(1)—Finding that signer of lease contract did so without consideration, and in reliance on fraudulent representation, held to support judgment denying liability.

Finding that signer of lease contract for purchase of automobile was induced to do so because of fraudulent statements of seller and cosigner, and that signature was wholly without consideration, *held* sufficient to support judgment denying liability thereon.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by R. Ferro against G. C. B. Swisher and Angelus Young, wherein the Los Angeles First National Trust & Savings Bank was made defendant as administrator of the estate of G. C. B. Swisher, also known as Givens C. B. Swisher, deceased. Judgment for plaintiff against second named defendant and in favor of first named defendant, and plaintiff appeals. Affirmed.

Fred Horowitz, of Los Angeles, for appellant.

R. W. Richardson and James H. O'Neill, both of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This was an action brought by the plaintiff as the assignee of one Pietro Ferro, against G. C. B. Swisher, since deceased, and Angelus Young. A trial was had by the court without a jury, and, upon the conclusion of the trial, judgment was given in favor of the plaintiff against the defendant Angelus Young, and in favor of the defendant Swisher, against the plaintiff. This appeal is by the plaintiff against that portion of the judgment wherein judgment was given in favor of the defendant Swisher.

We cannot see that there is anything before this court for consideration, except the question of whether the findings support that portion of the judgment in favor of the defendant Swisher.

There is no specification that the evidence fails to support any of the findings of the trial court, nor any assignment of error.

The first fifteen pages of appellant's brief are devoted to a statement of the pleadings and the facts and "the important features of this case in their chronological order," immediately after which, on page 16, is the following:

> "The questions involved in this appeal are these:
>
> "(1) Can it be said that adversaries in a lawsuit occupy such a relation of trust and confidence that the parties are exonerated from reading contracts with each other?
>
> "(2) Assuming that there was a confidential relationship existing between the defendant Swisher and the defendant Young, can it be said that any misrepresentation by the defendant Young is chargeable to plaintiff's assignor?
>
> "(3) Where the defendant Swisher knew that he was signing as surety for the defendant Young and in favor of the plaintiff's assignor, Ferro, and where the defendant Swisher had the utmost confidence in the defendant Young, can the defendant Swisher then state that he believed that the amount of his obligation was less than that stated in the instrument, and that the legal effect of the instrument was different from that which he believed?"

[1, 2] The evidence shows that Swisher was blind, but not dumb, and that he not only could, but apparently did, so state. There being no specification of the particulars in which the evidence was insufficient to sustain the findings, we must accept the findings of fact as true. 2 Cal. Jur. 407 et seq., and the numerous cases there cited. As to this respondent the court found as follows:

> "The court finds that the agreement, designated as a lease contract, for the purchase of

a certain Hudson automobile for the consideration of $1,835.43, payable in installments, was signed by the defendants Angelus Young and G. C. B. Swisher, but that at the time the said Swisher, defendant, signed said agreement he did not read same on account of his blindness and extreme nearsightedness, it being almost impossible for him to read, and that he was induced to, and did, sign said paper wholly on the statements and representations of the plaintiff's assignee, Pietro Ferro, and of the defendant Angelus Young, and relied solely upon the statements and representations of said Angelus Young and Pietro Ferro that said instrument was only a lease to protect the said Ferro, and that the automobile was full security therefor, and that there would be no liability of the said Swisher thereon; that the said automobile was never delivered to the said Swisher, and he never had possession thereof, and the signing of said instrument was wholly without consideration to Swisher; and that he had no knowledge at the time he signed said instrument of the character of same and the obligations contained therein, and he would not have signed same had he known the kind of a paper or obligation he was signing, he being at the time more than 80 years of age, unable to read, and signed said paper wholly upon the false representations and statements of the said Angelus Young and the said Pietro Ferro; that said agreement is binding upon the said defendant Angelus Young, but is not an obligation of the defendant G. C. B. Swisher, and the said Swisher is not liable thereon."

The court then finds that the whole sum provided in the contract ($1,835.40) with interest is due from defendant Young to plaintiff, and that $200 is a reasonable attorneys' fee, and as conclusions of law as to said defendant Swisher:

"That the defendant G. C. B. Swisher, also known as Givens C. B. Swisher, was deceived and misled, and was induced to sign said lease contract upon the false statements and representations of Pietro Ferro and Angelus Young, the said Swisher being unable to read same, and did not read said agreement, and the instrument sued upon was not the obligation of the said Swisher; that he, the said Swisher, did not knowingly sign same; therefore is not liable thereon to the plaintiff in any sum by reason thereof,"

—and rendered judgment accordingly, and that defendant Swisher recover costs from plaintiff.

Appellant in his argument relies upon the case of Hawkins v. Hawkins, 50 Cal. 558, and cites other cases in which it is claimed that case has been affirmed. That case is decided upon the doctrine that, where without any intention of especial trust and the means of knowledge being equally available to each, two parties sign a contract of purchase and sale, the seller may not assail the terms of the contract solely because he read with difficulty. But the doctrine of that case and like authorities does not apply to cases of actual fraud and misrepresentation (Belden v. Henriques, 8 Cal. 87; Roseman v. Canovan, 43 Cal. 110), which the court found existed in the case at bar, and, as stated above, we must accept those findings as true. In Hanscom v. Drullard, 79 Cal. 237, 21 P. 737, the court says:

> "A man may perhaps be able to discover for himself what he ought to know if left to his own devices, but where he is induced by the artifice of another not to use his opportunities, it would seem hardly fair that the one using the trick or misrepresentation should remain protected."

The findings amply support the judgment as given in favor of defendant Swisher.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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89 Cal. App. 35

RICHEY v. ZIEGLER et al. (Civ. 6191.)

District Court of Appeal, First District, Division 1, California. Feb. 6, 1928.

1. Master and servant ⚷388½—Act prohibiting assignment of claims before Industrial Commission before payment held intended to protect disabled workmen, not to aid in resisting payment of award (Deering's Gen. Laws 1923, Act 4749, § 24).

Deering's Gen. Laws 1923, Act 4749, § 24, prohibiting claim before Industrial Accident Commission from being assigned before payment, was designed to protect disabled workmen and their dependents in event of death from making assignments of industrial compensation, and not as shield for purpose of resisting payment of award.

2. Master and servant ⚷416½—Award by Industrial Commission, reduced to judgment, loses actionable character as claim or award, and is merged in judgment, and suit to collect same is on judgment not award.

Award by the Industrial Commission, when reduced to judgment, loses its actionable character as claim or award, and is merged in judgment, and action to enforce liability of stockholders of employer company for amount of award is on judgment, and not on award.

3. Master and servant ⚷388½—Assignments of judgments, based on award of Industrial Accident Commission, held not limited by statute (Deering's Gen. Laws 1923, Act 4749, § 24).

Deering's Gen. Laws 1923, Act 4749, § 24, prohibiting claim before Industrial Accident Commission from being assigned before payment, *held* not to limit assignment of judgments based on awards.

4. Judgment ⚷846—Judgment is assignable to pass title, and assignee thereunder acquires property right not impaired by statute.

Judgment is assignable to pass title, and assignee thereunder acquires property right not impaired by statute.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by George B. Richey against Clara B. Ziegler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. E. Gleason, of Los Angeles, for appellants.

George D. Richey and C. A. Townsend, both of Los Angeles, for respondent.

TYLER, P. J. [1-4] Action on stockholder's liability. The complaint alleges the Gladiator Manufacturing Company to be a corporation with a total capital stock of 1,000 shares, of which defendant Clara B. Ziegler owns 500 shares and defendant Clarence M. Petty the remainder; that on October 3, 1923, one Belle Nutman obtained an award before the Industrial Accident Commission against said company for the sum of $3,893.10, and that thereafter a duly certified copy of said award was filed in the office of the clerk of the superior court of Los Angeles county on September 29, 1924, and thereupon a judgment on award for said sum was duly entered and docketed in the judgment book of said court; that said Belle Nutman assigned the said award and judgment to the plaintiff in the action at bar. The complaint then alleges that defendants and appellants herein were stockholders of said corporation at the time said debt was incurred, and it is prayed that a judgment be rendered against the defendants on account of their liability as stockholders of said Gladiator Manufacturing Company. The defendants demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against defendants or either of them. The demurrer was overruled, whereupon defendants answered, denying that Belle Nutman assigned the award or judgment to the plaintiff, and denying their liability to plaintiff as stockholders of said company for the said debt. Thereafter the case came on for trial, and the court made findings and rendered judgment against defendants for their proportionate shares of the debt as such stockholders. This is an appeal from such judgment. The sole point raised on the appeal is that the award made to Belle Nutman by the Industrial Accident Commission could not legally be assigned to plaintiff. This contention is based upon section 24 of Act 4749 (Deering's Gen. Laws 1923, p. 1731), which prohibits a claim before the Industrial Accident Commission from being assigned before payment.

In support of this contention we are cited to the case of Pacific Electric Ry. Co. v. Commonwealth, etc., Insurance Co., 55 Cal. App. 704, 204 P. 262, where it is held in construing this act that the word "claim" is used in its broadest sense, and covers both claims and awards, since claims are not paid until they become awards, and the only thing payable under the provisions of the act is awards. It is apparent that defendants are invoking the aid of an act to resist the payment of an award which was designed to protect disabled workmen and their dependents, in the event of death, from making assignments of industrial compensation. That the Legislature never intended the act should be used as a shield for this purpose goes without saying. However this may be, the defense interposed can avail defendants nothing, for the reason that the award, when reduced to judgment as above recited, lost its actionable character as a claim or award as it became merged in the judgment, and the complaint is based upon such judgment, and not upon the award. The complaint itself so recites. There could be no action based upon the award after it became merged in the judgment, for, as stated, it had lost its actionable character, nor could the award be paid, as it no longer existed. Satisfaction could only be had by payment of the judgment. The statute invoked does not attempt to limit the assignment of judgments based upon awards. A judgment is assignable to pass title, and the assignee thereunder acquires a property right that is in no manner impaired by statute.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

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88 Cal. App. 769

DONZE v. DONZE. (Civ. 5983.)

District Court of Appeal, First District, Division 2, California. Feb. 2, 1928.

1. Husband and wife 🔑262(1)—Property deeded to married woman at husband's request, in terms as her separate property, held conclusively presumed such; fraud or mistake not being charged (Civ. Code, § 164).

Where real estate is conveyed by a third person to a married woman with knowledge and consent and pursuant to directions of husband, and deed declares the property is conveyed to her as her separate property, regardless of the consideration being paid from husband's separate property or from the community funds, there is a presumption that it was intended as a gift to her as her separate property, conclusive, except on a showing of fraud or mistake on issue made (Civ. Code, § 164).

2. Evidence 🔑390(4)—Grounds on which recital of deed can be avoided by parol stated.

Recital of deed to married woman, that the property was conveyed to her as her separate property, can be avoided by parol only on ground of procurement through fraud, coercion, undue influence, or mistake.

3. Divorce 🔑203—Facts relied on to avoid recital of deed to married woman must be specifically alleged.

One seeking to avoid recital of deed to married woman, that the property was conveyed to her as her separate property, must specifically allege the facts relied on to show fraud, coercion, undue influence, or mistake, as ground therefor.

4. Divorce 🔑203—Divorce complaint merely alleging marital relation and that lot was community held insufficient to raise issue of wife's fraud in procuring deed as separate property.

Complaint in divorce is insufficient to raise the issue of fraud of wife in procuring a deed of a lot, as her separate property, by merely reciting the existence of the marital relation and that such lot was their community property.

Appeal from Superior Court, Santa Barbara County; Merle J. Rogers, Judge.

Action by Leon Jacque Donze against Hattie Genevieve Donze. From part of the judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

W. Preston Butcher, Jr., and Atwell Westwick, both of Santa Barbara, for appellant.
J. W. Smith, of Santa Barbara, for respondent.

THOMPSON, Justice pro tem. This is an appeal from that portion of an interlocutory judgment of divorce decreeing a certain house and lot standing in the name of appellant to be the community property of the respective spouses.

Appellant and respondent intermarried at Santa Barbara on July 29, 1909. In consideration of the sum of $100, the mother and father of respondent executed a deed of conveyance April 27, 1922, to lot 2, block 102, of said city of Santa Barbara, to appellant, Hattie Genevieve Donze, "as her separate property." A dwelling house was thereafter constructed on this lot at a cost of $2,800, which was borrowed from the building and loan association on a note and mortgage executed by these parties as a lien upon said premises. This money was subsequently paid in installments from the earnings acquired during coverture. Domestic trouble arose. In August, 1924, respondent brought suit against the appellant for divorce, alleging that said lot was their community property. The appellant answered, denying this allegation, and upon the contrary alleged that it was her separate property, and in a cross-complaint she prayed for a divorce on her part. Upon trial a divorce was denied respondent, but appellant was granted an interlocutory decree on the ground of extreme cruelty, and she was awarded the custody of their two minor children, and $60 per month alimony and maintenance, together with the temporary right of occupancy of said premises. The court also found that the house and lot in question was community property, and awarded it to the spouses as "tenants in common." An appeal was taken from that portion of the decree which finds that this house and lot is community property, on the ground that this finding is unsupported by the evidence, and that oral testimony as to the title was incompetent to vary the terms of the deed.

The evidence is without conflict to the effect that all of the purchase price of said lot, together with the cost of construction of the dwelling house, was paid from community funds; the deed was executed by the father and mother of respondent to the appellant. Following the name of the grantee in this deed was the recital that the lot was conveyed "as her separate property." This deed was delivered to the appellant, who had it recorded, and afterward kept it among her private papers; the respondent never afterward saw the instrument. Over the objection of appellant that the evidence was incompetent and tended to vary the terms of a written instrument, the respondent was permitted to testify in effect that the deed was taken in the name of his wife as a matter of convenience. He said:

> "It was deeded to my wife just simply in case —in the work I am in—driving a machine around, in the event anything should happen, my death or anything, there would be nothing in the way of red tape or anything, of her going ahead and proving ownership of the property. * * * We talked it over and it was just simply signed in her name. * * * I didn't know that it was in her name as separate property. * * * We agreed that it would be put over (in her name) in case anything should happen. * * * If anything happened to me there would be no argument so far as red tape of her getting hold of the property—her and the children. * * * I think she said something to the effect that parents of the husband could come in on his half of the property if it was community property. * * * (I said) rather than have an argument we would fix it so she and the children could have it all. * * * I told my father to have the property made out in her name."

Appellant said the respondent told her the reason he had the deed executed in her name was:

> "Just so the children and I could always have a home. * * * He said, if anything should happen to him, we would have it always. * * * He said he wanted the property in my name and the children's, so that his folks could never come in on it, or any one else—that it would always be our property."

The evidence is undisputed that the deed was executed to appellant with the consent and at the request of respondent. There was no contention in this case that it was executed through fraud or mistake.

[1] Where land is conveyed from a husband to his wife the presumption is that it was intended as a gift. So, also, where property is conveyed to a wife, from a third party, with the knowledge and consent of the husband, whether the consideration is paid by the husband from his separate property or from their community property, the presumption is that it was intended as her separate property. Civ. Code, § 164; Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 P. 2; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919; 13 Cal. Jur. 854, § 50. The intention must ordinarily be inferred from all the surrounding circumstances, including the acts, declarations, and conduct of the interested parties at the time of the transaction. Gilmour v. N. Pasadena L. Co., 178 Cal. 6, 171 P. 1066; Fanning v. Green, 156 Cal. 279, 104 P. 308; Cohn v. Smith, 37 Cal. App. 764, 174 P. 682. But where a deed of conveyance to real property is made from a third party to the wife with the knowledge and consent and pursuant to directions from the husband, and the deed contains an express declaration that the property is conveyed to her as her separate property, regardless of whether the consideration is paid from his separate property or from the community funds, the presumption that it was intended as a gift to the wife is conclusive, except when that intent is challenged on the trial by an issue of fraud or mistake. 13 Cal. Jur. 855, § 50; Miller v. Brode, 186 Cal. 409, 199 P. 531; Estate of McCauley, 138 Cal. 546, 71 P. 458; Swain v. Duane, 48 Cal. 358.

In the case of Miller v. Brode, supra, it is said:

"* * * The deed by which the ranch was acquired conveyed it to the decedent as sole grantee, and described it as her separate property, and was so made with the consent of her husband, who participated in the transaction. This definitely establishes the character of the property as her separate property. In McComb v. Spangler, 71 Cal. 418, 12 P. 347, it was held that, where a third person conveys property to a wife as her separate property, there is but a prima facie presumption that it is taken by her as such. This may be true where, as in that case, it does not appear that the deed was made with the husband's consent. But where, although the property is purchased with community funds, it is conveyed to the wife with the husband's consent by a deed expressly describing it as her separate estate, it is as if the husband himself had conveyed community property to her by deed expressing that she took it as her separate estate. Such a conveyance would be nothing more nor less than an express gift by the husband to the wife of community property. Swain v. Duane, 48 Cal. 358; Shanahan v. Crampton, 92 Cal. 9, 28 P. 50. There is no impediment to a husband making such a gift if he desires, and, if he does it, the property at once becomes the wife's separate property, and the effect of the conveyance in this respect cannot be avoided except by avoiding the conveyance itself. This, of course, cannot be done except for fraud, mistake, or some similar ground. In the absence of some such ground for setting aside the transaction it is wholly immaterial that the property was community property before the husband conveyed it to the wife, or in case it were conveyed to her by a third person that the consideration given for it was community property. Its character is changed at once by the conveyance to the wife as her separate property either by the husband directly or by a third person with his consent."

The foregoing language seems to fit the instant case exactly. This deed was made to the wife at the request of the husband, and it recited that the property was conveyed to appellant "as her separate property." There was no fraud or mistake charged with relation to its execution. Under such facts the house and lot in question is conclusively presumed to be the separate property of the appellant.

[2-4] The evidence as to the intent with which the deed was executed in the name of the appellant varied the terms of the written instrument, and, in the absence of appropriate allegations, was incompetent. The objection to this evidence should have been sustained. No rule of evidence is more firmly established than the one that "parol evidence cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument." 10 Cal. Jur. 916, § 186; 10 R. C. L. 1016, § 208; Jones on Evidence (3d Ed.) 656, § 434. There are, however, equally well-recognized exceptions to this rule, as, for instance, where an instrument has been procured through fraud, coercion, undue influence, or mistake. 10 R. C. L. 1056, § 251. But he who seeks to set aside an instrument which is valid on its face, upon any of these grounds, must specifically allege the facts upon which he relies. 12 Cal. Jur. 800, § 62; 10 Standard Enc. of Proc. 49, § 8; Hammond v. McCollough, 159 Cal. 639, 649, 115 P. 216. A complaint in a suit for divorce is insufficient to raise the issue of an alleged fraudulent conveyance from a husband to his wife, or from a third person to the wife, which merely recites the existence of the marital relationship and the possession of the community property by the spouses. Such general allegations utterly fail to warn the accused that she will be expected to defend against the serious charge of fraud. Regardless of the existence of fiduciary relationship, one who is accused of fraud or undue influence is entitled to be informed of the charge by specific averments which may enable him to refute the charge and adequately prepare his defense. 12 Cal. Jur. 800. It is true that in transactions between a husband and wife the law presumes the existence of confidential relationship. Civ. Code, § 158. This fiduciary relationship also precludes either spouse from procuring an unfair advantage over the other by means of fraud, mistake, or undue influence. During the existence of this

relationship, where an unfair advantage has been obtained, under appropriate pleadings, the transaction will be deemed to have been secured without consideration and by means of undue influence. Civ. Code, § 2235; 13 Cal. Jur. 860, § 54. Where such undue influence and advantage is alleged, the burden is cast upon him who has the advantage to show that it was fair and free from fraud or undue influence. 13 Cal. Jur. 860, §§ 54–56; Locke Paddon v. Locke Paddon, 194 Cal. 73, 80, 227 P. 715; Henley v. Bursell, 61 Cal. App. 511, 516, 215 P. 114; Williamson v. Williamson, 41 Cal. App. 721, 183 P. 301; Estate of Cover, 188 Cal. 133, 143, 204 P. 583. But the mere existence of the relationship of husband and wife does not create a presumption of fraud or undue influence, in the absence of the procuring of an undue advantage, nor does it constitute a prima facie showing of such conduct. Before this presumption may be indulged it must appear that the marital confidence was violated and that an undue advantage was thereby secured. Yordi v. Yordi, 6 Cal. App. 20, 91 P. 348; Dimond v. Sanderson, 103 Cal. 97, 37 P. 189; 13 Cal. Jur. 862, §§ 55, 56. Clearly, if a wife were to obtain, without consideration, an absolute conveyance of property from her husband, by means of false promises which she did not intend to perform, the transaction would constitute actual fraud. And if the wife obtained, without consideration, an absolute conveyance of property from her husband upon a promise to reconvey it, and, subsequently, upon request failed and refused to do so, her conduct would constitute constructive fraud. Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189. But, manifestly, relief from such a fraudulent transaction may be secured only in a proceeding which presents the issue of fraud by specific pleadings. We have been pointed to no decision in the California Reports, nor elsewhere, holding that this serious charge of fraud may be raised without pleading the fiduciary relationship, the circumstances of the fraud, and the undue advantage secured. Upon the contrary, the cases cited indicate that the issues of fraud, lack of consideration, and undue influence were invariably raised by definite pleadings. In Brison v. Brison, supra, it is said:

> "The complaint shows that the * * * promise upon which plaintiff relies was false and 'in bad faith,' and 'made with intent to deceive.'"

In the case of Falk v. Turner, 101 Mass. 496, therein quoted with approval, it is said:

> "It is averred that the plaintiff 'had at all times confidence in his said wife and her devotion and fidelity to him,' and that he made the deed 'having confidence in his said wife, and in her said representation and promises, and relying upon the same.'"

In Kohn v. Kempner, 59 Cal. App. 621, 211 P. 805, the court said:

> "Appellants contend that the complaint is insufficient because it does not allege that the plaintiff relied upon the promise of his wife to reconvey or believed that she would perform it. The allegation in this connection is that the conveyances were made to Mrs. Kohn 'upon her express promise to reconvey to plaintiff upon his demand.'"

In Feeney v. Howard, 79 Cal. 525, 21 P. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162, where a fiduciary relationship existed, and an action was brought to set aside a deed of conveyance upon the ground of fraud, it was held that both the relationship and the fraud must be alleged. In that case evidence of fraud was received over objection, and the case was therefore reversed. The court said:

> "No actual fraud was alleged. A material ingredient of actual fraud is the fraudulent intent, and this must be alleged as one of the facts constituting the fraud. * * * The facts constituting fraud must be averred in cases of constructive as well as of actual fraud. Golson v. Dunlap, 73 Cal. 164, 14 P. 576."

We therefore conclude that where a deed of conveyance is made to a wife, in which deed the character of the property is specifically declared to be "separate property," a rebuttable presumption is thereby created to the effect that it is her separate property, and that she holds the legal title thereto. This presumption may be overcome by the husband only on the theory that the deed is not what it purports to be, and was executed through fraud, mistake, or undue influence, and that the wife therefore holds but an equitable title for the benefit of the community. The invariable rule under such circumstance requires these issues to be raised by appropriate pleadings.

For the foregoing reasons the portion of the judgment determining property rights is reversed, and the cause is remanded for a new trial upon the sole issue as to the property rights. Inasmuch as the trial court was of the opinion that although the legal title to the property was in the wife, yet she held it for the community, and that the equitable title was in the community, it is directed that the plaintiff be permitted to amend his complaint upon timely and proper application therefor adding appropriate allegations of fraud, mistake, or undue influence, presenting the issue of the equitable ownership of the property, if he be so advised.

We concur: KOFORD, P. J.; STURTEVANT, J.

88 Cal. App. 621

PEOPLE v. WOOD. (Cr. 1012.)★

District Court of Appeal, Third District, California. Jan. 25, 1928.

Hearing Denied by Supreme Court March 22, 1928.

1. Intoxicating liquors ⟹132—Law making possession of still felony held as legislation independent of and separate from state Prohibition Act (Wright Act; St. 1927, p. 497).

St. 1927, p. 497, making the possession of a still for use in manufacture of liquor a felony, *held* as legislation entirely independent of and separate from state Prohibition Act (Wright Act [St. 1921, p. 79]) though effecting a change in penalty for act therein described.

2. Statutes ⟹133—Law submitted to people under referendum reservation held not direct legislation as bearing on right to amendment by Legislature (Const. art. 4, § 1).

Submission of law to people for approval or rejection under referendum reservation in Const. art. 4, § 1, *held* not to constitute direct legislation as bearing on right to amendment by Legislature.

3. Intoxicating liquors ⟹132—State law making possession of still a felony held not invalid because imposing heavier penalty than federal law (St. 1927, p. 497; Volstead Act [27 USCA]; Const. U. S. Amend. 18).

St. 1927, p. 497, making possession of still for manufacture of liquor a felony *held* not invalid because of imposing a heavier penalty than is authorized for a like act by the Volstead Act (27 USCA), passed for purpose of enforcing Eighteenth Amendment to Federal Constitution.

4. States ⟹4—State police power not authorizing that forbidden by national law is paramount.

Police power of state is paramount where it does not authorize what national law forbids.

5. Statutes ⟹64(1)—Invalidity of subsidiary section does not affect validity of other provisons.

Invalidity of one section of act having no interdependence with other sections thereof and being subsidiary to main purpose of act and not essential to its validity does not have effect of invalidating other and more important provisions thereof.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

C. C. Wood was convicted of possessing a still for the manufacture of intoxicating liquor, and he appeals. Affirmed.

J. T. Fraser and H. L. Ford, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information filed in the superior court of Humboldt county with the crime of willfully, unlawfully, and feloniously having in his possession and under his control, on or about the 25th day of October, 1927, in said county, "a still, designed, used, and intended for use in the manufacture of intoxicating liquor for beverage purposes." Upon his arraignment upon said charge, the defendant entered a plea of guilty thereto, waived the statutory time for the pronouncement of judgment, and was thereupon sentenced by the court to pay a fine of $1,000 and to be imprisoned in the state prison.

Notwithstanding the foregoing proceedings or the fact that judgment was passed upon him upon his plea of guilty to the information, the defendant has taken this appeal from said judgment. Counsel for the defendant, however, in their brief introduce their argument in support of the appeal by the statement that the defendant employed them to prosecute this appeal for the reason that he and others, including counsel, entertain serious doubt as to the constitutionality of the act under which the defendant was proceeded against.

The act upon the provisions of which the information filed against the defendant is based was passed by the Legislature of 1927 (Stats. 1927, p. 497), and went into effect on July 29th of that year. The first section of said act reads as follows:

> "Any person whether acting in his own behalf or as the agent, servant, officer or employee of any person, firm, association or corporation, who shall be the owner of or have any interest in or who shall operate or cause to be operated or knowingly have in his possession or control, any still, still worm, still cap, still condenser or stilling device of any kind, designed, used or intended for use in the manufacture or production of intoxicating liquor for beverage purposes, shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000), and by imprisonment in the state prison for not less than one year nor more than five years."

The penalty fixed by said statute is heavier than the penalty prescribed for the same act by the National Prohibition Law.

[1, 2] It is claimed by counsel for the defendant that the foregoing act involves an attempted amendment of the state Prohibition Act, commonly known as the Wright Act (Stats. 1921, p. 79), and that, inasmuch as said act was, after its enactment by the Legislature, submitted to the people for approval or rejection, under the referendum reservation contained in article 4, § 1, of the Constitution, and approved by the people at the general election in November, 1922, it thereupon in effect became and that it involves direct legislation by the people themselves, and therefore not subject to amendment by the Legislature. This contention is obviously unsound. In the first place, it is to be noted

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★Hearing denied by Supreme Court.

that the act does not purport to be an amendment of the state Prohibition Act, effective in due time after its approval by the people in November, 1922, but, while having reference to or bearing direct connection with the subject-matter and the object of said act, and effecting a change in the penalty for the act therein described, it is, as legislation, entirely independent of and separate from said act; secondly, notwithstanding that an act of the Legislature may, under the power of referendum reserved by the people in their Constitution to themselves, be referred to the people after its passage by the Legislature and approval by the Governor for their approval or rejection, such act is no less an act of the Legislature than if it were never so submitted. In other words, an act so passed and referred does not constitute the "direct legislation" which the people, by article 4, § 1, of the Constitution, have reserved to themselves the power and right to inaugurate. But said section of the Constitution itself directly answers the proposition. Among other things, it provides:

> "No act, law or amendment to the Constitution, initiated or adopted by the people, shall be subject to the veto power of the Governor, and no act, law or amendment to the Constitution, adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure; but acts and laws adopted by the people under the referendum provisions of this section may be amended by the Legislature at any subsequent session thereof."

[3] But it is further contended that the statute is invalid because it imposes a heavier penalty for the act denounced in the section of the statute under which the defendant was proceeded against than is authorized for a like act by the so-called Volstead Act (27 USCA), passed by Congress for the purpose of enforcing the Eighteenth Amendment to the national Constitution; that the Wright or state Prohibition Act, so far as penalties are concerned, is, by its own express terms, the congressional act referred to, and that it follows, therefore, that it is incompetent for the Legislature of the state to prescribe any different penalties for the violation of the state prohibition law from those which the Volstead Act proscribes or the Congress may hereafter prescribe. This contention seems to be founded on the following language of section 3 of the Wright Act:

> "Whenever Congress shall amend or repeal the Volstead act, or enact any other law to enforce the Eighteenth Amendment to the Constitution of the United States, then the provisions of sections one and two of this act shall apply thereto."

[4] The courts of this as well as of other jurisdictions, state and federal, have time and again declared, as unquestionably they were required to declare, in view of the established proposition that the federal and state governments involve and exercise wholly and entirely separate and independent sovereignties, that the Congress has no power to control or regulate the exercise or administration of the state's power of police or its local internal affairs. Indeed, even in the matter of the enforcement of the Eighteenth Amendment of the Federal Constitution, the general government may not interfere with the manner in which, by virtue of its police power, the state may elect to proceed. As is said by Presiding Justice Finch, in Re Volpi, 53 Cal. App. 229, 199 P. 1090:

> "The police power of the state, therefore, is paramount where it does not authorize what the national act prohibits, and through its inherent reserve power it has the right to legislate in such manner [referring to the ordinance in that case under attack]. The state may prohibit, but it may not authorize."

Again, it is said in the Volpi Case, citing Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568:

> "Legislation by the states need not be identical with that of Congress. * * * The states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable that a state may forbid under penalty acts not prohibited by the act of Congress."

In People v. Pagni, 69 Cal. App. 94, 98, 99, 230 P. 1001, 1002, it is said:

> "The Wright Act is to be regarded as though it had been enacted by our Legislature without regard to or independently of any consideration of the Volstead Act, and it is, therefore, too clear for argument that its language and all its provisions are to be viewed and construed without reference to the source from which they were taken—in other words, construed as purely a state statute and not as having anything to do or any connection with the act of Congress whose penal provisions it has adopted. These propositions follow from the impregnable premise that there does not exist a relation of interdependence between the two sovereignties, the federal and the state, with respect to the matter of providing for the punishment of crime against their respective sovereignties, each in that particular being entirely independent of the other and capable, according to its own plan, of protecting its own sovereignty against transgressors of public law or of punishing those that may transgress it."

[5] Whether the above-quoted provision of section 3 of the Wright Act is or is not valid may not be considered here; but, it is not improper to say that if it should be held to be beyond the constitutional power of the Legislature to enact or amend our statutory laws by the method assumed by said section, the elimination of said provision from the Wright Act, by reason of its invalidity on that ground, would not have the effect of invalidating the other and more important

provisions of said act, since there is no interdependence between section 3 and the other sections thereof. In other words, the provision of section 3 is "subsidiary to the main purpose of the act and not essential to its validity. * * * It was not the controlling consideration prompting the enactment of the law." People v. Capelli, 55 Cal. App. 461, 467, 203 P. 837, 839.

The case which counsel seem to rely upon (In re Mingo, 190 Cal. 769, 214 P. 850) is not in point here.

There is no merit in the appeal from any viewpoint.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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88 Cal. App. 761

SPERANCO et al. v. BRYAN. (Civ. 6231.)

District Court of Appeal, First District, Division 1, California. Feb. 2, 1928.

1. Mortgages 🔑369(8)—Whether notice of sale under trust deed was posted in conspicuous place as required held question for court.

In action to set aside sale under a trust deed, whether notice of sale was posted in a conspicuous place on the premises sold as required, *held* for determination of the trial court in exercise of its judicial function.

2. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence could not be disturbed on review, where supported by evidence.

Trial court's finding on conflicting evidence could not be disturbed on review, where there was evidence to support it.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Louis Speranco and others against Julia J. Bryan. Judgment for defendant, and plaintiffs appeal. Affirmed.

John C. Scott, of Oakland, for appellants.

J. W. O'Neill, of Oakland, for respondent.

TYLER, P. J. [1, 2] Action to set aside a sale under a trust deed. The sole contention of plaintiffs at the trial was that the notice of sale under the trust deed was not posted in a conspicuous place upon the premises sold. The trial court, in substance, found that the notice was properly posted, and judgment went for defendant. Appellants contend that the proof of posting was too limited and does not sustain the finding for the reason that, at the particular place on the premises where the notice was posted, the land was elevated and covered with flowers and shrubbery. There is no merit in this claim. The evidence upon the subject was somewhat conflicting, but it is amply sufficient to support the finding. The question of whether or not the notice was posted in a conspicuous place is one upon which minds may differ, and it must be determined by the court in the exercise of its judicial function. Elder v. Frevert, 18 Nev. 278. Such determination cannot here be disturbed, where there is evidence to support it. There is no merit in the appeal.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

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89 Cal. App. 194

CALL PUB. CO. et al. v. INDUSTRIAL ACCIDENT COM'N OF CALIFORNIA et al. (Civ. 6195.)

District Court of Appeal, First District, Division 1, California. Feb. 10, 1928.

Master and servant 🔑367—Agent employed to distribute papers was not independent contractor, making newsboy distributors his servants, within Compensation Act (Workmen's Compensation, Insurance & Safety Act of 1917).

Agent of newspaper, employed to distribute papers, receiving definite compensation for services in addition to profits and being subject to dismissal with or without cause, and being under direction of officers, was not an independent contractor, although given authority to hire and fire newsboys, and newsboy injured in course of employment was employee of newspaper within Workmen's Compensation, Insurance and Safety Act 1917, p. 831.

Certiorari to Review an Order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Allen Edgar Young, compensation claimant, opposed by the Call Publishing Company, the employer, and another. The Industrial Accident Commission awarded compensation. Application of the employer for a rehearing was denied, and it brings certiorari. Award affirmed.

John Francis Neylan, John C. Costello, Frank J. Creede, and Henry G. Sanford, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. It appears from the petition: That on the 1st day of January, 1927, the State Compensation Fund insured petitioner, the Call Publishing Company, against liability under the Workmen's Compensation Act (St. 1913, p. 279, as amended). That on the 25th day of May, 1927, Allen Edgar Young sustained an injury in a collision with an automobile while delivering newspapers in the city of

San Mateo, resulting in a fracture of the left femur and a lacerated wound on the left ankle. That on the 30th day of June, through his guardian ad litem, Young filed an application for industrial benefits with respondent Industrial Accident Commission, wherein it was alleged that he sustained his injuries in the course of and arising out of his employment, while employed as a newspaper carrier by the respondent Call Publishing Company, and accordingly prayed that it be determined that the insurance carrier be held responsible for the benefits provided for under the Workmen's Compensation Act. The application came on for hearing before the commission, and on August 17, 1927, it made findings and award.

It determined: (1) That Young, who was 14 years of age, while employed as a newspaper carrier, on May 25, 1927, at San Mateo, by the Call Publishing Company, sustained injury occurring in the course of and arising out of his employment while delivering his papers, proximately resulting in a fracture of the left femur, and a lacerated wound of the left ankle. That at said time said employer's insurance carrier was State Compensation Insurance Fund, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831). (2) That F. W. McKnight was not the employer on said date. (3) That said injury caused temporary total disability from May 25, 1927, indefinitely, entitling the employee to $4.17 a week, based on minimum wages provided by said act. (4) That the employee is entitled to be reimbursed for his reasonable medical expense, to be determined subsequently by the filing of itemized bills in duplicate, if the parties are unable to adjust the same out of court. The award was entered accordingly. Petitioner herein asked for a rehearing upon the ground that the evidence did not justify the findings of facts and that the commission had acted in excess of its authority in making the findings and award. The application was denied, and this proceeding was thereafter instituted, and the same contention is here made.

It appeared at the hearing before the commission that the Call Publishing Company, at the time of the injuries sustained by the applicant, and for many years prior thereto, owned, published, and distributed a large metropolitan daily evening newspaper in San Francisco and in neighboring vicinities. In order to facilitate and expedite the distribution of its newspapers, and the collecting of subscriptions, the insured made and executed various contracts in different locations. About April 21, 1927, an oral contract was executed by the Call with one F. W. McKnight, under which the latter was given the agency for the distribution of the insured's newspapers in the district between Beresford and the city of South San Francisco. No salary agreement was arranged for at this time. McKnight was to receive his lists of customers from the Call, paying $1.85 per 100 for the papers, and for which he charged the subscribers 75 cents per month, the difference between the two figures representing the profit of McKnight under the contract. At this time all the expenses incurred by McKnight in the distribution of the papers and the collection of subscriptions were assumed and paid by him. The receipts for the first month being small, McKnight was given an allowance by the Call of $97 for said month, in order that he might receive some compensation out of his venture. The former agent of the route had employed four or five carriers, one of whom was the injured applicant herein, to assist in the distribution of the papers, and these assistants were retained by McKnight when he took over the agency. Under the arrangement as above set forth, there was little or no profit, and, as the result of a conference had between the parties some time between May 1st and 10th following, it was agreed that McKnight was to receive $22.50 a week from the Call, in addition to any profit that he might make on a sale of the papers. Some time in June, 1927, this amount was raised to $32.50. No definite period was agreed upon as to how long this arrangement was to continue, the sole requirement in this respect being that McKnight was to give the Call 30 days' notice of any intention on his part to discontinue with the arrangement. McKnight testified in this connection that the Call had the right to fire him at any time. Additional facts show: That all bills were made out by the Call upon its own stationery without cost to McKnight. That he was subject to the general direction in the performance of his duties by the city circulation manager of the Call. That, when extras were printed, McKnight was directed by an officer of the Call to put on more boys for street sales, so as to dispose of the papers. That all papers were to be delivered to the satisfaction of the customers, and it was McKnight's responsibility to see that this was done. The list of subscribers kept by McKnight was the property of the Call. It also appeared that McKnight paid all expenses under the different arrangements, and that he had the right to hire and fire the newsboys.

Under these facts petitioners claim that McKnight was an independent contractor in so far as the publishing company is concerned, and that the injured employee was his servant. There is no merit in the contention. The evidence shows conclusively that McKnight was a mere agent of the company, employed for the purpose of distributing its papers. He received a definite compensation for his services, in addition to any profit that might arise under the arrangement. He was subject to dismissal at any time with or without cause, and was under the direction of the officers of the company. True he had authority to hire and fire the newsboys, but they were employees of the publishing company and not his. An extended discussion of this case would answer no useful purpose. The facts speak for themselves. The principles applicable to cases of this character are well considered and discussed in Press Publishing Co., I. A. C., 190 Cal. 114, 210 P. 820.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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89 Cal. App. 1

PEOPLE v. NUNO. (Cr. 1577.)★

District Court of Appeal, Second District, Division 1, California. Feb. 3, 1928.

Hearing Denied by Supreme Court April 2, 1928.

1. **Criminal law ⚿1160—If trial court denies new trial on conflicting evidence, generally appellate courts will not interfere.**

In criminal prosecution, generally appellate courts will not interfere with trial court's granting new trial on conflicting evidence.

2. **Criminal law ⚿935(1)—Trial court, concluding evidence in criminal prosecution is insufficient to support verdict, has duty to grant new trial.**

Trial court, concluding that evidence in criminal prosecution is insufficient to support verdict, has duty to grant new trial.

3. **Criminal law ⚿1156(2)—Granting new trial for insufficient evidence will not be disturbed on appeal except for abuse of discretion.**

In criminal prosecution, where trial court decides testimony is insufficient to support verdict, it has duty to grant new trial, and its action in so doing will not be reversed on appeal except on showing of abuse of discretion.

4. **Criminal law ⚿1158(1)—That evidence would have supported conviction does not render granting new trial error.**

In criminal prosecution, fact that evidence would have supported conviction if trial court had denied new trial does not render trial court's granting new trial error.

5. **Homicide ⚿316—Granting new trial after conviction of manslaughter held not abuse of discretion under evidence.**

After conviction of manslaughter, granting of new trial *held* not abuse of trial court's discretion under evidence indicating that defendant shot into ground to frighten deceased and that bullet glanced and struck him.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Matthew K. Nuno was convicted of manslaughter, and from an order granting a new trial, the People appeal. Affirmed.

Hearing denied by Supreme Court: PRESTON and LANGDON, JJ., voting for a transfer.

U. S. Webb, Atty. Gen., John L. Flynn, and John D. Richer, Deputy Attys. Gen., and Asa Keyes, Dist. Atty., and Leo Aggeler, Deputy Dist. Atty., both of Los Angeles, for the People.

J. Marion Wright, of Los Angeles, for respondent.

WOOD, Justice pro tem. Defendant, a Japanese, was accused by information filed by the district attorney of the crime of murder and was convicted of manslaughter. He made a motion for a new trial, which was granted upon the ground that the evidence was insufficient to justify the verdict. From this order the district attorney has appealed.

The defendant was in charge of an orchard situated on Duarte road, Arcadia. He had been having trouble in protecting the orchard from numerous petty thieves. The deceased, Victoriano Sanchez, and two other Mexican youths entered defendant's orchard and began stealing plums. Defendant's attention was called to the three boys while they were in the orchard, but before he could reach them they left and went down the road a short distance and began eating part of the plums. Defendant drove up with his automobile accompanied by his wife and children. Sanchez was the largest of the Mexican boys and was considerably larger than the defendant. The testimony of the other two boys, Torres and Barrios, who testified for the people, differs from that of the defendant. They stated that after some conversation the defendant grabbed the arm of Sanchez, whereupon all three ran into an orange orchard. Defendant followed them a short distance and then went to the automobile and procured a gun. He then pursued them, firing four shots. At the time of the shooting several rows of trees were between the boys and defendant. Barrios testified that he did not see defendant point the gun. Torres testified that defendant pointed the gun at the boys, but was impeached by a showing that at the preliminary examination he had testified that he could not see the defendant above the waist. Defendant testified, in substance, that upon reaching the boys he asked their names and addresses, to which he received evasive answers; that when the boys laughed and refused to tell their names he took hold of the largest boy and held him by the arm; that he did this because he wanted to arrest him and get the police; that while he was holding the deceased he told his son, 9 years of age, to leave the automobile and go to the gasoline station near by and get the motor officer; that thereupon the deceased jerked away and all three boys ran into an orange or-

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★Hearing denied by Supreme Court.

chard; that defendant ran after deceased and tried to catch him, but failing, went back to his car and got his gun; that his purpose was to catch the defendant and arrest him, and that he had taken his gun with him so that he could arrest the boys more easily; that when he procured the gun he ran back into the orange grove and shot it into the ground about five feet in front of him; that he did not point the gun at the boys nor in their direction, nor were they in sight when he shot; that he shot only to scare the boys so that they would not return to his orchard; that he was not angry and never intended to shoot any of the boys; that he did not know the deceased was injured until later in the day.

Dr. Frank R. Webb, the autopsy physician, testified that the bullet entered at a point about level with the right ear and at about four inches behind the ear; that at that place the skull is a thin-plated bone, thinner than the base of the skull; that the bullet after penetrating this portion of the skull did not hit any hard substance until it came to the place of exit on the left temple about one inch in front of the border line of the ear, where it lodged just beneath the skin; that the point of entrance was an elongated or an oval hole; that if the bullet had entered in a perfectly direct line one would expect to find a rounded opening rather than an elongated one. Edward C. Crossman, after qualifying as an expert on small firearms, testified that he obtained the gun from which the shot was fired from the custodian of criminal records on a court order for the purpose of making experiments; that he made various tests by shooting through bone at various distances for the purpose of determining if shooting a bullet through bone would cause it to be in the condition in which the bullet in question was found; that the bullet fired into the skull of Sanchez was a metal-cased bullet and the base and one side of the bullet were flattened and the nose of the bullet indented; that the bullet was scarred and scratched, all of which was shown by photographs; that all of the bullets which the witness had shot through bone of various thicknesses had a uniform flattened appearance at the point and the bases were perfectly round in every case; that in his opinion the bullet in question struck some object and glanced before it hit the skull of the deceased, the base of the bullet having been flattened badly on one side, which indicated to him that the bullet must have tumbled end over end; that in his opinion the bullet could not have been scarred and gouged as it was simply by being shot into a human skull in the way shown in the skull of deceased. There was some evidence that a sign had been placed against one of the plum trees bearing the words: "If you steal plums again I will shoot you." Defendant testified that he had instructed his son to make a sign to keep people from stealing plums, but that he did not tell the boy what to put on the sign and did not know what was written upon it.

[1] Appellant cites several cases in which verdicts of manslaughter were returned upon evidence showing that the defendants had accidentally discharged firearms and in which the judgments were upheld after the trial courts had denied motions for new trials. In appellant's brief this statement is found:

> "These cases, however, on facts not as strong as those in the case at bar, held that the evidence was sufficient to justify a verdict of manslaughter. It therefore must follow that if the evidence in the case at bar was sufficient to justify a verdict of manslaughter, then the trial court abused its discretion in granting a new trial."

[2-4] This is not a correct statement of the law. The cases are innumerable in which it is held that if the trial court denies a motion for a new trial upon conflicting evidence the appellate courts will not interfere with the ruling. The rule is entirely different, however, where the trial court after listening to the testimony concludes that the evidence is insufficient. In such cases it is the duty of the trial court to grant a new trial, and its action in so doing will not be reversed except upon a showing of an abuse of discretion. We are not merely to decide whether or not the judgment would have been upheld if the trial court had denied the motion for a new trial. The showing must be far stronger to justify a reversal in a case where the trial court in the exercise of its discretion has granted a new trial. In People v. Chew Wing Gow, 120 Cal. 298, 52 P. 657, the court, speaking through Mr. Justice Temple, says:

> "It is claimed by the Attorney General that the judge in granting a new trial abused the discretion reposed in him by the law. It is made his duty to grant a new trial if in his opinion the verdict is against the evidence. This is one of the most important duties which the trial judge has to perform, and, since no efficient review of his action can be had, it is peculiarly incumbent upon the judge to weigh the evidence with care, and grant a new trial when, in his opinion, the interests of justice require it. In my opinion, there is no more prolific cause of the miscarriage of justice than the reluctance of trial judges to grant new trials in criminal cases. This court can review the evidence only so far as it is necessary to pass upon points of law raised; and, although there are cases in which it is assumed that this court will on appeal review such an order as that involved here, no case can be found in which an order granting a new trial in a criminal case for insufficiency of the evidence was reversed."

[5] It is manifest that the trial judge after hearing the evidence must have concluded that the testimony of the defendant, re-enforced by that of the expert witnesses, was

worthy of credence. In granting the motion for a new trial he did not abuse the discretion reposed in him by law.

The order granting the motion for a new trial is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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89 Cal. App. 148

MAHONEY v. NATIONAL SURETY CO.★

(Civ. 5362.)

District Court of Appeal, First District, Division 1, California. Feb. 9, 1928.

Rehearing Denied March 10, 1928. Hearing Denied by Supreme Court April 9, 1928.

1. **Courts ⚷198—Jurisdiction of superior court sitting in probate can be exercised only after compliance with statute.**

Jurisdiction of superior court sitting in probate is limited, and can be exercised only after compliance with statutory requirements.

2. **Executors and administrators ⚷184—After widow had acknowledged to administrator receipt of insurance money, her waiver of claim of exemption of insurance money was ineffectual.**

Attempted waiver by widow of claim of exemption of insurance money *held* ineffectual, where she had previously acknowledged to the administrator that she had received the insurance money.

3. **Executors and administrators ⚷181—Superior court in probate held without jurisdiction to deny widow's application to set aside insurance as exempt property.**

Superior court, sitting in probate, *held* without jurisdiction to deny application of widow, duly made and noticed, to set aside insurance money, which was exempt property.

4. **Executors and administrators ⚷527(1)—Where exempted insurance policy was sole asset of estate, surety on administrator's bond held not liable for administrator's failure to pay claim for services.**

Where widow's attempted waiver of claim of exemption of insurance policy, which was the sole asset of the estate, was ineffectual because she had acknowledged receipt of the money to the administrator, surety *held* not liable on administrator's bond for failure to pay claim for services, since there were no funds properly chargeable to the administrator out of which debt could have been paid.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by I. G. Mahoney against the National Surety Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Knight, Boland & Christin, of San Francisco, for appellant.

Goldman, Nye, Surr & Spicer, of San Francisco, for respondent.

STROTHER, Justice pro tem. Jose J. Robledo died, leaving him surviving a widow, Irene Robledo, and for estate a policy of insurance amounting to $1,988.06. On November 12, 1920, Nathan C. Coghlan was appointed as administrator of his estate, and took the oath and gave bond, upon which the defendant National Surety Company was the surety. John Harloe was attorney for the administrator, and James M. Carroll was attorney for the widow. The check for the insurance money was turned over to Carroll for collection, for the reason, it appears, that he was depositor in a local bank, which was correspondent of the bank upon which the check was drawn. The money was never paid over to the administrator. It is stipulated that the insurance policy was the sole asset of the estate.

On the 2d day of February, 1921, the widow filed in the estate proceedings her petition asking that the insurance money be set aside to her as exempt property. The petition was set for hearing on February 18, 1921, at 10 o'clock a. m., and due notice of the hearing was given; the proofs filed in the estate proceeding being introduced in evidence at the trial of this action. No written opposition to the granting of the petition was filed in the proceeding at any time. On May 3, 1921, Coghlan filed an account, as and for his first and final account of his administration of the estate, crediting himself with the payment of $1,988.06 to Irene Robledo. The account was fixed and noticed for hearing on May 27, 1921. On May 17, 1921, Goldman, Nye, and Surr, attorneys, filed exceptions to the account setting out as the basis of their right to except that they had performed extraordinary services for the administrator, not specifying their character, which were of the reasonable value of $694.40, which the administrator had agreed to pay, and, further, as representing themselves and other named creditors of the estate, whose claims had been allowed and filed, aggregating the sum of $694.40.

On May 20, 1920, the widow filed, at whose instance does not appear, her waiver of claim of exemption of the insurance money. Her receipt for this money, of date February 18, 1921, was filed as a voucher accompanying the administrator's account.

There appears in the record in the estate proceedings an order reciting that the petition of Goldman, Nye, and Surr for the allowance of attorneys' fees "coming on duly for hearing upon due notice this 13th day of April, 1921," and that it appeared that they had performed services of great value to the administrator which were reasonably worth the sum of $694.40, and directed the administrator to pay the same forthwith. The order concludes, "Done in open court this 27th day

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★Rehearing denied. Hearing denied by Supreme Court.

of May, 1921," and is indorsed by the clerk, "Filed May 23, 1921."

The following entry appears in the minutes on the date May 27, 1921: "Application for settlement of account and petition to exempt insurance money denied." No appeal was taken from any of these orders. This is all the evidence introduced from the proceedings in the matter of the estate of Robledo.

Goldman, Nye, and Surr assigned their claim for extraordinary services to their stenographer, for collection, taking no action as to their allowed claim against the estate. Demand was made upon the administrator and his surety, the defendant here, payment was refused, and this action was brought upon the bond. The trial was before the court without a jury, and judgment entered in favor of the plaintiff, from which the defendant appealed; the record coming before this court on the judgment roll and a bill of exceptions.

The statement of the evidence which follows is from the oral testimony at the trial, most of it from plaintiff's witnesses, none of it denied by them.

Some part of the money received from the insurance policy, perhaps all of it, was paid over by Carroll to the widow, probably before the date fixed for the hearing of her petition. On February 18, 1921, the date fixed for its hearing, in the afternoon of that day, she signed a receipt to the administrator for the full amount, in the presence of her attorney, Carroll, and Harloe, attorney for the administrator, and delivered it to the latter. Shortly after 10 o'clock in the morning of that day, in the courtroom of the department in which the petition was noticed for hearing, Harloe, the administrator's attorney, called the attention of the judge presiding to the petition, stating that the administrator had no ground for opposition to it, whereupon the judge made the statement that the petition was "granted." Some 20 or 30 minutes thereafter, and after Harloe had left the courtroom, Goldman appeared, and upon inquiry was told by the court clerk that the petition had been granted. He then addressed the court, and stated that he wished to oppose the petition, and was told by the judge that, if he would notify the other parties, the court would postpone action until 2 o'clock in the afternoon. He did not notify them, and nothing further appears to have been done in the matter by the court, or any one else, until May 27th, upon the hearing of the administrator's account.

Goldman, Nye, and Surr performed no services, extraordinary or otherwise, for the administrator, and were at no time employed by him. Coghlan so testified, without objection, at the trial. Goldman and Nye, both of whom were witnesses for the plaintiff, made voluntary statements clearly indicating that they procured the allowance to cover their own, and other claims which they represented, against the estate.

The only evidence of compliance by the attorneys with the requirements of section 1616, Code of Civil Procedure, of a written application for allowance of their fees, and of notice of the application, is the recital in the order for its allowance and payment. Coghlan testified, again without objection, that no notice was given to him of any such application.

[1] While the jurisdiction of the superior court, sitting in probate, is limited, and can only be exercised after complying with the statutory requirements for its exercise, yet, when exercised within its probate powers, its findings and orders are probably not subject to collateral attack.

[2, 3] Having acknowledged to the administrator receipt of the insurance money, the widow was without authority thereafter to waive her claim, and the waiver was ineffectual. The order of the court denying the petition to set aside the insurance money was void. The requirement upon the court to set aside exempt property upon application of the widow, duly made and noticed, is mandatory, and the court is without jurisdiction to make an order denying it. Estate of Ballentine, 45 Cal. 696; County of Los Angeles v. State, 64 Cal. App., page 296, et seq., 222 P. 153.

The order apparently actually made by the court on February 18th was the only one which could be made.

[4] From the foregoing it follows that there were no funds properly chargeable to the administrator out of which to pay plaintiff, and that his surety is not liable.

The judgment is reversed, and the trial court is directed to make findings and decision in accordance herewith, and to enter judgment for the defendant.

We concur: TYLER, P. J.; CASHIN, J.

89 Cal. App. 157

LEFFINGWELL v. FAUBION. (Civ. 5107.)

District Court of Appeal, Second District, Division 1, California. Feb. 9, 1928.

1. Appeal and error ⚷1011(1)—Trial court's findings on conflicting testimony are conclusive, where record contains supporting evidence.

Where there is ample evidence in record to sustain trial court's findings on conflicting testimony, appellate court cannot disturb them.

2. Evidence ⚷584(3), 598(1)—Testimony of one witness is sufficient to establish fact, notwithstanding evidence of witness' bad reputation and contradictory testimony by several witnesses.

Testimony of one witness entitled to credit is sufficient to establish a fact in a civil case, even though contradicted by several witnesses and although there is evidence that reputation of the sole witness is bad.

3. Evidence ⚷314(1)—Defendant's testimony of instructions to agent and agent's report held hearsay and properly excluded on issue of tender of pasturage money.

In action involving question of whether defendant's agent tendered plaintiff money at a certain time for pasturage for defendant's horses and mules, defendant's testimony as to instructions given agent and testimony of agent's report *held* properly excluded as hearsay.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Anna G. Leffingwell against Frank Faubion, wherein defendant filed a cross-complaint. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

J. C. Craig, of Los Angeles, and J. F. Seymour, of Riverside, for appellant.

Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, for respondent.

WOOD, Justice pro tem. A contract was entered into by plaintiff and defendant, whereby plaintiff agreed to furnish pasturage for certain horses and mules of the defendant at the rate of $2 a head per month. Five colts were to be pastured at the rate of $1 a head per month. Some of the animals were turned into plaintiff's pasture on November 6, 1921, and others on November 17, 1921. By the terms of the agreement, defendant was to remove his stock as soon as possible after the commencement of the rainy season. Plaintiff alleges that the stock was not removed until February 23, 1922. She asks judgment for $353.30 for pasturage and an additional sum of $500 claimed to be due on account of damages done to her premises by the presence of the stock during the rainy season. Defendant alleges that on December 21, 1921, he tendered to plaintiff the sum of $100 and offered to remove his stock. He claims that there was due at that time only the sum of $98.80. Defendant filed a cross-complaint, in which he claims that he has suffered damages in the sum of $777 occasioned by the conduct of plaintiff in not properly taking care of his stock. The trial court found that there was due plaintiff the sum of $342 for pasturage. The court found against plaintiff on her claim for alleged damages to her premises and against defendant on his claim for alleged damages to his stock. Defendant made a motion for a new trial, which was denied, and he now appeals from the judgment and from the order denying a new trial.

A sharp conflict is presented by the evidence on several points, the number of animals pastured, the amount due on December 21, 1921, the facts concerning the alleged tender of that date, and the date on which the stock was removed. On all these points the findings are in favor of plaintiff and are fully sustained by the evidence. Appellant states in his brief:

> "It is for the court to determine whether the animals were pastured until February 23, 1922, or whether they were pastured until January 15, 1922, with the exceptions noted, and, further, if there were 41 horses and 5 colts, as claimed by the plaintiff, or 36 horses and 5 colts, as claimed by the defendant. The only witness for the plaintiff as to the number of horses pastured, and the time of pasturage, was the plaintiff herself, while on the part of the defendant as to the number of horses pastured and the time of pasturage there was the testimony of the defendant and A. Frosseth, Leon D. Gates, Frank Goodall, and the stipulated testimony of Mr. Charlie Salisbury."

The record discloses this testimony by the plaintiff:

> "Q. How many horses, mules, and colts altogether were on your pasture? A. 46. Q. And those are the defendant's horses that you have testified with respect to? A. Yes, sir. Q. How long did the 46 animals remain on your pasture land? A. Until about the 23d of February. Q. What year? A. 1922. Q. When were they removed, if at all? A. It was in the night of February 23d."

On the subject of the alleged tender, plaintiff testified as follows:

> "Q. I will ask you then if it is not a matter of fact that some time later during that day that Mr. Salisbury returned to your home and offered you $100 in payment for the pasture? A. He came, but he didn't offer it to me, but he said this—he said, 'Frank won't come because somebody beat him up and he don't want to venture out, but he will pay you the first month on the 18 horses that were brought in there, and then you can fight it out with Frank for the balance, but he will pay you because he has to pay you.' Now he says, 'He can pay you that,' but he never offered me any money. I never saw any money, and this man was never in the house that I know of in my life; I don't know that he was, if he was he didn't go there as a

witness with Charley Salisbury. He stayed out in the road if he was there."

[1, 2] The trial court found that defendant did not tender the sum of $100 on December 21, 1921, as claimed; that the sum due at that time was more than $100; that defendant did not then demand possession of his stock. The findings having been made upon conflicting testimony and there being in the record ample evidence to sustain the findings, the action of the trial court cannot be disturbed. Appellant lays stress upon the fact that plaintiff's testimony is not corroborated, while that of the defendant is corroborated by several witnesses. It is well settled that the testimony of one witness entitled to credit is sufficient to establish a fact in a civil case, even though it be contradicted by the testimony of a number of witnesses, and this notwithstanding the reputation of the sole witness was declared to be bad by several other witnesses. Manifestly the judge believed the testimony of the one witness in this case.

[3] Defendant contends that the trial court erred in refusing to allow him to prove his instructions to the agent whom he sent to make the alleged tender. The court sustained an objection to this testimony, as also to testimony concerning the report to defendant by the agent, on the ground that it was hearsay and not binding on the plaintiff. The court did allow, however, testimony showing that the money taken by the agent to the premises of plaintiff was in fact the property of defendant. The action of the court was not erroneous.

The judgment and order are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

89 Cal. App. 94

ST. CLAIR v. BRIX et al. (Civ. 6070.)★

District Court of Appeal, First District, Division 2, California. Feb. 8, 1928.

Rehearing Denied March 7, 1928. Hearing Denied by Supreme Court April 5, 1928.

1. Dismissal and nonsuit 🔑60(1)—Plaintiff's filing request and order for default judgment held not to render granting defendant's prior motion to dismiss for lack of prosecution error.

Filing of request and order for entry of default judgment, which was not entered, did not give plaintiff absolute right to default judgment so as to render granting defendant's motion to dismiss for lack of due prosecution, noticed prior to motion for default, error.

2. Dismissal and nonsuit 🔑80—On granting motion to dismiss for want of prosecution, refusing to thereafter pass on motion for default judgment held proper.

Where, when motion to dismiss for want of prosecution was noticed there was no motion for default pending, considering motion to dismiss first was proper, and, on dismissal of action which had been pending more than seven years without plaintiff's attempting to secure default, refusal to pass on plaintiff's motion for entry of default was not error.

3. Dismissal and nonsuit 🔑60(1)—Court, without legislation, has general discretionary power to dismiss for want of prosecution where no answer has been filed.

Court, independent of legislation, has general discretionary power to dismiss for want of prosecution, in action in which no answer has been filed.

4. Appeal and error 🔑948—Appellant from judgment of dismissal for want of prosecution has burden to establish affirmatively abuse of discretion.

Appellant from judgment dismissing action for want of prosecution has burden to establish affirmatively that dismissal was abuse of trial court's discretion.

5. Dismissal and nonsuit 🔑73—In considering motion to dismiss for want of prosecution, trial court had right to consider all facts appearing in affidavits and record.

In passing on motion to dismiss case for want of prosecution, trial court had right to consider all facts appearing in affidavits and record, including fact that plaintiff's offer to extend defendant's time to answer had inception, at least in part, in desire to secure defendant's stipulation to certain facts, and that, while threatening default some seven years later, he was still attempting to secure stipulation in refence to taking of deposition.

6. Dismissal and nonsuit 🔑73—In passing on motion to dismiss for want of prosecution, trial court can consider plaintiff should use due diligence to expedite case.

In passing on motion to dismiss for want of prosecution, trial court has right to consider duty rests on plaintiff at every stage of proceedings to use due diligence to expedite his case to final determination.

7. Dismissal and nonsuit 🔑60(1)—Granting defendant's motion to dismiss action which had been pending over seven years held not abuse of discretion.

Where action had been pending over seven years, although plaintiff's attorney had offered to extend defendant's time to answer through desire to secure stipulation to certain facts, and although threatening default, some years later was still attempting to secure stipulation in reference to taking of deposition, dismissing case on defendant's motion for want of prosecution, filed prior to plaintiff's request for order for entry of default judgment was not abuse of discretion.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by E. S. St. Clair against H. H. Brix. On the death of defendant, Emma M. Brix and others, administratrix and administrators with the will of H. H. Brix, deceased, annexed, were substituted as defendants. From a judgment of dismissal for want of prosecution, plaintiff appeals. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

F. E. Borton and James Petrini, both of Bakersfield, for appellant.

Fenston, Williams & Hansen, Chester O. Hansen, and Ray W. Hays, all of Fresno, for respondents.

LUCAS, Justice pro tem. Plaintiff appeals from a judgment of dismissal for want of prosecution. This action, originally begun in Kern county, was by stipulation transferred to Fresno county, the original complaint being filed therein on May 5, 1915. Issue was joined on November 22, 1916, the case set for trial for April 26, 1917, and thereafter reset for December 4, 1917. By reason of the death of the original defendant, plaintiff was permitted to file and did file on November 26, 1917, an amended and supplemental complaint, substituting defendant's administrators as parties defendant and alleging due presentation and rejection of the claim upon which plaintiff's original cause of action was based. Defendants were granted ten days in which to answer.

On November 26, 1917, M. B. Harris of Fresno, then one of the attorneys of record for defendants, wrote Anderson and Borton of Bakersfield, attorneys for plaintiff, advising them that the court would not set the case for trial until it was at issue, and saying that he would therefore have to wait until the filing of defendants' answer before arranging for the trial. Anderson and Borton replied on November 27, 1917, suggesting the possibility of stipulating to certain facts, and concluding:

> "You might find it desirable, if we attempt to ascertain and stipulate these facts, to postpone answering the amended complaint until we have settled upon the stipulated facts. Should you see fit to do so, you can regard this letter as an indefinite extension of time to answer, while we are investigating the question of stipulation."

Mr. Harris answered on November 30, 1917:

> "I think we can probably stipulate to the matters suggested in your letter. As soon as I can, I will have these facts investigated, and will then write you definitely. Meantime, we will understand that my answer need not come in until we either stipulate or decide not to stipulate, it being understood of course, that this only means a reasonable delay on my part."

During the ensuing six years, plaintiff's prosecution of the cause consisted in his counsel writing four letters to Mr. Harris in reference to dates of trial and the filing of an answer. Replies were received to two of them.

On February 19, 1924, Mr. Borton wrote Mr. Harris in reference to taking the testimony of a certain witness and inclosing a stipulation to be signed by counsel. By letter dated February 25, 1924, Mr. Harris advised that Mr. Earl J. Fenstenmacher of Fresno was now defendants' attorney, though formal substitution had never been filed, and that Mr. Borton's letter and papers in the case had been turned over to him. Mr. Borton received no further letter from Mr. Harris. On December 4, 1924, Mr. Borton went to Fresno, called at Mr. Fenstenmacher's office, and, finding he was absent from the city that day, left word with his clerk that defendants had been in default for seven years, and that he desired a stipulation for the taking of a deposition. Having received no word from Mr. Fenstenmacher, Mr. Borton, under date of December 11, 1924, wrote him reminding him on his visit and asked him to file his answer and sign the stipulation. On the same date Mr. Borton wrote Mr. Harris, saying he had in mind to take a default if Mr. Fenstenmacher did not answer, but that he hesitated to do so in a case where Mr. Harris was attorney of record without giving full and sufficient notice. He asked Mr. Harris to urge Mr. Fenstenmacher to file an answer and sign the stipulation.

On December 15, 1924, Mr. Borton received a letter from Mr. Fenstenmacher in reply to his of December 11th. In it Mr. Fenstenmacher said:

> "We are now looking into the matter and will again communicate with you in regard to the same, within the next few days."

When Mr. Borton next heard from Mr. Fenstenmacher it was on January 9, 1925, when he received notice of motion to dismiss for want of prosecution. The same day the court made its order granting defendants time to appear.

Thereafter, and on January 14th, plaintiff's attorneys delivered to the clerk for filing a request and order for the entry of defendants' default. The clerk filed this request on January 20th, but did not enter the default. Subsequently plaintiff moved the court to enter the default of the defendants and for judgment in favor of plaintiff and against defendants. This motion was argued and submitted at the same time defendants' motion to dismiss was presented, to wit, on January 23d. On January 17th the court extended defendants' time to appear, and on February 5th and February 14th, respectively, the court made orders granting defendants ten days' additional time in which to file their answer. No answer, however, was ever filed, and on March 18, 1925, the court made the following order:

> "Defendants' motion for an order of court dismissing the above-entitled action having been heretofore argued herein, and submitted to the court for its decision, and by the court taken under advisement; and the court, now being fully advised in the premises, renders its decision, wherein it is ordered that said motion be and it is hereby granted, and said action is hereby dismissed."

The court did not otherwise pass upon plaintiff's motion for default, and a judgment of dismissal was entered, from which plaintiff appeals.

Appellant contends (1) that he had an absolute right to the entry of a default on January 14th, when the request for default was handed to the clerk; (2) assigns as error the court's action in "denying the motion of plaintiff to enter the default of defendants"; and (3) complains that the making of the order of dismissal constituted an abuse of discretion.

[1] In view of the rule laid down in Grigsby v. Napa County, 36 Cal. 585, at p. 589, 95 Am. Dec. 213, the matter of plaintiff's absolute right to the entry of a default by the clerk is immaterial. In that case defendant noticed its motion to dismiss for want of due diligence the day before summons was served. Before the motion was heard, plaintiff caused the default of the defendant to be regularly entered. At the time defendant's motion was presented, plaintiff offered to prove damages and moved for final judgment. The court nevertheless granted the motion to dismiss. The Supreme Court, in upholding the trial court's action, held:

> "The order dismissing the cause took effect by relation from the time when the notice of the motion was served. * * * The mere noting of the default did not, in law, preclude the court from entertaining the motion to dismiss."

[2] This case also appears to effectually dispose of appellant's second point, namely, that the trial court erred in denying, or rather in refusing to pass upon, plaintiff's motion for entry of default.

To the same general effect is the case of Romero v. Snyder, 167 Cal. 216, at p. 220, 138 P. 1002, 1004:

> "The situation existing at the time the motion" (to dismiss for want of diligence in prosecution) "was noticed is that which controls its determination."

It is to be borne in mind that from November 26, 1917, the date of the filing of plaintiff's amended complaint, until January 14, 1925 (five days after the filing of defendants' motion to dismiss), a period of more than seven years, plaintiff made no attempt to secure a default. Such was the situation existing when the motion to dismiss was noticed. There being no motion for a default pending at the time the motion to dismiss was noticed, the trial court very properly first considered defendants' motion. Having seen fit to dismiss the action, the application for default fell.

The remaining question is whether or not the trial court, in view of the circumstances as they existed at the time the motion to dismiss was noticed, was guilty of an abuse of discretion in granting such motion.

[3] It is agreed by counsel, and indeed is well settled law, that in the court, independent of legislation, is vested general discretionary power to dismiss for want of prosecution in actions in which no answer has been filed. Romero v. Snyder, 167 Cal. 216, 138 P. 1002; Overaa v. Keeney, 169 Cal. 628, 147 P. 466.

[4] It is also well settled that it is incumbent upon the appellant to establish affirmatively that there has been an abuse of discretion. Grigsby v. Napa County, supra.

[5] In the exercise of its discretion the trial court had a right to, and presumably did, take into consideration all the facts appearing in the affidavits and the record (People's Home Savings Bank v. Sherman, 150 Cal. 793, at p. 796, 90 P. 133), including the fact that plaintiff's courteous offer to extend defendants' time to answer had its inception, at least in part, in a desire to secure defendants' stipulation to certain facts, and that, while threatening a default some seven years later, he was still attempting to secure a stipulation—this time in reference to the taking of a deposition. From this it would appear that at no time was plaintiff prepared for immediate trial. A letter from plaintiff's counsel, bearing date March 20, 1923, written after a period of inaction of almost two and a half years, may also have been considered significant: "My client spoke to me recently and said that he was prepared to try the case now."

[6] The trial court further had the right to consider, and presumably did consider, that the duty rests upon the plaintiff at every stage of the proceedings to use due diligence expedite his case to a final determination. Raggio v. S. P. Co., 181 Cal. 472, at p. 475, 185 P. 171.

While it may seem harsh that a plaintiff who has refrained from taking a default for a long period of time is ultimately in effect himself defaulted, the complete answer under the rule last above stated is that his predicament is due entirely to his own lack of diligence rather than to defendants' neglect.

Had plaintiff's interests demanded, or had his attorneys earnestly desired an early trial, it was easily within their power, during at least the first year or two of defendants' default, to secure either a trial on the merits or to obtain a justifiable default. By written notice to the effect that a default would have to be taken unless an answer was filed within a stipulated time, plaintiff would have complied both with the rule of due diligence and the requirements of legal ethics.

[7] In the light of the foregoing discussion and the rule that an "enactment to prevent unlimited postponement of trials is to an extent one of public policy as well as of private concern to litigants" (City of L. A. v. Sup. Ct., 185 Cal., at p. 405, 197 P. 79), we believe the court in no wise abused its discretion in granting the motion to dismiss.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

89 Cal. App. 145

GOTTSTEIN v. HOLMES. (Civ. 5505.)

District Court of Appeal, First District, Division 1, California. Feb. 9, 1928.

1. Taxation 🔑788(4)—Deed to state is conclusive evidence of regularity of auditor's extension of tax (Pol. Code, § 3787).

Extension of tax on real property by auditor is no part of assessment, and deed to state is conclusive evidence of regularity, under Pol. Code, § 3787.

2. Taxation 🔑428—Fraction which auditor must drop in extending tax is one resulting from multiplication of assessed value by tax rate (Pol. Code, § 3731).

The fraction which Pol. Code, § 3731, requires auditor to drop in extending tax is one resulting from multiplication of assessed value of property by tax rate.

3. Taxation 🔑621—Charge of 50 cents against each of lots separately assessed by tax collector in sale of property held not excessive (Pol. Code, § 3770).

Where lots were separately assessed, charge of 50 cents against each lot by tax collector in sale of property *held* not excessive, since Pol. Code, § 3770, requires tax collector to collect such amount on each lot of land separately assessed.

4. Taxation 🔑788(5)—After issuance of tax deed, it is conclusively presumed that collector stamped words, "Sold to the state," on tax statements (Pol. Code, § 3787).

After issuance of tax deed, it is conclusively presumed, under Pol. Code, § 3787, that collector stamped on tax statements issued by him subsequent to sale words, "Sold to the state," with date of sale.

5. Taxation 🔑734(9)—Contention that there was no showing of notice by mail of tax sale to person to whom property was last assessed held not to show invalidity of sale (Pol. Code, §§ 3785b, 3787).

Contention that there was no showing of notice by mail of tax sale to person to whom property was last assessed *held* not to show invalidity of sale, since provisions of Pol. Code, § 3787, are, by section 3785b, made applicable to deeds executed by tax collector conveying land sold to state to purchasers after 5-year period of redemption.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action in partition and to quiet title by John Gottstein against Nellie K. Holmes. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph S. Campbell, of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondent.

STROTHER, Justice pro tem. The plaintiff became the purchaser of two lots in the city of San Diego, in 1923, at a sale by the tax collector of San Diego county of property sold to the state for delinquent taxes. This action was commenced in partition of the lots between plaintiff and his grantees of an undivided interest, and, incidentally, to quiet the title as to the defendant appealing, and other persons. Appellant, Holmes, answered, asserting title in herself with a cross-complaint to quiet title. At the conclusion of the trial interlocutory judgment was entered in favor of plaintiff and the cross-defendants, from which defendant, Holmes, appeals.

The grounds presented by appellant in support of her contention for reversal of the judgment are errors in the assessment and other proceedings, which, it is claimed, invalidated the sale to the state and the sale to plaintiff, and title in herself by prescription.

The sale to the state was for the delinquent taxes of 1917. The assessment roll for that year was introduced in evidence by defendant appellant. This showed that the lots were assessed separately to the same owner, but the auditor extended the tax on the sum of their assessed valuations, the total tax being $1.59. This total he divided into two parts, one of 80 cents, the other of 79 cents, and entered them in the several columns as first and second installments of the tax, respectively. It is the contention of appellant that this invalidated the assessment, and therefore made void the deed to the state. This contention cannot be sustained.

[1, 2] In the first place, the extension of the tax by the auditor is no part of the assessment of the property, and, assuming that it was improperly done, it is one of the proceedings, of the regularity of which section 3787 of the Political Code provides that the deed to the state shall be conclusive evidence. But the fraction which section 3731 of the Political Code requires the auditor to drop is one resulting from the multiplication of the assessed value of the property by the tax rate. In this case there was no such fraction resulting.

[3] It is also claimed by the appellant that the charge of 50 cents against each of the lots assessed, by the tax collector in his sale of the property, was excessive. The lots were, however, separately assessed, and section 3770 of the Political Code requires the tax collector to collect "fifty cents on each lot, piece, or tract of land separately assessed."

The items above mentioned appear upon the delinquent assessment roll, and it is the contention of appellant that the sale was void because for an amount in excess of that authorized by law. As we have seen, the amounts were in exact conformity with the law.

[4] It is also contended by appellant that

the failure of the collector to stamp on the tax statements issued by him subsequent to the sale in 1917 the words, "Sold to the state," with the date of the sale, invalidated the sale. This, however, is one of the things which, after the issuance of the tax deed, is conclusively presumed to have been done, under the provisions of section 3787, Political Code. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P. 936.

[5] The provisions of section 3787 are, by section 3785b, expressly made applicable to deeds executed by the tax collector conveying lands sold to the state to purchasers after the 5-year period of redemption. This disposes of appellant's contention that there was no showing of notice by mail, of the sale, to the person to whom the property was last assessed.

The final contention of appellant that she had acquired title as against the owners of the tax title, by adverse possession, requires no refutation. The statement of it is sufficient.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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88 Cal. App. 777

NORTON et al. v. BEDELL ENGINEERING CO. et al. (Civ. 3390.)★

District Court of Appeal, Third District, California. Feb. 2, 1928.

Rehearing Denied March 3, 1928. Hearing Denied by Supreme Court April 2, 1928.

1. Mechanics' liens 🔑5—Statutory procedure to establish and foreclose mechanic's lien must be substantially complied with (Code Civ. Proc. § 1187).

Under Code Civ. Proc. § 1187, remedy for securing payment of claim through mechanic's lien is statutory, and procedure required by statute must be substantially complied with.

2. Mechanics' liens 🔑271(15)—Mechanics' lien foreclosure complaint held defective for failure to show that claim specified kinds of material and labor (Code Civ. Proc. § 1187).

Under Code Civ. Proc. § 1187, complaint seeking to establish and foreclose mechanic's lien, whose allegations as to notice of mechanic's lien did not state specifically kind of materials and labor furnished, was defective on objection to introduction of evidence.

3. Mechanics' liens 🔑271(15)—Proposed amendment to complaint held not to supply allegations showing that lien claim specified the nature of the work and materials (Code Civ. Proc. § 1187).

Under Code Civ. Proc. § 1187, where complaint, seeking to establish and foreclose mechanic's lien, did not allege notice of mechanic's lien specifically stated materials and labor furnished, proposed amendment, merely alleging that plaintiffs furnished to defendants labor and materials actually used in construction of building, did not remedy complaint in that respect so as to make evidence admissible thereunder.

4. Pleading 🔑428(4)—Failure to demur to complaint seeking to foreclose mechanic's lien held not to waive right to object to introduction of evidence (Code Civ. Proc. §§ 434, 1187).

Under Code Civ. Proc. § 434, failure to demur to complaint in proceeding to foreclose mechanic's lien, which was insufficient under section 1187, did not waive right to object to introduction of evidence.

5. Mechanics' liens 🔑271(15)—Complaint, based on claim of mechanic's lien setting out neither copy of notice of lien nor allegations of material statements contained therein, fails to state cause of action for foreclosure of lien (Code Civ. Proc. § 1187).

Complaint, based on claim of mechanic's lien, which sets out neither copy of notice of lien required by law nor allegations of material statements therein contained, required by Code Civ. Proc. § 1187, fails to state cause of action for foreclosure of lien.

6. Mechanics' liens 🔑139(1)—Statute held not to excuse omission to state materials furnished or work performed in notice of mechanic's lien (Code Civ. Proc. §§ 1187, 1203).

Code Civ. Proc. § 1203, is intended to relieve mechanic's lien claimant against error or mistake occurring in figures or facts in notice of lien, but it does not purport to relieve one from absolute omission for materials furnished or work performed in notice of lien required by section 1187, and in complaint.

7. Mechanics' liens 🔑134—Unless claimant files notice containing statutory statements, he is not entitled to mechanic's lien (Code Civ. Proc. § 1187).

Unless claimant filed his notice containing statements required by Code Civ. Proc. § 1187, he is not entitled to mechanic's lien.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Suit by Thomas and Walter Norton, doing business as Norton & Norton, against the Bedell Engineering Company and others, in which Frank G. Raichle and G. W. Dulany were substituted as parties defendant, to foreclose a mechanic's lien. From a judgment in favor of the substituted defendants, plaintiffs appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.
McComb & Hall, of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of respondents Frank G. Raichle and G. W. Dulany, Jr., substituted defendants, which was entered following an order sustaining their objection to the introduction of evidence on the part of

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★Rehearing denied. Hearing denied by Supreme Court.

appellants in support of their claim for a mechanic's lien. The objection was sustained on the ground that the complaint failed to state facts sufficient to constitute a cause of action for the foreclosure of a mechanic's lien.

The complaint was originally filed against the Bedell Engineering Company and a number of fictitious defendants. The defendant corporation suffered default. Frank G. Raichle and G. W. Dulany, Jr., were substituted at the trial as parties defendant, and filed separate answers specifically denying all the material allegations of the complaint. The complaint alleged that the "above-named defendants * * * (were) owners of * * * lots 46, 47, 48 and 49, tract No. 4685, of Los Angeles"; that between December 13, 1922, and February 27, 1923, plaintiffs supplied defendants with labor and materials pursuant to contract, of the value of $1,990, no part of which has been paid; that said work consisted of installing electric fixtures in defendants' building on said premises. The only allegations in the complaint with reference to the notice of lien required by law to be filed, are found in paragraph 5 as follows:

> "That thereafter, to wit, on April 11, 1923, and within 30 days after the filing of notice of completion of said structure on said building upon which said labor and fixtures were furnished, and within the time provided by law, plaintiffs caused to be filed in the office of the county recorder of Los Angeles county, California, in book 2048, page 186, of official records of said county, a mechanic's lien for said labor and material. and that said lien has not been released or satisfied in any way."

The complaint failed to specify any of the material statements which may have been contained in this notice of lien, as required by section 1187 of the Code of Civil Procedure.

At the trial it was conceded by appellants that their contract for labor and materials was not made with these respondents, but was made solely with the defendant corporation Bedell Engineering Company. The question of the liability under this contract, in the cause of action based upon assumpsit, is not involved on this appeal. Appellants' counsel, Mr. Stone, announced in court: "We do not care to proceed on anything except the foreclosure of our lien." When appellants' first witness was called, these respondents objected to the introduction of any evidence in proof of the alleged mechanic's lien upon the ground that the complaint failed to state facts sufficient to constitute a cause of action for a mechanic's lien, for the reason that it omitted to allege any of the material facts required to be stated in the notice of lien under the provision of section 1187, supra.

Thereupon the appellants asked leave to amend their complaint by adding to paragraph 5, above quoted, the following language:

> "That said mechanic's lien claim set forth that plaintiffs actually furnished to the defendants the labor and material actually used in the construction of said building, and that said labor was actually done and performed, that said material was actually furnished, and actually entered into the erection and construction of said building so described."

And further:

> "That the said lien set forth the names of the owners as the defendants in this action. That it further set forth that said owners contracted for said labor and materials, and caused said structure to be erected. That it further set forth the date the said labor and material was furnished. That it further set forth the terms, time given, and conditions of said contract for said labor and the payment therefor. That it further set forth that said contract had been fully performed on the part of the claimants, plaintiffs in this action. That it further set forth the date on which the said material and labor was delivered and rendered, and when they ceased to furnish the same. That it further set forth the date of the completion of said building. That it further set forth the exact amount due after allowing all offsets and credits. That it further set forth the fact that the plaintiffs claim the benefit of the law of the state of California relative to liens, mechanic's and laborers upon real property. And further that the claim is duly verified."

To this application to amend the court said:

> "Your proposed amendment is still defective. * * * You can't amend the complaint to state anything more than the lien shows."

To which the appellants' attorney replied:

> "I have dictated the complaint *as it is in the lien; the lien does not state the kind of labor or materials—I concede that.* * * *"

Whereupon the court denied appellants' application to amend, in the following language:

> "I think this (complaint) * * * is still defective as a lien, therefore I deny you leave * * * to amend."

Subsequently, findings and a judgment were duly filed and entered in the cause in favor of the respondents and against appellants denying the validity of the alleged mechanic's lien.

[1-3] Conceding, for the purpose of this appeal, that the complaint included the statements heretofore quoted which appellants offered by way of amendment, still it is fatally defective with respect to several material allegations which are necessary in order to state a cause of action based upon a claim of mechanic's lien. The remedy for securing the payment of a claim by means of a mechanic's lien is statutory, and the procedure provided by law must be substantially com-

plied with. 17 Cal. Jur. 16, § 6. Section 1187, Code of Civil Procedure, provides that a claimant furnishing labor or materials for any work, improvement, or structure, in order to secure the benefit of the statutory lien, must, within 60 days after the completion of the contract, file with the recorder of the county in which the property is situated a verified claim, setting forth, among other things:

> "* * * A statement of his demand after deducting all just credits and offsets, the name of the owner or reputed owner, if known, a general statement of the kind of work done or materials furnished by him, or both, the name of the person by whom he was employed or to whom he furnished the materials, and a description of the property sought to be charged with the lien sufficient for identification. * * *"

It will be observed that the original complaint failed to allege any of the foregoing necessary statements required by the statute. Nor does the proposed amendment supply these deficiencies. There was no pretense of alleging the kind of work done, or materials furnished. In fact, appellants' counsel frankly admitted:

> "The lien does not state the kind of labor nor materials (furnished), I admit that."

All that the proposed amendment does state with respect to the nature of the labor or materials furnished, is that "plaintiffs * * * furnished to the defendants the labor and material actually used in the construction of the building." There is no intimation of the nature of either the labor or materials furnished. It cannot be ascertained from the allegations of the complaint, as to the contents of the notice of lien, whether compensation is sought for lumber, hardware, paint, plaster, or brick, nor whether the labor performed was that of a carpenter, plumber, painter, or brick mason. This is a fatal defect, without the allegations of which the complaint failed to state a cause of action upon a mechanic's lien. Even if the notice of lien were offered in evidence, it would be insufficient upon which to base an action to foreclose a mechanic's lien. Upon appellants' own admission as to this defect in their notice of lien, they would necessarily fail on the merits of their cause. Nor does the proposed amendment contain a statement of any of the other material averments required by the statute. It is a recitation of mere conclusions. No definite facts are stated. The amendment, therefore, fails to remedy the defects of the original complaint with respect to the contents of the notice of lien.

[4, 5] The respondents did not waive their right to object to the introduction of evidence by their failure to demur to the complaint. "This objection that the complaint fails to state facts sufficient to constitute a cause of action is not waived by failure to demur, and may be taken at any stage of the case." Section 434, Code Civ. Proc.; Bell v. Thompson, 147 Cal. 694, 82 P. 327. A complaint based upon a claim of a mechanic's lien, which sets out neither a copy of the notice of lien required by law, nor allegations of material statements therein contained, which are required to be stated by the provisions of section 1187, Code of Civil Procedure, utterly fails to state a cause of action for the foreclosure of a mechanic's lien. 19 Standard Enc. of Proc. 672d; Hicks v. Murray, 43 Cal. 515; Davis v. Treacy, 8 Cal. App. 395, 97 P. 78; 17 Cal. Jur. 187, § 132. In Hicks v. Murray, supra, Chief Justice Wallace, writing the opinion, says:

> "It is true that we can see that the statement itself is not defective in the particular of ownership—but this will not aid the pleading upon the point. * * * It has so often been determined that unless the facts essential to the support of the case be alleged upon the record [in the pleadings] evidence upon such omitted facts cannot be heard or considered."

In the case of Davis v. Treacy, supra, which is quite similar in its facts to the instant case, and wherein a general demurrer was sustained upon the ground that the complaint failed to state essential facts required to be recited in the notice of lien, the court said:

> "There is absolutely nothing in the complaint to show what plaintiff's claim or 'lien,' as he styles it, filed with the county recorder, contained. * * * The complaint in this respect utterly fails to show a compliance with the provisions of section 1187 of the Code of Civil Procedure, and for this reason fails to set forth a cause of action for the foreclosure of a mechanics' or laborers' lien."

Appellants contend that it is unnecessary for the notice of lien or complaint to state the kind of work done or materials furnished, and in support of this assertion they rely upon the case of McClain v. Hutton, 131 Cal. 132, 61 P. 273, 63 P. 182, 622. But this case is not authority upon that proposition, for the reason that it was decided in 1900 and section 1187, Code of Civil Procedure, was amended in 1919 to specifically require this particular statement to be made.

[6] Nor does section 1203, Code of Civil Procedure, relieve a claimant from the necessity of complying with the requirements of section 1187, Code of Civil Procedure. The former section above mentioned provides that:

> "No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien."

[7] This section of the Code is intended to relieve a claimant against error or mistake

occurring in the figures or facts recited in the notice of lien, but it does not purport to relieve one from an absolute omission to state such facts. Such a construction would have the effect of abrogating the requirements of section 1187 entirely. Clearly, this was not the intention of the Legislature. Evidently the saving clause of section 1203 was to relieve one from the unimportant errors occurring with respect to an effort to specify the exact balance due to the claimant, or the amount of credits to be allowed, or inaccuracy in the description of the property sought to be charged with the lien. This section of the statute does not relieve the claimant from stating those matters which are made essential to the statement of the claim, 17 Cal. Jur. 146; Schultheiss v. Hunziker, 42 Cal. App. 73, 183 P. 347. Unless the claimant has filed his notice containing the statements required by statute, he is not entitled to a lien. 17 Cal. Jur. 127, §§ 82-84; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 P. 555; Wagner v. Hansen, 103 Cal. 104, 37 P. 195; Hogan v. Bigler, 8 Cal. App. 71, 96 P. 97. In the instant case, it is not mere error which is complained of in the statement of the kind of work performed, or materials furnished, but there is an absolute omission to specify this essential information in both the notice of lien and the complaint. Under such circumstances, section 1203, Code of Civil Procedure, furnishes no relief. For this reason the complaint fails to state facts sufficient to constitute a cause of action for the foreclosure of a mechanic's lien.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

89 Cal. App. 132

PEOPLE v. ROSS. (Cr. 1398.)

District Court of Appeal, First District, Division 1, California. Feb. 9, 1928.

1. Criminal law ⟹1159(5)—Where testimony regarding alibi was conflicting, jury's verdict was controlling on appeal.

In rape prosecution, where substantial conflict existed between testimony of witnesses whose identification of accused and of machine he was operating was positive and testimony given by accused's witnesses in support of his alibi, verdict of jury must be *held* controlling on appeal.

2. Criminal law ⟹1159(2)—Jury's finding in criminal case will not be disturbed on appeal unless it is without evidentiary support as matter of law.

Jurisdiction of appellate court in criminal case is limited by Constitution to review of questions of law alone, and, although testimony given in case will be carefully examined for purpose of ascertaining whether it is legally sufficient to sustain verdict rendered, jury's finding will not be disturbed unless it can be said, as matter of law, that same is without evidentiary support.

3. Criminal law ⟹1159(4)—Appellate court cannot pass on credibility of witnesses or determine weight of testimony.

Where two reasonable inferences are deducible from evidence, one looking to defendant's guilt and the other to his innocence, jury's verdict is conclusive on appeal, since appellate court has no power to pass on credibility of witnesses or to determine weight to be accorded their testimony.

4. Criminal law ⟹824(3)—Failure to instruct regarding assault with intent to commit rape in rape prosecution held not error, in absence of request.

In rape prosecution, where defendant neither proposed nor requested giving of instruction relating to assault with intent to commit rape and jury was fully and fairly charged on law appertaining to all issues of fact which were contested, failure to instruct on lesser crime was not error, in absence of request.

5. Criminal law ⟹763, 764(1)—Court's stating there was no serious denial that rape was committed held not error, where evidence proved crime and defense was alibi.

In rape prosecution, court's stating to jury that there was no serious denial that rape was committed by some one, and that it would not dwell on subjects of resistance, force, or violence, *held* not error, where evidence proved commission of crime and defense was an alibi.

6. Criminal law ⟹775(6)—Instruction regarding alibi, containing statement that jury should scrutinize evidence with care, held not erroneous.

In rape prosecution, instruction that jury might consider evidence upon alibi in case with care and should scrutinize evidence with care *held* not erroneous because of statement regarding scrutinizing evidence with care.

7. Criminal law ⟹823(6)—Instruction that defense of defendant was an alibi held not misleading because of word "defense," in view of other instructions.

In rape prosecution, instruction that defense of defendant was an alibi and that jury might consider evidence upon alibi in case with care and should scrutinize evidence with care, etc., *held* not misleading because of use of word "defense," in view of other instructions on burden of proof, reasonable doubt, and presumption of innocence.

8. Criminal law ⟹811(4)—Instruction regarding alibi held not objectionable as stressing facts adduced by prosecution in opposition to alibi.

In rape prosecution, instruction regarding alibi *held* not objectionable as stressing facts adduced by prosecution in opposition to alibi, but mentioning none proved by defendant in support of alibi, where in same instruction court stated that it was not attempting to repeat all testimony bearing on subject of alibi, and that it was jury's duty to consider all evidence, and especially where defendant did not request instruction embodying facts upon which he relied in support of alibi.

9. Criminal law 🔑911—Motion for new trial is addressed to trial court's discretion, exercise of which includes power to determine truth of matters on which motion is based.

Motion for new trial is addressed to sound discretion of trial court, the exercise of which includes power to determine truth of matters on which such motion is based.

10. Criminal law 🔑1156(1)—Trial court's decision on motion for new trial will not be disturbed on appeal unless there has been clear abuse of discretion.

Motion for new trial is addressed to sound discretion of trial court, exercise of which includes power to determine truth of matters on which such motion is based, and its decision thereon will not be disturbed on appeal unless it appears that there has been a clear and unmistakable abuse in exercise of such discretion.

11. Criminal law 🔑940—New rape trial based on affidavit of witness seeking to correct testimony regarding milk tags delivered with milk to store at time defendant, relying on alibi, claimed to be there held properly denied, where witness did not remember to whom milk was delivered.

In rape prosecution, where defense was that defendant was in charge of store at time of alleged offense, motion for new trial based on affidavit of witness seeking to correct testimony given at trial to effect that he had not written memorandum reading "12 to 12:30" on milk tag which was delivered to store with milk on day of commission of offense *held* properly denied, since such question was unimportant where witness was unable to remember to whom milk was delivered.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

J. E. Ross was convicted of rape, and he appeals. Affirmed.

Nathan Merenbach, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was found guilty of the crime of rape, and has appealed from the judgment of conviction and the order denying his motion for a new trial. His defense was that he was not present at the time or place of the alleged crime, and on this appeal he contends that the testimony offered in support of his alibi, when considered with other circumstances shown by the evidence, proves that he is the victim of mistaken identity, and that, therefore, the verdict is contrary to the evidence.

It appears from the record that the crime was committed upon a young married woman named Di Fiori in her home on a small ranch just outside the city of San Jose, where she lived with her husband and infant child. On the day in question, October 18, 1926, she had been left alone with her baby while her husband went to San Jose to repair his automobile. About 10 minutes past noon a strange man called and inquired for her husband, stating that he was a salesman from Cuthbert's garage and wanted to interest him in the purchase of an automobile. The prosecutrix told him that her husband was in San Jose at Drake's garage, but was expected home soon for lunch. The man said he would return later and started to leave. Believing he had gone, she went into the bedroom to feed her baby. As she picked up the child, she heard the outside screen door open and some one walk into the house. She jumped up hurriedly and had proceeded as far as the foot of the bed when this same man suddenly appeared at the bedroom door armed with a pistol which he pointed at her and said:

> "Don't scream or I will shoot you. You know what happened to those other women will happen to you if you make any objections to what I am going to do."

In explanation of the foregoing threat it may be stated, as suggested in appellant's brief, that there was a manifestation of excitement and fear in certain parts of the state at this particular time on account of several women having been ravished and brutally murdered in their homes by an unknown criminal. Having these crimes in mind and being terrified by the man's threat, the prosecutrix made no outcry. Thereupon he forced her backward onto the bed and while pressing the pistol against her perpetrated the crime charged. As he left the room he threatened to "come and get" the prosecutrix if he saw "anything in the papers or anything like that." The prosecutrix followed him out of the house on to the porch for the purpose of ascertaining the number of the license plate on his automobile which he had parked in the yard, but upon observing her the man turned and pointing the pistol at her exclaimed, "Go back in the house or I will shoot you," whereupon she stepped back behind the screen door. Just then her husband drove up in an automobile and stopped on the highway at the entrance to their property to look into the mail box, and while he was doing so this man drove out of the property close to and waved his hand at him. As Di Fiori then drove toward the house he saw that his wife was much excited and crying, and she told him what had happened. Di Fiori quickly turned his machine around and took up the pursuit of the man, chasing him down the highway into San Jose, where the man followed a circuitous route for some distance and finally disappeared. During the chase down the highway and soon after leaving the scene of the crime the two machines were driven past two road employees of the county who were sitting on the side of the highway eating their lunch. The attention of these men was especially attracted to the first machine on account of the excessive rate of speed it was traveling, one remarking to the other, "That guy is coming like somebody was after him;" and for that reason, as they afterwards testified, they carefully observed the driver of the car and his machine, noting, among other things, that the machine bore no rear license plate. They also recognized Di Fiori, with whom they were acquainted, as he followed closely behind the first car. The prosecutrix definitely fixed the time of the commission of the crime at 10 minutes past 12, having looked at the clock just before she entered the bedroom to feed her baby, and her testimony as to the time was corroborated by that of her husband and of the county employees. The man was described by the witnesses as having worn a dark suit of clothes and a gray hat, and the machine as being a Ford coupé with white wire wheels. The husband also noted when the car passed closely by him at the entrance to his home that the rear license plate was missing, and that one of the rear tires was of the make known as a "Royal Cord." Full descriptions of the perpetrator of the crime and of his automobile were furnished the sheriff's office soon after the man disappeared on the streets of San Jose.

The day following the attack appellant was apprehended in a small grocery store in San Jose owned by appellant's mother-in-law and which appellant and his wife helped to operate, and was positively identified by the prosecutrix and her husband as being the perpetrator of the crime. They were equally positive in their identification of him at the trial. They also identified an automobile belonging to appellant's wife as being the one he was using at the time. It was a Ford coupé equipped with white wire wheels, the rear license plate was missing, and one of the rear wheels was mounted with a "Royal Cord" tire; and appellant admitted when arrested and also at the trial that he used this car in going to lunch about 11 o'clock in the morning, on the day the crime was committed. Moreover, appellant admitted that he owned a dark suit of clothes and a gray hat, the only discrepancy in the description of the clothing being that his suit was made of blue serge material, whereas the prosecutrix described the suit this man was wearing as being dark with a fine white stripe, but owing to the feeling of terror with which the prosecutrix was seized at the time of the attack, it is not strange that she was mistaken as to a minute description of her assailant's clothing. Soon after his arrest appellant denied ever having owned a pistol, but when told of a statement made by his mother-in-law to the effect that he had owned such a weapon, claimed that some time prior to the date of the crime he had given the pistol to a friend in Oakland. The two county employees also positively identified appellant as being the man who was being pursued down the highway, and they likewise identified his wife's automobile as being the car appellant was at that time driving.

With reference to appellant's alibi he testified that on the day in question he was in charge of the grocery store until about 11 o'clock in the morning, when he was relieved from duty by his wife so that he might go to lunch at the home of his mother-in-law, which the evidence shows, was located not far from the store, but about three miles distant from the home of the prosecutrix; that he drove to his mother-in-law's home in his wife's coupé and after washing and shaving, sat down to lunch; that after he had eaten he walked back to the store, arriving there about 10 or 15 minutes past 12, and that his wife then went home to lunch, leaving him alone in the store, where he remained the rest of the day. His testimony as to his movements was corroborated generally by that of his wife and her mother. However, at the time of appellant's arrest on the day following the commission of the crime, his mother-in-law stated to a deputy sheriff, according to the latter's testimony, that appellant did not arrive at her home for lunch on the preceding day until after half past 12, and upon cross-examination she would not deny having made such statement. An attempt was made also on behalf of appellant to prove by a dairy delivery employee that he delivered a quantity of milk to appellant personally at the store on the day in question between the hours of 12 and 1 o'clock, but his testimony was of little value, because he did not remember whether the milk was delivered to appellant or to his wife.

[1-3] It will be seen from the foregoing statement of the evidence that a substantial conflict exists between the testimony of the four witnesses whose identification of appellant and of the machine he was operating is positive, and the testimony given by appellant's witnesses in support of his alibi; and, therefore, in that state of the record, the verdict of the jury must be held as controlling on appeal. The jurisdiction of an appellate court in a criminal case, as has been frequently pointed out, is limited by the Constitution to a review of questions of law alone, and although the testimony given in a case will be carefully examined for the purpose of ascertaining whether it is legally sufficient to sustain the verdict rendered, the jury's finding will not be disturbed unless it can be said, as a matter of law, that the same is without evidentiary support. 8 Cal. Jur. 583; People v. Niino, 183 Cal. 126, 190 P. 626 Here, as shown, the evidence supporting the verdict consists of the positive identification by four witnesses of appellant and of the automobile he was using at the time; also of a number of incriminating circumstances

relating to appellant's clothing and the ownership of the pistol. Even conceding, in view of the asserted alibi, that two reasonable inferences are deducible from the entire evidence, one looking to appellant's guilt and the other to his innocence, the verdict of the jury under such circumstances is conclusive on appeal (People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Meyers, 39 Cal. App. 244, 178 P. 965; People v. Lewis, 141 Cal. 543, 75 P. 189) the appellate court having no power to pass upon the credibility of witnesses or to determine the weight to be accorded their testimony (People v. Haydon, 18 Cal. App. 543, 123 P. 1102, 1114).

[4, 5] Appellant further contends that the evidence is insufficient to establish the commission of any greater crime than an assault with intent to commit rape; that the court erred in not having instructed the jury with reference to the lesser offense, and also in stating to the jury that there was "no serious denial" that the act of rape was committed by some one, and for that reason it would not dwell upon the subjects of resistance, force, or violence. We find no merit in any of the points mentioned. Aside from disclosing ample evidence to prove that the crime of rape was committed, the record shows that at no time during trial did appellant claim that such crime was not committed, the attempt to exculpate himself from the charge being made solely upon the ground that he was not present at the time or place of its commission. The situation here is therefore the same as it was in the case of People v. Craib (Cal. App.) 249 P. 543, and consequently must be governed by the adverse ruling there stated. Moreover, appellant neither proposed nor requested the giving of any instructions relating to the lesser crime, and since it appears that the jury was fully and fairly charged upon the law appertaining to all issues of fact which were contested, its failure to instruct upon a subject now deemed essential by appellant was not error in the absence of a request for such instruction. People v. Anthony, 20 Cal. App. 586, 129 P. 968, and cases therein cited.

[6, 7] On stipulation the jury was instructed orally, and in view of appellant's denial that he was present at the time or place of the alleged crime, the court briefly charged the jury upon the subject of an alibi and in part said:

> "I have already indicated to you what the defense in this case is. The defense of the defendant is an alibi. You may consider the evidence upon the alibi in this case with care; you should scrutinize the evidence with care. You must, however, take in consideration the evidence of the defendant, and the evidence on his behalf, on the subject of an alibi. In connection with the evidence, you may and must consider all the other evidence and circumstances in the case; you must and may take into consideration the direct evidence of four witnesses as to the identity of this defendant. You can take into consideration the automobile that is in evidence, and which you viewed in the jail yard. You may take into consideration the evidence of the husband of the prosecutrix as to the tracks of the automobile that he found in the driveway, and his testimony as to the pursuit of that automobile and the person who drove it. You may take into consideration all of this evidence, pro and con, bearing upon this question of alibi. Alibi, as you know, is the fact of a person, accused of crime, being at another place and time to that charged in the information."

Appellant contends that it was error for the court to refer to an alibi as a defense, and complaint is also made of the court's statement that the jury should scrutinize the evidence with care, claiming that in both respects the instruction was violative of the rules declared in People v. Roberts, 122 Cal. 377, 55 P. 137, and People v. Girotti, 67 Cal. App. 399, 227 P. 936. We are unable to agree with either of the foregoing contentions. The vice of the instructions considered in the cases cited was in stating to the jury in effect that an alibi when "satisfactorily proved" or when "established" was a good "defense" in law, clearly implying, as the decisions in those cases point out, that an alibi was an affirmative defense which the defendant must establish or prove by a preponderance of evidence before he was entitled to an acquittal. Of course, such is not the law. People v. Derwin, 78 Cal. App. 781, 248 P. 1029. And in People v. Girotti, supra, and in the cases upon which the decision therein is founded, the erroneous instructions considered elaborated upon the proposition of a fabricated alibi as a defense, the jury being instructed that:

> "Experience has shown that an alibi as a defense is capable of being and has been occasionally successfully fabricated; and that even when wholly false its detection may be matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court."

And the instruction concluded with the statement:

> "You are to scrutinize the testimony offered in support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

The instruction in the present case is not open to the objections which called for reversals in the case cited by appellant, for here the instruction contained no language casting suspicion or distrust upon appellant or upon the testimony relating to his alibi, nor did it in any manner suggest to the jury that the evidence offered in support of his alibi should not be fairly and properly considered; and although, as held in People v. Winters, 125 Cal. 325, 57 P. 1067, an alibi sought to be shown is not strictly speaking a defense, for the reason that the accused is entitled to an acquittal if there be evidence adduced sufficient to raise a reasonable doubt as to the fact, we do not believe, in view of the other instructions given in the present case upon the doctrines of burden of proof, reasonable doubt, and presumption of innocence, that the jury could have been misled by the use of the word "defense" in applying those doctrines.

[8] Nor do we think that the instruction under attack is subject to the further criticism made against it by appellant, to the effect that it stressed facts adduced by the prosecution in opposition to the alibi, but mentioned none of those proved by appellant in support of the alibi, for the reason that later on and as a part of the same instruction the court stated:

> "I am not attempting to repeat all of the testimony bearing upon the subject of alibi in this case, but I am commending to you and saying to you that it is your duty to consider all of the evidence and circumstances in this case bearing upon the subject of the alibi, because that is the principal question for you to determine. * * *"

Furthermore, if appellant deemed it advisable to have an instruction given embodying the facts upon which he relied in support of his alibi, he should have proposed such an instruction and having failed to do so we think he is not in a position now to complain.

[9-11] The motion for a new trial was based mainly upon an affidavit made by the dairy delivery employee wherein he sought to correct part of his testimony given at the trial to the effect that he had not written a memorandum reading "12 to 12:30" on the milk tag which was delivered with the milk on the day of the commission of the offense; and because of the facts averred in this affidavit it is claimed that the court abused its discretion in denying appellant's motion for a new trial. The question as to whether the memorandum mentioned was written on said tag by the witness or by some one else is not of great importance for the reason that the witness was unable to remember to whom the milk was delivered; and in any event, a motion for a new trial is addressed to the sound discretion of the trial court, the exercise of which includes the power to determine the truth of the matters on which such motion is based, and its decision thereon will not be disturbed on appeal unless it appears that there has been a clear and unmistakable abuse in the exercise of such discretion. People v. Byrne, 160 Cal. 217, 116 P. 521; People v. Weber, 149 Cal. 325, 86 P. 671. In view of the equivocation with which the witness gave his testimony and the minor importance to be attached to the memorandum, the trial court was clearly justified in refusing to grant a new trial upon the strength of said affidavit.

After reviewing the entire record, we are unable to say that appellant has not had a fair trial or that the verdict rendered against him has resulted in a miscarriage of justice. The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 609

PEOPLE v. PERFETTI. (Cr. 1010.)

District Court of Appeal, Third District, California. Jan. 25, 1928.

1. Infants 🔑20—Information charging furnishing intoxicating liquors to minor 18 years of age, which act tended to contribute to minor's becoming delinquent, held sufficient (Pen. Code, § 1004; Juvenile Court Law 1909, § 1, subds. 8, 11, 13, and Juvenile Court Law 1915, § 21, as amended by St. 1921, p. 773, § 1).

Where defendant did not call court's attention to claimed defects in information, as he was entitled to under Pen. Code, § 1004, information charging him with furnishing intoxicating liquors to a minor child of age of 18 years, which unlawful act tended to, and did, encourage, cause, and contribute to minor becoming and remaining a person as described in Juvenile Court Law (St. 1909, p. 213), § 1, subds. 8, 11, 13, *held* to state facts sufficient to charge offense under Juvenile Court Law (St. 1915, p. 1225), § 21, as amended by Laws 1921, p. 773, § 1.

2. Indictment and information 🔑147—When particulars of offense are not stated with clarity, or information duplicitous, defendant must demur (Pen. Code, § 1004).

When particulars of offense, or more than one offense was charged, or if the particular results of defendant's actions were not stated in information with sufficient clarity to satisfy him, or to enable him to more ably present his defense, it was his duty, under Pen. Code, § 1004, to demur.

3. Criminal law 🔑1186(4)—Defendant's substantial rights were unaffected because information for contributing to delinquency of minor did not state result of minor's use of liquor (Juvenile Court Law, § 1; Pen. Code, §§ 950, 951, 952, 1004, 1012, 1258, 1404).

Where defendant did not demur under Pen. Code, §§ 1004, 1012, to information for selling liquor to minor, which tended to contribute to minor's becoming a delinquent, as described by Juvenile Court Law § 1 (St. 1915, p. 1225), nor object to jurisdiction, or that information did not state offense, and since, under sections 1258 and 1404, reviewing court must disregard technical errors and departures from form, defendant's substantial rights were not invaded or denied within sections 950, 951, and 952, because information did not completely state the ultimate result of the minor's use of intoxicating liquor.

4. Criminal law ⊂⇒970(7)—Defendant, having failed to demur to information, could not urge in arrest of judgment that information did not conform to Penal Code (Pen. Code, §§ 950, 951, 952, 954, 1185).

Where defendant did not demur to information charging him with sale of liquor to minor, which tended to contribute to minor's delinquency, he could not, in arrest of judgment under Pen. Code, § 1185, urge that information did not conform to Pen. Code, §§ 950, 951, 952, 954, requiring offense to be described in ordinary and concise language.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

C. Perfetti was convicted of contributing to the delinquency of a minor, and he appeals. Affirmed.

See, also, 262 P. 477.

W. F. Cowan and J. O. Kroyer, both of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted on an information charging acts tending to contribute to the delinquency of a minor child, and appeals from the judgment of conviction.

The appeal is based upon three grounds, to wit: (1) That the information fails to state facts sufficient to charge the offense denounced by section 21 of the Juvenile Court Law; (2) that the information is defective, in that it fails to specifically show what offense, or offenses, the defendant is guilty of under section 1 of the Juvenile Court Law; and (3) that the information does not conform to the requirements of sections 950, 951, and 952 of the Penal Code.

[1] The charging portion of the information is in these words:

> "That the said E. Perfetti and C. Perfetti, on or about the 11th day of September, A. D., one thousand nine hundred and twenty-seven, at and in the county of Sonoma, state of California, did then and there willfully and unlawfully give, sell, and furnish certain intoxicating liquors, to wit, white wine containing more than one-half of 1 per centum of alcohol by volume to Wesley Daniels, a minor child then and there under the age of 21 years, to wit, of the age of 18 years, which willful and unlawful act and course of conduct, as aforesaid, did thereby, then, and there manifestly tend to, and did, encourage, cause, and contribute to the said Wesley Daniels becoming and remaining such a person as described in section 1 of the Juvenile Court Law, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

No demurrer to the information was filed by the defendant, but, after the conclusion of the trial, the defendant interposed a motion for a new trial, and also a motion in arrest of judgment. The transcript shows only the following in relation to the motion in arrest of judgment, to wit: Motion of Mr. Cowan on behalf of defendant in arrest of judgment under section 1185, Penal Code. Upon this appeal the appellant calls our attention specially to two cases. The first of which we will consider is that of People v. Pierro, 17 Cal. App. 742, 121 P. 689, in which case it was held that the defendant was entitled to have the information set forth the particulars of the issue which he was called upon to meet as to whether the child had in fact become a delinquent, and that, if the child had not in fact become a delinquent, a case could not be made out against the defendant. In citing this case as an authority to support the insufficiency of the information upon which this defendant was tried, appellant apparently overlooked the fact that the case of People v. Pierro, supra, was decided upon the wording of section 26 of the Juvenile Court Law approved March 8, 1909 (St. 1909, p. 225), which presupposed that the child had already become a delinquent. The holding in that case was to the effect that, under the terms of the Juvenile Court Law of 1909, before a defendant could be convicted of a misdemeanor for contributing to the dependency of a minor under the age of 18 years, the fact that such minor had become a dependent thereunder, or that there had been an adjudication of such dependency, must be distinctly alleged and proved. This provision of the law was eliminated when the Juvenile Court Law, approved June 5, 1915, was enacted (St. 1915, p. 1225). The acts made punishable by section 26 of the Juvenile Court Law of 1909 are written into section 21 of the Juvenile Court Law as it now stands (St. 1921, p. 773, § 1), and the necessity for either charging or proving that the minor has become a delinquent is omitted therefrom, and in place thereof we find the following: That if the person charged does any act which "would cause or manifestly tend to cause any * * * person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 * * * of section 1 of this act, shall be guilty," etc. Under such circumstances further consideration of the case of People v. Pierro, supra, is unnecessary.

Our attention is next called to the case of People v. Lamanuzzi, 77 Cal. App. 301, 246 P. 557, in support of the contention that the information is insufficient. In the Lamanuzzi Case the information charges that the defendant "did willfully, unlawfully and knowingly commit certain acts, to wit, sell and furnish wine, said wine being then and there fit for use for beverage purposes, and then and there containing more than one-half of 1 per cent. of alcohol by volume, to Budd Stoffers, which caused and tended to cause the said Budd

Stoffers, a minor child of the age of seventeen years, to visit a place where intoxicating liquor was sold, bartered, exchanged and given away, to have intoxicating liquor in his possession, which said intoxicating liquor was then and there fit for use for beverage purposes and then and there contained more than one-half of one per cent. of alcohol by volume." Defendant demurred generally and specifically to the information, setting forth that the facts did not constitute a public offense, and that the pleading did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code. The demurrer was sustained, and the people appealed. The court, in considering the information, among other things, said:

> "That the information charged respondent with acts which were in violation of certain provisions of section 397b of the Penal Code," and that "it not being directly alleged therein that the acts tended to bring the minor within any of the provisions of the Juvenile Court Law, unless the allegations that the act caused or tended to cause the minor to have intoxicating liquor in his possession and to visit a place where intoxicating liquor was sold, bartered, exchanged and given away, may be said to be equivalent thereto,"

—and it was held to be insufficient. The opinion further refers to cases where the information or indictment has been held insufficient on demurrer in failing to allege that the acts tended to encourage the minor to come within the provisions of the Juvenile Court Law, and cites the exception as being cases where the information, from the facts set forth, necessarily led to such conclusion. It is further set forth in the opinion that it was not alleged that the possession of the minor, following the sale and delivery, was unlawful, and calls attention to the fact that the language of section 397b of the Penal Code is sufficiently broad to include a sale or delivery of intoxicating liquor to a minor under the age of 18 years upon a physician's prescription, etc., and to the fact that such possession would not in every case be unlawful or inconsistent with an innocent and proper purpose, nor would the fact of an illegal sale or delivery, followed by possession, under all circumstances necessarily or manifestly tend to bring the minor within the provisions of the Juvenile Court Law, and then finally holds that, where the ultimate facts necessary to a complete description of the offense have been omitted from the pleadings, and such facts do not follow as a necessary conclusion from the allegations contained therein, a demurrer to the information is properly sustained. A comparison of the information upon which the defendant in this cause was tried and convicted, with the information in the Lamanuzzi Case, shows that they are readily distinguishable. In the case at bar the information is founded solely and exclusively upon the Juvenile Court Law. In the Lamanuzzi Case the prosecution appears to have been based upon section 397b of the Penal Code, which describes a separate and distinct offense from that denounced in section 21 of the Juvenile Court Law. We may point out the further distinction that in the information upon which the defendant was tried and convicted it is specifically charged that the defendant unlawfully sold and furnished certain intoxicating liquor, etc., to the minor, and that such conduct did then and there manifestly tend to, and encourage, cause and contribute to the said minor becoming and remaining a person described in section 1 of the Juvenile Court Law. The opinion in the Lamanuzzi Case apparently overlooks the fact that, when intoxicating liquor is unlawfully sold to a minor, the possession of such liquor by the minor immediately become a misdemeanor (see People v. Avila [Cal. App.] 248 P. 693), which fact immediately brings the minor within the terms of subdivision 13 of section 1 of the Juvenile Court Law. There is another distinction to be borne in mind between the decision in the Lamanuzzi Case and that which should be had herein, in this: In the Lamanuzzi Case a demurrer was interposed by the defendant setting forth that the information therein did not conform to sections 950, 951, and 952 of the Penal Code, while in the case at bar no demurrer was interposed. The defendant apparently was content to go to trial upon the information as it stood without calling attention to any of the defects in the information, which he is entitled to do under section 1004 of the Penal Code, when the trial court would be called upon to determine whether the information did actually contain all the particulars of the offense as required by said sections. That the information in the case at bar charges a public offense seems to us unquestionable. It first charges the unlawful sale of intoxicating liquor, and then charges a sale and delivery to a minor in such manner that the possession of the intoxicating liquor so purchased by the minor would constitute a misdemeanor on the part of the minor. The information in the case at bar is identical with that in the case of People v. Baker, 38 Cal. App. 28, 175 P. 88, save and except as to the concluding clause, to wit:

> "A person under the age of 21 years who habitually uses intoxicating liquors, and who is leading or is in danger of leading an idle, dissolute, lewd and immoral life; contrary," etc.

That this may be a further description of the crime charged may be admitted, but that it tends to add anything to the offense committed by the defendant does not seem to follow. The act of the defendant is in unlawfully furnishing intoxicating liquor to the minor. The result of the act is wholly immaterial, if it tends toward producing any of the conditions of the minor mentioned in section 1 of the Juvenile Court Law. Whether such a result actually follows is wholly immaterial under section 21 of that act as it now reads. In the Baker Case it was also held that the intent of the seller was immaterial, since the law contemplates the effects of selling, and its tendency to cause the minor to become a delinquent, and not the intent or motive of the seller. While the appellant argues that it is the result, and not the act itself, which brings the accused within the provisions of section 21, such is not the law. If the act of the defendant tends toward such a result, the crime is committed. It certainly is not the law that a defendant cannot be prosecuted until he has actually ruined the minor. The Juvenile Court Law in all its intendments is preventive of the ruination of minors, and not simply the punishment of those who have ruined him after the minor has become a charge upon the state. The simple reading of the information in this case leads unavoidably to the conclusion that the manifest tendency of the acts charged against the defendant is to cause the minor to become a person such as is referred to in subdivisions 8, 11, and 13 of section 1 of the Juvenile Court Law. The tendency, in selling intoxicating liquor to a minor, is to cause him to become an habitual user thereof. The tendency of the habitual use of intoxicating liquors by a minor is to cause him to become an idle and dissolute person, and also the violation of law in the disregard thereof by the seller, as well as causing the minor to have unlawful possession thereof likewise, induces the minor to become a person violating the laws of the state. That a public offense is charged in the information is thus shown beyond question.

[2] When the particulars of an offense, or if in this case the particular results of the defendant's actions, were not stated with sufficient clarity to satisfy the defendant or to enable him to more ably present his defense, it was his duty to demur thereto, as provided by section 1004 of the Penal Code, or, if more than one offense was charged, it was such duty.

[3] Upon this appeal the appellant urges urges that the information does not conform to the requirements of sections 950, 951, and 952 of the Penal Code, in that the statement of the acts constituting the offense is not made in ordinary and concise language, and in such manner as to enable him to understand what is intended in this case, under what particular subdivision of section 1 of the Juvenile Court Law the minor should be classed. Section 1012 of the Penal Code further provides that, when the objections mentioned in section 1004 of the Penal Code, which refers to sections 950, 951, 952, and 954, appear on the face of the information or indictment, objection thereto must be taken by demurrer. If the defendant does not demur, there remain only two objections: (1) That the court has no jurisdiction of the subject-matter; and (2) that the indictment does not state a public offense. Again, section 1258 of the Penal Code requires this court to give judgment without regard to technical errors or defects which do not affect the substantial rights of the parties. Also the judgment of this court must be controlled by section 1404 of the Penal Code wherein the law is set forth that:

> "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

It cannot be successfully argued that the failure of the information to state whether the minor was in danger of becoming an habitual user of intoxicating liquors, or a dissolute or an idle person, or one addicted to the commission of misdemeanors, affected the defendant, as the defendant's act or acts would be the same in any case. It is only a question of a difference in results that might follow the defendant's acts. The defendant is not on trial for what might occur to the minor, or as to what might be the ultimate effect of the minor's use of intoxicating liquors. The defendant was placed on trial for acts which manifestly tended to produce certain results, to wit, to bring the minor under the provisions of section 1 of the Juvenile Court Law. Whether the defendant succeeded or failed is wholly immaterial. If this is true, then no substantial rights of the defendant have been either invaded or denied by reason of the information not completely stating the ultimate result of the use of intoxicating liquor by the minor.

[4] This brings us to a consideration of the appellant's motion in arrest of judgment. The motion is made in general language, and may be insufficient in not specifying the grounds thereof, but, assuming the motion in itself to be adequate, the ruling of the court thereon could not have been otherwise. Section 1185 of the Penal Code, after providing for the interposing of a motion in arrest of judgment, further specifies:

> "It may be founded on any of the defects in the indictment or information mentioned in section 1004, unless the objection has been waived by a failure to demur."

No demurrer was interposed by the defendant in this case. Thus all the objections which have been urged upon this appeal are completely unanswered by this section, under the terms of which the appellant must be held to have waived any of the alleged defects. After sitting still and taking chances on the verdict of the jury, he cannot now come into this court and urge that sections 950, 951, and 952 of the Penal Code, as well as 954 thereof, were not complied with. The authorities that an appellant is precluded from raising such objections upon appeal after having failed to demur are too numerous for citation, but may be found in the annotations to section 1085, Penal Code, of Kerr's Cyc. Codes 1920, and supplements thereto. Two late cases, however, may be referred to: People v. Lauman, 187 Cal. 214, 201 P. 459, where it is held that failure to demur constituted a waiver of all the objections which we have been considering herein. Also, in the case of People v. Welton, 190 Cal. 236, 211 P. 802, the subject is fully considered. There the information read, omitting the formal parts:

> "Did then and there unlawfully, willfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of and advising criminal syndicalism."

No demurrer was interposed, and, upon motion in arrest of judgment, it was urged that the information did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, in that the particular circumstances of the alleged offense were not set forth, etc. The court held that, as no demurrer was interposed, the objection was waived.

The objection that the testimony is insufficient to support the verdict is so manifestly untenable that consideration thereof is unnecessary.

The order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

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88 Cal. App. 617

PEOPLE v. MARTINSON et al. (Cr. 1013.)

District Court of Appeal, Third District, California. Jan. 25, 1928.

1. Criminal law ⟹1111(1)—Reviewing court is bound by record, not by statements in oral argument.

The reviewing court is bound by the record, and not by statements in oral argument.

2. Criminal law ⟹1166½(12)—Defendants held not prejudiced by court's reference to witness' false testimony in different case or to attorneys therein not shown to be defendants' attorneys.

Where similar prosecution had preceded prosecution for contributing to the delinquency of a minor, court's pronouncement of judgment in preceding case, and referring to testimony of witness therein as having been palpably false, and reference to attorneys indicating they should have known of falsity, was not prejudicial to defendants' own trial, where witness referred to was not called by defendants, and attorneys in former trial were not shown by the record to be same attorneys engaged by defendants.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

O. A. Martinson and another were convicted of contributing to the delinquency of a minor, and they appeal. Affirmed.

See, also, 262 P. 474, 477.

W. F. Cowan and J. O. Kroyer, both of Santa Rosa, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendants were convicted, after trial, upon an information charging them with acts tending to contribute to the delinquency of a minor child, interposed a motion in arrest of judgment, and also a motion for new trial, both of which were denied. The information in this case is word for word with that set out in the case of People v. C. Perfetti, 264 P. 318, this day decided by this court, save and except it charges the sale of "jackass" brandy. All of the objections considered in the Perfetti Case are presented in this case. No demurrer was filed, and the objections are raised on a motion in arrest of judgment. The conditions are exactly the same as in the Perfetti Case, and the authorities there cited and the reasons there stated apply, and, upon the authority of the Perfetti Case, we hold that the objections sought to be raised upon this appeal are untenable; all having been waived by failure to demur.

In addition to presenting the same technical objections as were presented in the Perfetti Case, the defendants upon motion for a new trial in this case sought to raise the objection that the trial court was guilty of such misconduct as prevented the defendants from having a fair and impartial trial. It appears that the case of People v. Perfetti had been tried preceding the trial of the Martinson case, and that, upon the day set for pronouncing sentence in the Perfetti Case, the trial court, in pronouncing judgment, referred to the testimony of one of the witnesses in the Perfetti Case, to wit, a witness by the name of Guenza, as having been palpably false, and pointed out the particulars showing the falsity of such testimony, and referred to the attorneys in the Perfetti Case in language indicating that intelligent attorneys ought to have known of the falsity of the defense. This is the substance of the trial court's language in commenting upon the testimony in the Perfetti Case. The affidavit to which we have referred, omitting the remarks of the court, is in the following words and figures:

"State of California, County of Sonoma—ss.:

"O. A. Martinson and Ione Martinson, being first duly sworn, each deposes and says:

"That affiants state that the trial of the above-entitled cause was commenced November 10, 1927, and at the close of court on said day continued by consent of all parties until Monday, November 14, 1927, at the hour of 10 o'clock a. m. That at the hour of 10 o'clock a. m. November 14, 1927, affiants and their counsel and the jurors impaneled in the above-entitled cause were present in court and sitting in seats in the courtroom within the hearing of the judge, as spectators. That, promptly at 10 o'clock of said last day, said court called the case of the People of the State of California v. C. Perfetti, who had been convicted in said court on the 9th day of November, 1927, of a misdemeanor in furnishing to a minor under the age of 21 years intoxicating liquors, thereby contributing to the delinquency of said minor at said time and place the court made the following statement from the bench: * * * That said statement was made by said court in the presence of the jury impaneled and sworn to try the cause of which these defendants was accused, and all of said jurors did hear the statements so made by said court.

"That upon the conclusion of said remarks and the pronouncing of judgment against said defendant C. Perfetti in said action above mentioned, the court directed the members of the jury sitting in trial of these defendants to take their place in the jury box. That thereupon these defendants offered evidence of themselves and another witness to prove that the said defendant O. A. Martinson did not see, and that said Wallace Cordray was not in the presence of said O. A. Martinson at the time of said alleged sale of liquor, and that said defendant Ione Martinson testified in her own behalf that she refused to sell any liquor to the said Wallace Cordray, and the testimony of said affiants consisted substantially of a denial of the testimony of the said Wallace Cordray, and these affiants had, and there was, no other evidence which was known to them which could be offered in support of their defense. The foregoing affidavit is made in support of the motion of defendants for a new trial herein.

"Wherefore affiants pray that their action for new trial may be granted.

"O. A. Martinson.
"Ione Martinson."

[1] The witness Guenza was not called as a witness in the Martinson case. The affidavit is absolutely silent as to whether the defendants did or did not desire to use the testimony of the witness Guenza. There is nothing in the affidavit which we have set forth, nor is there anything in the record in the Martinson case indicating that the attorneys in the Martinson case were the attorneys representing the defendant in the Perfetti Case. There is nothing in the affidavit, nor is there anything in the record, indicating that the jurors in the Martinson case knew who the attorneys were in the Perfetti Case. Upon oral argument herein it was stated that the attorneys were the same, but this court is bound by the record, and not by oral statements. We call attention to the further fact that there is not a word in the affidavit nor a word in the record tending to show that the jurors referred to in the affidavit were influenced in any particular by the remarks of the court. No objection was made at the time, and whatever of merit, if any merit at all there be in the appellant's contention in relation to the remarks of the court, the record shows that the appellants sat idly by, and were willing to take their chances upon the result of the trial before the jury already impaneled. Even though the question were presented to us in such form that it might be considered, there are many authorities which would justify holding the objection raised by the affidavit untenable. In the case of Johnson v. State, 59 Ga. 189, in considering remarks of the trial court upon a charge to the grand jury, in the presence of trial jurors, the Supreme Court of that state said:

> "The charge to the grand jury was proper. It was right to exhort them to put down crime. That is their business as the grand inquest of the county, and the only criticism that can be made upon the whole affair is that the judge spoke in presence of the traverse jury, and painted a class of offenders, to which this defendant seemed to belong."

[2] We will not extend this opinion by consideration of the cases cited in the memorandum of authorities submitted by the district attorney of Sonoma county, but will simply cite them as supporting the contention that the defendants have not suffered any prejudice by reason of the remarks of the trial court. Landthrift v. State, 140 Ala. 114, 37 So. 287; People v. Threewitt, 251 Ill. 509, 96 N. E. 242; State v. Little, 174 N. C. 793, 94 S. E. 97; People v. Murphy, 68 Cal. App. 738, 230 P. 21. While the testimony is conflicting, it contains sufficient, if believed by the trial jury, to amply support the verdict. It cannot be assumed that the remarks of the court in referring to the testimony of a witness in a different case and to the testimony of a witness not called in this case, or to the attorneys in the Perfetti Case, not shown by the record to be the same attorneys as were engaged in the Martinson case, affected the jury in its decision of the cause now under consideration.

Thus, the record not showing that the defendants were accorded other than a fair and impartial trial, the order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

89 Cal. App. 18

PEOPLE v. WELCH et al. (Cr. 1550.)

Division 1, California. Feb. 4, 1928.

District Court of Appeal, Second District,

1. Indictment and information 🔑125(5½)—Information charging "conspiracy" to commit burglary, grand larceny, robbery, and other crimes held to charge only one offense (Pen. Code, §§ 182, 184).

Information charging defendants with criminal conspiracy to commit crime of burglary, grand larceny, robbery, assault with deadly weapon, assault with intent to commit murder, and to violate Deering's Gen. Laws 1923, Act 1970, § 2, *held* not subject to objection that it charged several offenses, since criminal "conspiracy," as denounced by Pen. Code, §§ 182 and 184, for purposes of instant case, is agreement between two or more persons to commit crime, and gravamen of offense is agreeing or conspiring together to commit crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. Conspiracy 🔑43(1)—That several crimes specified in information as object of conspiracy made determination of punishment difficult did not make information charging conspiracy bad.

Where information charged conspiracy to commit crime of burglary, grand larceny, robbery, assault with deadly weapon, and other crimes, fact that with several crimes specified as object of conspiracy serious difficulty would arise in determining period of imprisonment that might be fixed as punishment did not make information bad, since punishment was question for prison board to determine and not trial court.

3. Indictment and information 🔑119—Information charging assault with deadly weapon with intent to commit murder charged crime, even if words "with a deadly weapon" be treated as surplusage (Pen. Code, § 217).

Information charging defendants with crime of assault with a deadly weapon, with intent to commit murder, charged offense defined in Pen. Code, § 217, treating words "with a deadly weapon" as surplusage.

4. Conspiracy 🔑40—Defendant, co-operating with party with whom he was handcuffed in reaching automobile and extracting revolver, aided and abetted him in shooting.

Defendant, co-operating with party with whom he was handcuffed in aiding him to reach automobile and extract revolver, aided and abetted him in shooting at officers.

5. Conspiracy 🔑41—Where persons conspire to carry out common design, each conspirator is liable for every act of confederates done during life of conspiracy in furtherance of accomplishment of plan.

Where two or more persons conspire to carry out a common design, each one of conspirators is liable for every act of his confederates done during life of conspiracy and in furtherance of accomplishment of common plan.

6. Homicide 🔑257(1)—Evidence held to support conviction for assault with intent to commit murder (Pen. Code, § 217).

Evidence *held* sufficient to support conviction for crime of assault with intent to commit murder, in violation of Pen. Code, § 217.

7. Criminal law 🔑736(1)—Where testimony was conflicting on whether accused's testimony in another case was induced by promise of immunity, evidence was properly admitted, leaving question for jury.

Where testimony given by one of defendants in another case, in which defendant has appeared as witness for state against codefendant, was objected to on ground that testimony had been adduced by promise of immunity from punishment, and testimony on point was conflicting, it was within province of court to overrule objection, and, after evidence was read to jury, instruct them that matter involved issue of fact for them to decide.

8. Criminal law 🔑1202(3)—Evidence held to support conviction for possessing revolver capable of being concealed on person after having been previously convicted of felony (Deering's Gen. Laws 1923, Act 1970, § 2).

Evidence *held* sufficient to support conviction of defendants for having in their possession, or under their custody, revolver capable of being concealed on person, after having been previously convicted of felony, in violation of Deering's Gen. Laws 1923, Act 1970, § 2.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

George Richard Welch and another were convicted of criminal conspiracy, assault with intent to commit murder, possession of deadly weapon, and prior conviction of felony, and they appeal. Affirmed.

George E. Stoddard, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer and John L. Flynn, Deputy Attys. Gen., for the People.

HAHN, Justice pro tem. Appellants were charged by information filed by the district attorney of Los Angeles county, in count I with the crime of criminal conspiracy; in count II with the crime of assault with a deadly weapon with intent to commit murder; in count III defendant Welch was charged with having in his possession, custody, and under his control, a revolver capable of being concealed on his person, he having been previously convicted of a felony; and in count IV defendant Grace was charged with the same offense which Welch was charged with in count III.

The information was attacked by demurrer upon the following grounds: First, that the court had no jurisdiction of the offense charged; second, that the information does not substantially conform to sections 950, 951, and 952, of the Penal Code; third, that more than one offense is charged in said information, and the information does not conform to section 954 of the Penal Code; and, fourth, that the facts stated in the information do not constitute a public offense.

The demurrer was overruled, and the defendants put upon trial before a jury, which resulted in verdicts of guilty upon each of the counts. The jury also found as true the allegations contained in counts III and IV, that each defendant named therein had been previously convicted of a felony.

From the judgment of conviction and the order denying their motion for a new trial the appeal is taken.

Appellants specify three counts upon which they urge a reversal of the judgment: First, that the court erred in overruling their demurrer; second, that the verdicts are contrary to the evidence; third, that the court erred in allowing the introduction in evidence of the testimony of defendant Welch given in a previous trial.

[1] The first point urged involves count I, which, omitting unimportant portions thereof, reads as follows:

> "The said George R. Welch and the Vernon Young Grace are accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of the crime of criminal conspiracy, a felony, to commit the crime of burglary, a felony, grand larceny, a felony, robbery, a felony, assault with a deadly weapon, a felony, assault with intent to commit murder, a felony, and violating section 2 of Act 1970 of the Statutes of 1923 [Deering's Gen. Laws 1923], a felony," etc.

The gist of the criticism laid against this count by the demurrer is that it charges that the conspiracy was formed to commit six separate and distinct crimes, when as a matter of law but one crime may be charged as the object of the alleged conspiracy. The main reason urged in support of this contention is that the statute provides as punishment for the offense of conspiracy to commit a crime the same punishment that is provided for the commission of the crime, and where a count, as in the instant case, charges a conspiracy to commit six different and separate offenses for which crimes different penalties are provided by the statute, there is no measure or method provided by law to determine which penalty to impose.

The first inquiry suggested as we approach a consideration of this question is: What are the essential elements that constitute the offense of criminal conspiracy? For the purposes of the instant case, a criminal conspiracy as denounced by section 182 of the Penal Code may be defined as an agreement between two or more persons to commit a crime. Section 184 of the Penal Code further provides that—

> "No agreement amounts to a conspiracy, unless some act, besides such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement."

Manifestly, there is nothing indicated in either of these two sections that a charge of criminal conspiracy must be limited to an agreement to commit but one crime. The gravamen of the first element of the offense is the agreeing or conspiring together to commit a crime. It is this element which distinguishes the crime of criminal conspiracy to commit robbery from the crime of robbery itself which involves the overt act. The iniquity of the conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful. It may be, and not infrequently happens, that but one or a portion of the number who actually plan the evil design take part in the overt act that accomplishes the intended crime. Forsooth, the most dangerous members of the conspiracy, without whose malignant hearts and shrewd minds the crime would not have been instigated, are adroit enough to refrain from actual participation in the overt act. Unquestionably, the purpose of the law in making it an offense to conspire to commit a crime is to reach every one who in any way participated in forming the evil plan, irrespective of who or how many carry out the design, and well may this be a protection to society, for a group of evil minds planning and giving support to the commission of crime is more likely to be a menace to society than where one individual alone sets out to violate the law.

It would seem to do violence to reason to hold that, where several persons agreed to rob a bank and as a part of the plan they determined to shoot any one who resisted or interfered, they may not be charged in one count with criminal conspiracy because, forsooth, their evil designs contemplated murder as well as robbery. The part of the plan to be armed with loaded revolvers and commit an assault with intent to kill, if need be in carrying out the robbery plan, is just as much a part of the crime which the statute denounces as that part which contemplated the robbery. The fact that neither the actual robbery nor the actual shooting is an essential element in the crime of criminal conspiracy, further emphasizes the fact that the crime of criminal conspiracy consists in the planning and scheming together, and there would seem to be no reason to hold that the charging of a part of the evil plan would properly state a cause of action, when the charging of the entire plan does not state a cause of action.

This view finds support in the case of People v. MacPhee, 26 Cal. App. 221, 146 P. 523, where the court says:

> "It is the first contention of the appellants that the indictment is defective in the fact that it charges the defendants with two crimes, viz. a conspiracy under section 182 of the Penal Code, and also the offense of receiving bribes under section 68 of the Penal Code. We cannot agree with this contention. The indictment is sufficient to charge the offense of a conspiracy to commit or connive at the commission of the

several kinds of offenses enumerated in section 182 of the Penal Code; the language of that section is inclusive and elastic enough to permit the framing of an indictment charging a conspiracy to do or permit the doing of any or all of the illegal acts referred to therein; and the fact that the parties to the conspiracy succeeded in perpetrating the acts of crime or fraud specified in the section, which thus became crimes under those other sections of the code forbidding these specific offenses, would not in any wise relieve the conspirators from their liability under section 182 of the Penal Code. To hold otherwise would be to practically nullify that section by making success in the consummation of its enumerated acts of fraud and crime a defense to the conspiracy by which that success was made possible."

In the case of People v. Johnson, 22 Cal. App. 364, 134 P. 340, the indictment contained two counts, one charging a conspiracy to falsely accuse one Loveland of the crime of issuing checks without sufficient funds, and the second charged a conspiracy to pervert and obstruct justice and the due administration of the law. In discussing the merits of a demurrer filed to the indictment, which was overruled, the court says:

> "To do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to a single offense only, and it is quite plain that the district attorney might have joined in one count of his indictment all of the matters which were made the subject of the two counts. That he did choose to separate them and state with more particularity the charge in the way which is exhibited by the indictment did not violate any of the rules of criminal pleading, or any of the specific provisions of section 954 of the Penal Code."

This line of reasoning finds support in the decision of the United States Supreme Court in the case of Frohwerk v. United States, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561. One of the counts of the indictment charged a conspiracy to commit numerous specific acts, each of which constituted a separate offense under the Espionage Act of June 15, 1917 (50 USCA § 31 et seq.; U. S. Comp. St. §§ 10212a–10212h). In sustaining the ruling of the district court overruling a demurrer filed to the indictment on the ground that the count in question stated a conspiracy to commit a number of offenses, Mr. Justice Holmes, speaking for the court, said:

> "Countenance we believe has been given by some courts to the notion that a single count in an indictment for conspiring to commit two offenses is bad for duplicity. This court has given it none. * * * The conspiracy is the crime, and that is one, however diverse its objects."

Our Supreme Court furnishes support for similar conclusions in the case of People v. Gosset, 93 Cal. 641, 29 P. 246, and People v. McClennegen, 195 Cal. 445, 234 P. 191.

Appellants cite the case of People v. Barnard, 63 Cal. App. 562, 219 P. 756, in support of their contention. While there is language in the opinion in that case which is susceptible to a construction that would give aid to appellants' theory, it clearly appears from a reading of that case that facts and matters were there involved and which unquestionably were determinative of the case which do not appear in the instant case. To discuss these points in detail would seem to extend this opinion to undue length, and we deem it sufficient to say the case is readily distinguished from the instant case.

[2] We now come to the point urged that, with several crimes specified as the object of the conspiracy, serious difficulty will arise in determining the period of imprisonment that may be fixed as punishment for the crime. But this is a question for the prison board to determine and not the trial court. All of the offenses charged as being the object of the conspiracy are felonies, and the minimum period of incarceration provided for the least serious is one year in a state prison. This determines the place of imprisonment, and to the prison board under our indeterminate sentence law is left the question of determining the extent of sentence. It is quite possible that the query will never become acute, for the reason that the prison board may see fit to fix a period of incarceration within the maximum provided for the least serious offense specified as the object of conspiracy, in which even appellants would have no legal cause for complaint.

We are of the opinion that the demurrer was properly overruled.

[3] The next point urged by appellants, that "the verdict is contrary to the evidence," relates to count II, which charges the defendants with the crime of assault with a deadly weapon with intent to commit murder. The offense intended to be charged in this count is undoubtedly that denounced by section 217 of the Penal Code, which declares:

> "Every person who assaults another with intent to commit murder, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

It will be noted that the information has the added language, "with a deadly weapon," not found in the above-quoted section, but which does constitute a part of the crime defined in section 245 of the Penal Code. However, treating this added language as mere surplusage, there is still charged in the information all the essential elements of the offense defined in section 217 of the Penal Code.

There is evidence in the record tending to establish the following state of facts: Early on the evening of May 29, 1926, in response to a telephone call that three men in a Hudson brougham were seen acting in a suspicious manner in the vicinity of Second and Temple streets in the city of Long Beach, Officers M. A. Smith and Albert Haas were detailed to round up the suspected trio. As the officers approached a gasoline service station situate on the corner of Temple and Broadway streets, they observed standing on the service station grounds a Hudson brougham having the license number given by the informant. As the officers approached the Hudson car, they observed two men in the car, defendant Welch and one Walter Gale. Drawing their revolvers, the officers ordered the two men to put up their hands. They were promptly handcuffed and ordered out of the car. Officer Haas asked the men where the third man was, but the two refused to make any reply. Thereupon the service station man informed the officers that the third man was in the lavatory. Officer Smith remained with the two handcuffed men while Officer Haas went over to the lavatory and there placed the third man, who proved to be the defendant Grace, under arrest. In the meantime, Officer Smith searched the Hudson car and found a .38 caliber loaded revolver lying on the floor of the car under the driver's seat. While the officers were discussing the manner of proceeding to the police station with the three men, Gale and Welch worked their way from where they were standing over to the Hudson car, and Gale, reaching inside of the Hudson car, extracted a loaded revolver and ordered the officers to put up their hands. Immediately Gale began shooting, he and Welch maneuvering in such a way as to keep the Hudson car between them and the officers. The officers returned the fire, but without effect. When Gale had emptied his revolver he and Welch made their escape by jumping over a low fence which was built along the boundary line of the service station grounds and succeeded in secreting themselves in the adjoining property. During the shooting Grace took no part in the affray, nor did Welch do any shooting, although he apparently co-operated with Gale in reaching the car in order to get the revolver. Gale was subsequently apprehended.

It also appears from the testimony that Welch and Grace were acquainted in the northern part of the state and came to Long Beach upon the suggestion of Grace that the Long Beach territory furnished a good opportunity for burglary jobs. They met Gale at Long Beach, and the three men, with one McDonald and two young women, lived in a house on Prospect avenue in Long Beach for a number of weeks. During this period of time, Welch and Grace did a job of shingling and some plastering; otherwise the trio found their main source of livelihood in burglarizing houses and selling their loot to Afana Bros., who appear to have made a business of acquiring stolen goods.

On the night of the shooting, Welch, Gale, and Grace left the house where they were living with the purpose of doing a burglary job. They picked out a house occupied by one Merithew as the object of their attack. While reconnoitering about the place, they were observed by a neighbor, John T. Houser, who became suspicious of their conduct and reported them to the police station. The trio realized they were the object of Houser's scrutiny, and deemed it advisable to drive away from where they were discussing the situation in front of the Merithew house. It was their theory that by going away they would thus lull the suspicions of Houser and return later and complete the job. As they were driving about waiting for the opportune time to return to the Merithew house, Grace, who was driving the car and apparently the owner of the car, or at least exercised ownership over it, drove up to the service station where the shooting took place, for the purpose of going into the lavatory. While there, the officers came up and the shooting followed.

[4] There is abundant evidence to support the theory of the prosecution that Grace, Gale, and Welch were making a business of burglarizing unoccupied houses; that on the night in question, when they started out to rob the Merithew house, they carried with them two loaded revolvers to be used unquestionably in the event that any one should interfere with their evil design. A reasonable inference to be drawn from the fact that they had the loaded revolvers on a burglary job is that they were prepared to and would shoot to kill any officer or other person who interfered with them or apprehended them. Welch co-operated with Gale, with whom he was handcuffed, in aiding him to reach the automobile and extract the revolver, and thus clearly aided and abetted Gale in the shooting.

[5] It is a well-settled rule of law that, where two or more persons conspire to carry out a common design, each one of the conspirators is liable for every act of his confederates done during the life of the conspiracy and in the furtherance of the accomplishment of the common plan.

We can hardly conceive of a situation where this rule would be more clearly applicable than in the instant case. The use of the loaded revolvers carried in the Hudson car by any one or two of the trio to prevent arrest or interference was just as clearly a part of the common design of the conspirators as was the breaking into the house and stealing its contents, and, when Gale attempted to kill the officers, Welch and Grace were just as much responsible for the act of shooting as they would be of burglary if Gale had entered the house for the purpose of burglarizing it, leaving Welch and Grace outside to watch. This principle and its application to the facts in the instant case is recognized and declared in the case of People v. Kauffman, 152 Cal. 331, 92 P. 861, and also in the case of People v. Wheaton, 64 Cal. App. 58, 220 P. 451.

[6] We are of the opinion that the verdict of guilty as to the charge contained in the second count is abundantly supported by the

evidence. In fact, we are moved to suggest that it is difficult for us to understand how the jury could have arrived at any other verdict from the evidence.

[7] The third point urged by appellants is that the court erred in overruling their objection to the reading of the testimony given by defendant Welch in another case. The defendant Grace had previously stood trial for burglary, and in that case defendant Welch appeared as a witness for the state. In his testimony in that case Welch related his acquaintance and relations with Grace and gave the details of a number of burglaries which he and Grace committed in Long Beach. He detailed the events of the evening on which the shooting occurred. The prosecution in the instant case offered such portions of Welch's testimony given in the previous trial as were pertinent to the issues involved. Defendants objected on the ground that the testimony of Welch, given at the previous trial, was induced by a promise of immunity from punishment. The trial court took evidence upon that question. It would avail nothing here to go into the details of the testimony offered by appellants and by the state to meet that issue. Inasmuch as there was a conflict in the testimony on the point, it was well within the province of the court to overrule the objection. Subsequently, by stipulation, the same testimony that was offered upon the question in the absence of the jury was read to the jury, and the court properly instructed the jury that the matter involved an issue of fact that came within their province to decide. In view of the verdict of the jury, we must presume that they concluded the testimony given by Welch was not induced through a promise of immunity. In the case of People v. Black, 73 Cal. App. 13, 17, 238 P. 374, 375, the court, in considering a similar question, said:

> "In our opinion the whole question resolves itself into one merely of conflicting evidence, the determination of the result of the conflict resting finally in the trial court. * * * The evidence upon the point being in conflict, it must be assumed that the confessions were properly admitted."

[8] The last and final point urged by appellants is that the evidence is insufficient to establish a violation by appellants of section 2 of Act 1970 of the Statutes of 1923 (Deering's Gen. Laws 1923). This act makes it a felony for any person who has been previously convicted of a felony to have in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed on his person. Appellants contend that there is no evidence in the record to show that either of them had a revolver in his possession or in his custody or control. The evidence without dispute does show that there were two loaded revolvers in the Hudson car, one found under the driver's seat by the officers, and the other extracted from some place in the rear of the car by Gale and which Gale used in the shooting. The evidence further shows that Grace was the driver of the car and at least exercised ownership over it. To say that under the evidence appellants, while they were driving in the car, did not have in their possession or custody or under their control the revolvers that were then in the car, unquestionably carried to aid in the burglary job that was the object of the evening trip, would do violence to reason. In addition, there is the testimony of the witness Lillian O'Farrell, who was one of the two women who resided with the appellants in the house on Prospect avenue in Long Beach, that she saw both the appellants with revolvers, and that appellants were in the habit of carrying revolvers with them when they went out on their burglary jobs. There is no merit in this point.

As we find no merit in the record, the judgment and the order denying the motion for a new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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89 Cal. App. 29

GRAY v. SOUTHERNE et al. (Civ. 4863.)★

District Court of Appeal, Second District, Division 2, California. Feb. 4, 1928.

Hearing Denied by Supreme Court April 2, 1928.

1. Mortgages 🔑106—In determining whether promises were concurrent, court could look to entire transaction.

As to mortgage where there was promise to pay, and promise on part of grantor to convey water supply, court could look to entire transaction to determine whether promises were concurrent, and need not be governed by technical rules in ascertaining intention of parties.

2. Mortgages 🔑415(2) — Purchase-money mortgagee who had promised to furnish water held not entitled to foreclose until tender of water right.

In action to foreclose mortgage, where mortgagee had sold property with understanding he furnish water, *held* that promise to pay under mortgage and promise to furnish water were concurrent, and there could be no foreclosure until tender of water right.

3. Equity 🔑39(1)—Equity held to have duty to remove cloud on title created by mortgage attempted to be foreclosed nearly 27 years after issuance.

In action to foreclose mortgage about 27 years after it was given, where at time of giving mortgage mortgagee promised to supply mortgagor with water right, which was never done, *held* that mortgage constituted cloud on real property, and, lien being unenforceable by reason of laches, it was duty of court to order removal of cloud.

★Hearing denied by Supreme Court.

4. Equity ⚿39(1)—It is duty of equity, when all parties to controversy are before it, to adjust rights and leave nothing open for further litigation.

It is duty of court of equity, when all parties to controversy are before it, to adjust rights and leave nothing open for further litigation.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by A. C. Gray against Maude Southerne, administratrix of the estate of Claude E. Southerne, sometimes known as C. E. Southerne, deceased, and others to foreclose mortgage. From judgment for defendant plaintiff appeals. Affirmed.

Sapiro, Levy & Hayes and Boyd Oliver, all of San Francisco, for appellant.

William Guthrie, of San Bernardino, for respondent.

THOMPSON, J. On November 2, 1896, one R. E. Blackburn agreed by an instrument in writing to sell to Claude E. Southerne about fourteen acres of land known and described as lots 1 and 2 of block E, Blackburn's addition to Ontario, for the total sum of $1,800, payable in installments. A part of this contract reads as follows:

> "And it is further agreed by the said party of the first part (Blackburn) that he will furnish with said land a supply of water under pressure for domestic purposes equal to thirty gallons for each acre daily, said water to be piped along the street opposite said lot ——, whence it shall be taken at the expense of said party of second part. And said party of the first part shall, upon the execution and delivery of said deed of said lots as aforesaid, also deed to said party of the second part the said supply of water in the quantity specified, or else such an interest in the corporation stock of a water company as shall represent said water supply, and also a pro rata interest in the pipe system and rights of way for the distribution of water on said Blackburn's addition in the same proportion as said lots bears to the whole of the land in Blackburn's addition; it being understood that the cost, if any, of maintaining said water system shall be borne by the several owners thereof in proportion as their respective interests bear to the whole."

On April 22, 1897, Blackburn deeded to Southerne the land and in the deed covenanted as follows:

> "The said R. E. Blackburn hereby covenants, he shall and will on full payment of the notes given by said party of the second part, for part purchase price of said land and secured by mortgage on said land, deed for use on said land a supply of water under pressure for domestic purposes equal to thirty gallons per acre daily, said water to be piped along said lots Nos. 1 and 2, block E, whence it shall be taken at the expense of said party of the second part, and also deed a pro rata interest in the pipe system and rights of way for the distribution of water on said Blackburn's addition to Ontario in the same proportion as said lots bears to the whole of the land of said Blackburn's addition; it being understood that the cost (if any) of maintaining said pipe and water system and said water supply shall be borne by the several owners thereof as their respective interests bear to the whole."

Southerne, at the time, executed the two notes here sued upon for the balance of the purchase price, one for $600 and the other for $630, to fall due in three and four years, respectively, secured by a mortgage upon the real property. Blackburn endeavored to drill a well which proved a failure. At no time did he furnish or deliver any water or have any water to furnish or to deed. Southerne and his family lived on the property for a short time during the year 1898, during which period by courtesy of the city of Ontario they received water from that source, but, that city being obliged to discontinue the service on account of their own shortage, the Southernes were compelled to move. Testimony was introduced that the land was worth, at the time of its sale, without water, somewhere between $10 and $20 per acre and that it would have cost in the cheapest form $1,000 to sink a well and install equipment for a domestic supply of water. Blackburn assigned the notes to plaintiff on November 9, 1898, Southerne died on March 20, 1899, and Maude Southerne, the purchaser's widow, was appointed administratrix of his estate as late as May 7, 1919. Complaint was filed for the foreclosure of the mortgage in July, 1922. The defendant, Maude Southerne, as administratrix, answered, denying all of the allegations of the complaint, and alleging as a further defense that Blackburn agreed to supply water for irrigation or domestic purposes, that he had wholly failed to supply or deed water therefor, and that the consideration for the notes totally failed.

The court rendered its judgment denying foreclosure and ordering that the mortgage be canceled, for the reasons that the consideration had totally failed, and further that plaintiff had lost his right to foreclose by reason of laches. The plaintiff appeals from this judgment.

The appellant assigns as reasons for the reversal of the judgment that there was no laches, that there was no obligation on the part of plaintiff's assignor to deed a water supply until after payment in full of the notes, or, considering the covenants of the contract to be still in force, that there has been neither a rescission nor claim for damages.

[1, 2] This last-mentioned argument we think misses the mark. We may look to the entire transaction of the parties to determine whether the promise to pay and the promise

to deed rights to a water supply were concurrent. We need not be governed in our solution of the problem "by any technical rules, but by ascertaining, if possible, the intention of the parties." Ernst v. Cummings, 55 Cal. 179-183. The original agreement for the sale of the land not only required a grant of the water rights upon the execution and delivery of the deeds, which delivery was to be made upon completion of the payments, but also to furnish the water during the life of the contract, and in addition required Blackburn to cultivate the land and set it with deciduous fruit trees during the planting season 1896-97. Furthermore, the testimony established that as dry land the real estate value was very small—somewhere between $140 and $280. Undoubtedly the parties originally intended that payment should be made by defendant upon the furnishing of the water. When we turn our attention to the deed we find that the covenant is very similar to the covenant in the contract, except that it does not specifically provide that water be furnished prior to consummation of the contract, but it does provide that there shall be deeded "for use on said land a supply of water," etc., which was to be done "on full payment of the notes," whereas in the contract the parties used the expression "upon the execution and delivery of said deed of said lots, * * * also deed to said party of the second part the said supply of water," which in turn was to be "upon the completion of the terms of this contract." So far as the use of words is concerned, the only difference is found in the words "on" and "upon." We therefore conclude that the parties did not intend to make a distinction, and yet by no construction could it be said that the covenants were not dependent in the original contract. We are of the opinion that by a fair reading of the covenants of the deed and mortgage they were also concurrent, and especially so when read in the light cast upon them by the prior agreement and the surrounding conditions. Therefore, until there had been a tender of the water right on the part of Blackburn or his assignee, there could be no foreclosure of the mortgage. Englander v. Rogers, 41 Cal. 420, Bohall v. Diller, 41 Cal. 532; Naftzger v. Gregg, 99 Cal. 83, 33 P. 757, 37 Am. St. Rep. 23; Howard v. Higgins, 137 Cal. 227, 69 P. 1060.

[3, 4] It now remains for us to consider whether the court was within its right in directing the cancellation of the mortgage. For nearly 27 years no right to a supply of water was tendered, nor was Blackburn ever able to tender a right thereto, for the reason that he had none to tender. The defendant for that period of time was either under the necessity of securing a different source of supply or of going without the use of the property, which latter he was finally forced to do. To say that no prejudice has been suffered by the defendant as a result of the delay is to argue in the face of all reason and understanding. To argue that there was no change of position is to shut our eyes to the facts. Doubtless Southerne in his lifetime, and his widow since, would gladly have paid the amount of the notes upon receiving water rights pursuant to the covenant, and doubtless had come to the conclusion by reason of the fact that it was impossible to deliver the water rights, that this chapter had been closed, and that they had no reason to concern themselves with the possibility of the appearance of a modern "Rip Van Winkle." Certainly there has been such a great delay, accompanied by such circumstances as to awake an abhorrence on the part of equity, in taking action—and plaintiff has voluntarily submitted himself to this branch of our judicial system in seeking to foreclose his mortgage. Under these circumstances, the mortgage would constitute a cloud upon real property—a lien which would be unenforceable by reason of laches and the impossibility of tendering performance of a concurrent condition, but nevertheless a cloud. It was not only the right, but the duty, of the court under such circumstances to "wipe the slate clean" by ordering the removal of the cloud. 7 C. J. 1189; Wiard v. Brown, 59 Cal. 194. Or, as said in Swan v. Talbot, 152 Cal. 142-147, 94 P. 238, 240 (7 L. R. A. [N. S.] 1066):

> "It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation."

For very apparent reasons it is unnecessary for us to discuss whether the evidence was sufficient to justify the court in finding that the value of the water rights was at the time of the purchase the sum of $1,230, although it is obvious that the difference between the value of the land and the purchase price would leave considerable value to be put upon the water rights.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

89 Cal. App. 119

FOYE et al. v. SIMPKINSON. (Civ. 4638.)

District Court of Appeal, Second District, Division 2, California. Feb. 8, 1928.

Landlord and tenant 🔑214—Though lease was surrendered by mutual consent, lessor was entitled to payment advanced to be credited on last month's rent.

Where property was leased for three years at named monthly rental, and, in addition to regular monthly rental, additional sum of $375, to be credited on account of last month's rent, though lease was surrendered by mutual consent, additional payment being advance payment of rent, became absolute property of lessor, which he was entitled to keep.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. Edward Foye and another against Lydia P. Simpkinson. From a judgment for defendant, plaintiffs appeal. Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellants.

John M. Thomas, Jr., of Los Angeles, for respondent.

STEPHENS, Justice pro tem. The determination of the appeal in this case hinges upon one point. A house lease provides:

> "That for and in consideration of the payments of the rents, and the performance of the covenants contained herein, on the part of the said parties of the second part [plaintiffs and appellants], and in the manner hereinafter stated, said party of the first part does hereby lease, demise and let * * * for the term of three (3) years * * * at the monthly rent or sum of three hundred and seventy-five ($375.00) dollars, payable monthly in advance, * * * and in addition to the regular month's rent an additional sum of three hundred and seventy-five ($375.00) dollars to be credited on account of the last month's rent under this lease."

Many months prior to the expiration date of the lease term, the parties signed the following indorsement on the lease:

> "By consent of all parties hereto the foregoing lease is hereby terminated and possession of said premises and furniture surrendered as of date of May 24, 1921."

Plaintiffs contended in the trial court, and so contend here, that the $375 paid for the last month's rent should be returned to them. Judgment went for defendant, and plaintiffs appeal upon the judgmenet roll alone.

The law applicable to this case has been so often considered by the appellate courts of this state that we shall not attempt to review it here. Mr. Chief Justice Waste, when presiding justice of the First District Court of Appeal, collated the cases, and very clearly distinguished them in Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510. Mr. Presiding Justice Finlayson of the Second District Court of Appeal did likewise in Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077. Mr. Justice Waste in the above referred to case says:

> "If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor; if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it."

Mr. Justice Finlayson quotes this language with approval. Under the principles applied in these cases and numerous others cited and commented upon therein, the payment of the last month's rental in the instant case was clearly an advance payment of rent, and the lessor was and is entitled to keep it. McArthur v. Kluck, 75 Cal. App. 785, 243 P. 453; Pedro v. Potter, 197 Cal. 751, 760, 242 P. 926, 42 A. L. R. 1165. There is no element of forfeiture here, as in Parish v. Studebaker, 50 Cal. App. 719, 195 P. 721 and Jack v. Sinsheimer, 125 Cal. 563, 58 P. 130, and no element of deposit as security, as in Rez v. Summers, 34 Cal. App. 527, 168 P. 156.

It will be observed that the cases hereinabove cited have one and the same point of fact different from the instant case. A default has been in evidence, while here the leasehold was surrendered by mutual consent. Inasmuch as the leading cases adopt the principle that, if the money was paid in consideration of the covenants of the lease, or merely as advance payment of rent in accord with a requirement of the lease, it thereupon becomes the absolute property of the lessor, this difference in fact does not change the principle of decision. By the terms of the lease this payment of the $375 for a subsequent month's rental was fixed at a specified time, and accrued at such time exactly as the due date accrued on every other month's rental.

> "It is difficult to understand how, rent having become due at the commencement of the rent period, it can cease to be due because the tenancy subsequently comes to an end." 1 Tiffany, Landlord and Tenant, p. 1180.
>
> "I need only say that, in my opinion, the landlord was entitled by the terms of his contract to retain rent paid in advance although subsequently to the receipt of the rent he became entitled to reenter and did so." Ellis v. Rowbotham, 1 Q. B. 740, 744.
>
> "A surrender may be effected by express words, evincing such agreement, or may be implied from conduct of the parties going to show that they have both agreed to consider the surrender as made." 24 Cyc. 1382.
>
> "A surrender has no effect upon the liability of the tenant for rents accrued at the time of the surrender, and this is true though the rent was payable in advance for a period beyond the time of the surrender, and a fortiori rent paid in advance cannot be recovered on surrender." 18 Am. & Eng. Enc. of Law (2d Ed.) p. 295.

"The surrender of a term does not effect the discharge of the tenant from rent which has already accrued and become payable, even though the rent was payable in advance for a period beyond the time of the surrender." 36 Corp. Jur. § 1149, p. 340.

There is nothing before us, and presumably there was nothing before the trial court, upon which could be based a conclusion that the written surrender did not express the complete understanding of the parties, nor that they did not intend that it should finally close all of the relations created by, and arising from, the lease.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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88 Cal. App. 762

RUPRECHT et al. v. NICHOLSON.

(Civ. 5952.)

District Court of Appeal, First District, Division 2, California. Feb. 2, 1928.

1. Deeds ⚷100—Intention of parties in deed should be determined from language, interpreted in light of attending circumstances.

Intention of parties in deed should be determined from language of deed, interpreted in light of attending circumstances.

2. Evidence ⚷455—In action to restrain purchaser from erecting chicken houses under deed permitting "outbuildings," exclusion of evidence of attending circumstances held error.

In action to restrain plaintiff, who had purchased lot under deed restricting buildings to dwelling houses and garage or "outbuildings," from erecting buildings for chicken farm, refusal of court to permit introduction of evidence of attending circumstances *held* error; such evidence being admissible to explain intention of parties or to show change of conditions.

3. Covenants ⚷51(2)—Determination whether certain building is "outbuilding" usually depends upon location and use.

Determination of whether certain building is an "outbuilding," as term is used in deed, usually depends upon its location upon lot or tract of land upon which residence house is situated, and upon uses to which such building is put.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Outbuilding.]

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Pauline Ruprecht and others against S. J. Nicholson to enforce covenants of deed as to building restrictions. Judgment for plaintiffs, and defendant appeals. Reversed.

Superseding opinion in 261 P. 1026.

T. C. Gould and Louis G. Guernsey, both of Los Angeles, for appellant.

Mitchell, Silberberg & Davis, of Los Angeles, for respondents.

NOURSE, J. Plaintiffs sued to restrain defendant from erecting or maintaining upon defendant's premises buildings other than residences and outhouses permitted by the deeds of conveyance under which both parties held. Plaintiffs had judgment as prayed, and defendant has appealed upon a bill of exceptions.

The covenant under which plaintiffs sued was included in all the deeds of conveyance to all the lots of a tract of land owned and subdivided by the common grantor. The provision which plaintiffs claimed was breached reads:

> "Buildings restricted to dwelling houses and the buyer shall not construct any dwelling house upon said tracts to cost less than $3,000.00 * * * provided that the buyer may erect a garage or other outbuildings, the same to be built and located at the proper point on said tract for such building."

The complaint alleged that the defendant, disregarding this restriction, had erected on one of the lots purchased by him "unsightly chicken houses and barns for use in conducting a chicken ranch, and ever since has maintained and operated said chicken houses and barns on said property in conducting a chicken ranch." The trial court found that this allegation was true; that the buildings were used only in the business of raising chickens for commercial purposes; that they were not appurtenant or subservient to a dwelling house; and that they were not "outbuildings" within the meaning of the term as used in the deeds.

[1, 2] The crux of the case is the intention of the parties as expressed in the proviso in the deeds permitting the erection of outbuildings upon the premises. In approaching this question we should have in mind the admonition found in McBride v. Freeman, 191 Cal. 152, 156, 215 P. 678, 680, where it is said:

> "The intention of the parties should be 'determined by a fair interpretation of the grant or reserve creating the easement' (citing cases). 'It seems to us that in all these cases it is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances and then to make the language of the deed bend to that.'"

The real contention of the respondents in the present case is not that these chicken houses are not outbuildings in the ordinary sense of the term, but that all the deeds should be construed as prohibiting the use of any portion of the premises for commercial purposes. The language of the deeds differs in this respect from the customary language of deeds or contracts containing stipulations reserving premises for residential purposes only and prohibiting the use of the premises for business purposes. The customary language is that the premises are to be "used for residential purposes only"; that no part of the premises may be "used for business purposes"; that the land "is to be used for residential purposes only, and that no apartment house, store, or other place of business may be erected," or that "the premises shall be used for residential purposes only; that no apartment house, flat, hotel or any building other than a first-class private residence with the customary outbuildings shall be erected." Because of the uniformity of the use in similar deeds and contracts of these specific limitations of the premises to residential purposes, the failure of the deeds in suit to contain any limitation of that character adds to the uncertainty of the language used in these deeds. This being so, it was incumbent upon the trial court to determine the meaning of the restriction in the light of the intention of the parties at the time the contract was made, and for this purpose it was proper to receive evidence of the attending circumstances. This, however, was not done. When the appellant endeavored to show the surrounding circumstances as evidenced by the conditions of the locality in which the tract was situated, the offer of proof was, upon objection of the respondents, rejected. Without any evidence of any character touching upon the circumstances surrounding the execution of the deeds, the trial court determined, upon the face of the instruments alone, that it was intended to prohibit the erection of any building of any character upon the premises which might be used for commercial purposes. The question which comes before us at this time is therefore one of law only—whether the trial court drew the proper conclusion of law from the face of the instrument itself.

The word "outbuilding" or "outhouse" has a well-known and defined meaning. The definition of an outbuilding as given by Century Dictionary is, "A building near or subordinate to a main building;" of an outhouse is, "A small house or building separate from the main house; an outbuilding; specifically, in law under the definition of arson a building contributory to habitation, separate from the main structure, and so by the common-law rules a parcel of the dwelling house or not, according as it is within or without the curtilage." Bouvier defines outhouses as "buildings adjoining or belonging to dwelling houses." The term comes to us from the common law, where the outhouses located within the walls or fences of the curtilage received the same consideration as the main building in criminal proceedings covering burglary and arson. It is said in Hultin v. Klein, 301 Ill. 94, 133 N. E. 660, 20 A. L. R. 230:

"The question of curtilage is of no importance in this case. It was important at common law because the protection and privilege of the mansion house extended to all its branches and appurtenances within the curtilage, and if a barn, stable, or warehouse were parcel of the mansion house and within the same common fence, though not under the same roof or contiguous, a burglary might be committed therein, otherwise not. 4 Bl. Com. 225. An outbuilding must be appurtenant and appertain to the main building. Though distinct from the main building, it must be subservient to it and contributory to the habitation. It must belong to or be intended to be used with the dwelling house."

[3] In those cases where the premises were inclosed within a manor wall or fence, a barn, shed, stable, garage, greenhouse, chicken house, pigsty, storehouse, smokehouse, ice or meat house were all outhouses or outbuildings within the meaning of the term as applied to criminal proceedings for arson or burglary. In this country, where the wall or fence is generally not used, the determination of the question whether a certain building is an outbuilding or an outhouse usually depends upon its location upon the lot or tract of land upon which the residence house is situated and upon the uses for which such building is to be put. Thus what might be an outbuilding or an outhouse upon a farm might not be an outbuilding upon a small city lot. Manifestly, upon a farm a stable for the care of horses, cows and other stock, buildings for the housing of chickens, smokehouses for the curing of meat, and storehouses for food or farm implements, would all be outbuildings or outhouses in the ordinary use of the term, and their character as such would not be changed if the farmer should sell some of the produce of his farm.

In the present case, it is in the evidence that the lot owners of this tract have uniformly constructed upon their lots chicken houses for the purpose of raising chickens and it seems to have been the view of the trial court that these chicken houses were outbuildings within the meaning of the deeds, but that, because the appellant had constructed more of these buildings than was necessary to house chickens for his own personal use, he had thereby violated the restrictions in the deeds. The finding was made that the buildings erected upon the other lots within the tract were not as obnoxious to the restrictions as are the buildings of the appellant, and that the chicken houses erected by the appellant were not outhouses within the meaning of the deeds, because they were not appurtenant or subservient to a dwelling house. In this some connection, however, it was found that the restrictions in the deeds were violated by the appellant in the erection and maintenance of the buildings upon his lot "other than the dwelling house, the garage, and small chicken house or equipment sufficient to house and raise chickens for use only in connection with the use of the property for dwelling purposes and which are subservient to and appurtenant to the dwelling house." The judgment which followed upon these findings restrained the appellant from maintaining any of these buildings for commercial purposes and required him to remove from the premises all the buildings "except such portion of them as may be reasonably required for raising, housing or keeping chickens or poultry for domestic use only, but not in any manner for commercial purposes."

Conceding, as we must, that a barn, shed, or chicken house located upon the lot is an outhouse of the main residence when used solely for the pleasure and subsistence of the family, the question arises: What do those buildings become when the head of the family sells or gives away milk from the cow or eggs from the chickens? The trial court put its stamp of approval upon the chicken houses of one of the lot owners who had room for some 50 chickens and of another lot owner who was keeping 500 or 600 chickens, but it denounced the appellant's use of his buildings, which were prepared for housing between 2,000 and 3,000. It certainly cannot be a question of degree as to how obnoxious the raising of chickens might be to one of the complaining lot owners whose right of action rests upon the covenants found in these deeds, irrespective of any actual damage coming to him from any claimed breach. If it was intended by the parties that the grantees should be permitted to erect chicken houses sufficient to house 50 or 500 chickens, but no more, that restriction should have been inserted in the deeds. Any way we look at it, it is apparent that the interpretation placed upon the deeds by the trial court is not justified by the language of the deeds, but that to reach that interpretation it is necessary to read into the deeds a stipulation that the premises could not be used in any manner for commercial purposes and that the outbuildings permitted to be erected on the premises should be little ones. To reach such a construction of the deeds it is necessary to make a contract for the parties which they did not make themselves and which is not justified by the language employed.

We have said that the trial court did not receive any evidence of the surrounding circumstances upon which any light could have been thrown upon the intention of the parties as expressed in the language of the deeds. The appellant did offer evidence to show that the property was on the outskirts of the city of San Gabriel, in a section surrounded by a sewer farm, a dairy, and chicken ranches, and that the whole section was devoted to chicken raising and small suburban farms. This tender was refused by the trial court upon the ground that it was immaterial what was done in adjacent territory. This evidence was offered to prove the allegation in the answer:

> "That said property is located in a country district upon the outskirts of an incorporated city and in a territory devoted to farming and poultry raising; that said property is not adapted for a high-class residential section and has its greatest value in its use for the purpose of chicken raising and similar uses; that in the same section many large chicken ranches are located."

We feel that the trial court erred in denying to appellant the right to prove these allegations. If a subdivision of this character were to be laid out on the outskirts of the well-known chicken raising city of Petaluma, with no further restrictions than appear in these deeds, it would take a queer process of judicial construction to interpret those restrictions as preventing the raising of chickens for commercial purposes. The fact, if it be a fact, that the tract was located in such a neighborhood, would have been a circumstance attending the execution of the contracts which would have aided the court in determining the intention of the parties and in reaching an interpretation of the language of the deeds. The offer of proof was indefinite as to the time when these conditions existed, and we are unable to tell whether appellant relied entirely upon the conditions existing when the subdivision was made or whether he sought to prove a change of conditions after the execution of the deeds. Under either theory the evidence was admissible: First, to show the character of the territory in which the subdivision was located as bearing upon the intention of the parties in the use of the term "outbuilding" in the deeds if this condition existed at the time the subdivision was made; and, second, if the condition was a result of changes "in the uses to which property in the neighborhood is being put, so that such property is no longer residence property" (Miles v. Clark, 44 Cal. App. 539, 549, 187 P. 167, 171), the evidence was admissible upon the theory that, because of this change in conditions, it would be oppressive and inequitable, to give effect to the restrictions (Downs v. Kroeger [Cal. Sup.] 254 P. 1101).

It does appear that the subdivision was laid out in acre lots 137 feet wide by approximately 300 feet deep; that it was located "nine miles from the county courthouse"; that it was advertised as a desirable location for surburban home places with "fine soil—grows everything; plenty of pure water; cheaper than less desirable property much further out; building restrictions assuring high-class improvements"; and that, while the lots were being offered for sale, a blackboard was displayed in front of the office of the subdivider in the tract which carried the sign: "Suitable for chicken ranches." These are all "attending circumstances" bearing upon the question of the intention of the parties which they endeavored to express in the grant, and they would seem sufficient to compel an interpretation of the deed contrary to that found by the trial court. But the fundamental error is that the appellant was not permitted to make proof of other circumstances which would have supported his construction of the deeds.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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89 Cal. App. 142

WHISTON et al. v. PELHAM. (Civ. 5508.)★

District Court of Appeal, First District, Division 1, California. Feb. 9, 1928.

Hearing Denied by Supreme Court April 9, 1928.

1. Mines and minerals ⚷74—Assignment of interest in whole of said well held to contemplate a completed oil well brought to substantially continuous production.

Where defendants conveyed to plaintiffs an interest in an oil lease and oil well to be drilled, completed, and put on production at expense of defendant, interest to be in the whole of said well, well was not completed until brought to substantially continuous production, and, where well when first put on production flowed only a short time, defendant could not charge plaintiffs' proportionate share for deepening it and bringing it to permanent production.

2. Mines and minerals ⚷74—Plaintiffs assigned per cent. of whole of oil well were entitled to per cent. of gross proceeds thereof.

Under conveyance to plaintiffs of 3 per cent. interest in oil lease and well being drilled on leased property and to be completed, and declaring 3 per cent. should be of whole of well and assigned out of assignor's interest, plaintiffs were entitled to 3 per cent. of gross proceeds of well and not to that percentage out of interest and share of their assignor.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by R. Whiston and others against C. W. Pelham. From a judgment for plaintiffs, defendant appeals. Affirmed.

Spicer, Meacham & Mason and Bruce Mason, all of Long Beach, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondents.

STROTHER, Justice pro tem. This suit was brought by plaintiffs to require an accounting by defendant of proceeds of sale of oil and gas from an oil well in Long Beach, and for judgment for whatever might be found due them.

Defendant had sold and conveyed to plaintiffs R. Whiston and Celia Whiston, his wife, a 3 per cent. interest in an oil lease and in a well which was then being drilled on the leased property. In this conveyance the Whistons were named as parties of the first part and Pelham as party of the second part. The Whistons conveyed a part of their interest to the plaintiff Stevens. The conveyance by defendant Pelham provided:

> "The party of the second part hereby sells, conveys and assigns to parties of the first part a three per cent. (3%) interest in one certain oil and gas lease on lots 12, 13, and 14 in said block H to the party of the second part and his associates, given by J. W. Paulson et al. and C. W. Long, together with the same interest in one oil well now drilling on said location. Said well to be drilled, completed and put upon production at the cost and expense of party of the second part and his associates. Said three per cent. (3%) shall be of the whole of said well and assigned out of the interest and share of the party of the second part."

Under the arrangement made with the purchaser of the oil and gas, payments were made to Pelham for the whole of his original share, and he in turn made settlements with the plaintiffs for their part.

Defendant answered to the complaint alleging that he had fully accounted to plaintiffs for their part of the proceeds of such sales. In a separate defense he set out the total amount realized from sales, deducting the royalty payments under the lease, and expense of marketing the products and maintaining the well. He further set forth that he had sold the Whistons a 1½ per cent. interest in another well, out of his interest therein, the payments on account of sales to the extent of their interest, being made direct to the Whistons, without deduction for operating expenses, taxes, and maintenance, which was charged to him against his remaining interest. This was not alleged specifically as an offset or counterclaim, but was apparently so treated on the trial.

The court entered an interlocutory decree in favor of plaintiffs, and referred the accounting. Upon the filing of the referee's report, judgment was entered against the defendant for the amount ascertained to be due, and from this judgment appellant appeals.

[1] The controversy between the parties grew out of their differing ideas of what constituted a completion of the well, and of the construction of the meaning of the phrase "whole of the well" in the conveyance. When the well was first put on production it flowed only a short time, and the supply of oil became exhausted. Appellant and his associates expended a considerable sum of money in deepening the well and bringing it to permanent production. Three per cent. of this sum he charged to respondents in his settlements as part of the cost of maintenance. Respondents contend that the well was not completed until brought to substantially continuous production. Evidence was introduced in support of each of these views. Besides the appellant argued that the deepening of the well was in effect drilling a new well, the expense of which was, under the express terms of the conveyance, chargeable propor-

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★Hearing denied by Supreme Court.

tionally. The trial court, in construing the clause in its application to the facts, with such light as the expert evidence threw upon it, adopted, we think properly, respondents' view as the more reasonable.

[2] The other differences between the parties resulted from their differing contentions as to the meaning of the expression "three per cent. of the whole of the well, assigned out of the interest and share of the party of the second part," Pelham.

It will be noted that, by the assigning clause preceding this phrase, the interest in the well was vested in the plaintiffs. The later clause was evidently put in for the purpose of defining, or modifying in some way, the character or extent of the interest conveyed. It is quite apparent that the meaning of the language is not clear. The trial court took this view and admitted evidence of the circumstance of the transaction, and the negotiations between the parties.

The testimony of the appellant was to the effect that the clause was put in because Whiston feared that the contract might be construed as conveying 3 per cent. only of Pelham's interest in the well. Whiston, on the other hand, testified that the agreement was that his interest was to be 3 per cent. of the gross proceeds of the well. His version would appear to be confirmed by the statement in the contract that the 3 per cent. should be assigned out of the "interest and share" of Pelham, and by a further provision "that, in the event of any other well being drilled upon said lease, the parties of the first part are to pay their proportionate share of all expenses," not merely their share of the drilling expense.

The trial court adopted their view from the evidence, and its finding cannot be disturbed.

It follows that the judgment must be, and it is, affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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89 Cal. App. 6

LORENZ v. HUNT. (Civ. 3356.)

District Court of Appeal, Third District, California. Feb. 3, 1928.

1. Pleading ⚷417—Sustaining of demurrer is generally waived by amendment.

As a general rule, the amendment of a pleading after the sustaining of a demurrer thereto is a waiver of any error in the action of the court.

2. Assault and battery ⚷9—Advice of counsel in making forcible entry on plaintiff's premises held no defense in action for assault, unless attorney was informed of facts.

Matter presented as defense that defendant made forcible entry on plaintiff's premises acting under advice of attorney *held* immaterial, in plaintiff's action for injuries from assault, where defendant failed to allege that he had informed attorney of the facts, or that attorney had any knowledge thereof.

3. Trespass ⚷10—Action of deputy sheriff, purchasing land, in forcibly entering on premises and disturbing rightful possession of tenant without warrant or process, was wrongful (Pen. Code, § 418).

Where tenant from month to month had rightful and exclusive possession of land, forcible entry of deputy sheriff, purchasing property, made without warrant or process of any kind, was wrongful, regardless of his official capacity, since entry in official capacity would be abuse of authority, and entry as private citizen constituted misdemeanor under Pen. Code, § 418.

4. Assault and battery ⚷15—Tenant rightfully in possession of premises had right to use reasonable force to prevent forcible and unlawful entry by purchaser (Pen. Code, § 418).

Tenant rightfully in possession of premises had right to use reasonable force to prevent forcible and unlawful entry by purchaser of premises, where entry constituted misdemeanor under Pen. Code, § 418.

5. Criminal law ⚷27—If tenant resisted unlawful entry on premises by exhibiting loaded revolver not in necessary self-defense, without pointing it or attempting to shoot any one, offense at most was misdemeanor (Pen. Code, § 417).

If tenant, in rightful possession of premises, but not in necessary self-defense, merely exhibited loaded revolver as a bluff, without pointing it at person attempting unlawful entry, or attempting to shoot him or his associates, her conduct amounted to no more than a misdemeanor under Pen. Code, § 417.

6. Assault and battery ⚷35—Finding that deputy sheriff's arrest of tenant without warrant, after illegal forcible entry on premises which deputy had purchased, was made in bad faith, held justifiable, notwithstanding tenant may have exhibited revolver (Pen. Code, §§ 417, 418, 836, 837).

Where deputy sheriff purchased premises, and made forcible entry thereon, violating lawful possession of tenant contrary to Pen. Code, § 418, which makes such entry misdemeanor, finding that arrest of tenant by deputy sheriff without warrant or any process was not made in good faith, under section 836, but was made merely to serve private purpose of getting possession of premises, was justifiable, though tenant may have been guilty of misdemeanor, under section 417, in exhibiting loaded revolver, since deputy sheriff was first wrongdoer, and tenant would have had right to arrest him without warrant under section 837.

7. Appeal and error ⚷714(5)—Alleged error in excluding conversation unexplained in record held not reviewable on basis of statement in appellant's brief.

Alleged error of trial court in excluding answer to question, "What was the conversation?" *held* not reviewable, where record failed to indicate the subject-matter of the inquiry or what was sought to be proved, and statement in appellant's opening brief as to matter sought to be shown was unavailing.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

8. Evidence 🔑248(1)—Statements made by plaintiff's husband, not in plaintiff's presence, held not admissible as admissions against interest.

Proof of statements made by plaintiff's husband *held* not admissible as admissions against interest, where husband was not a party to the action, and statements were not made in plaintiff's presence.

9. Witnesses 🔑388(2)—Statements by plaintiff's husband in plaintiff's absence held not admissible for purpose of impeachment, where no foundation was laid.

Proof of statements claimed to have been made by plaintiff's husband, not made in plaintiff's presence, *held* not admissible for purposes of impeachment, where no foundation had been laid.

10. Assault and battery 🔑35—In tenant's action against purchaser of premises for assault and battery, findings as to tenant's right to possession, purchaser's forcible entry, and injuries inflicted, held sustained by evidence.

In action by tenant in possession of premises for personal injuries incident to arrest and assault and battery by purchaser, who made unlawful entry for purpose of putting his hogs in the inclosure, findings that plaintiff was entitled to possession, that defendant made unlawful entry, kicked her, and struck her with his fists, and finding relative to plaintiff's injuries, *held* supported by substantial evidence, trial court being in better position to pass on weight and credibility of witnesses.

11. Assault and battery 🔑40—$1,500 damages to woman for assault by deputy sheriff, striking her with black-jack, and handcuffing her, and forcing her in car, in making arrest, and for bruises, pain, and suffering and humiliation, held not excessive.

In action for assault and battery by female tenant against deputy sheriff in connection with defendant's forcible entry on premises, $1,500 actual damages for injuries resulting from assault with black-jack, bruising of plaintiff's wrists through use of handcuffs, and bruising of her legs when she was forced into automobile when arrested, and for indignity and humiliation in being driven through public street, and for resulting pain and suffering and shock to nervous system, *held* not excessive.

12. Appeal and error 🔑1010(1)—Findings supported by testimony are conclusive on appeal.

Findings of court, where supported by testimony, must be accepted as true on appeal.

13. Assault and battery 🔑39—Award of punitive damages for assault and battery held unauthorized, where complaint contained no allegation of malice, and made no demand for exemplary damages, though evidence showed malice.

Award of punitive damages, in action for assault and battery in connection with forcible entry on plaintiff's premises and wrongful arrest of plaintiff, *held* error, where complaint contained no allegation of oppression, fraud, or malice, and no demand for exemplary damages, even though evidence showed malice, and court found assault and arrest were malicious, inasmuch as such evidence is admissible in support of allegation of actual damages.

14. Assault and battery 🔑33—Evidence of defendant's malice and oppression is admissible to prove actual damages for assault.

Evidence tending to show malice and oppression in action for assault and battery is admissible in support of allegation of actual damages.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Carrie M. Lorenz against A. D. Hunt. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

W. E. Davies, of Marysville, for appellant.
Erling S. Norby, of Marysville, for respondent.

FINCH, P. J. This is an action for personal injuries. Plaintiff was given judgment, and the defendant has appealed.

The defendant was a deputy sheriff at the time of the alleged injuries. April 15, 1924, he purchased about two acres of land on which there was a dwelling house. The plaintiff and her husband were then in possession of the premises as tenants from month to month, and they continued in possession as such tenants until after the infliction of the injuries. The evidence shows that their possession was rightful and exclusive. Without their consent or permission, the defendant put about 40 hogs on the premises in the latter part of August of that year. The plaintiff and her husband objected to the presence of the hogs on the lot, and it appears that the gate was left open at times, so that the hogs passed back and forth through it. The plaintiff made "complaint about the hogs to the health officer," and the latter informed the defendant he "would have to get them away from there."

A witness for defendant testified that in the evening of September 8th "there were no hogs in the corral at all. Mr. Lorenz said to me, 'The first one that comes in this gate, I will smash his head in with this club;' he had a club in his hand. * * * I went back, and reported the conversation to Mr. Hunt that night. I told Mr. Hunt the pigs were in the alfalfa, and Mr. Lorenz had turned them out, and Mr. Lorenz had threatened me with a club." About 10:30 o'clock in the forenoon of September 9th, during the absence of Mr. Lorenz, the defendant, with three other men, appeared at the Lorenz place for the avowed purpose of putting the hogs in the inclosure. The defendant testified:

> "I was going to put them in there regardless of what Mrs. Lorenz wanted or didn't want. I was going to put them in the corral, through the big gate, regardless of whatever resistance Mrs.

Lorenz might put up. I had to take them through the big gate. From the way the boys were treated the night before, I expected there might be some trouble. I most always carry the handcuffs with me and the billy; I never carry any other arms of any kind."

The plaintiff testified:

"Mr. Hunt came towards the gate, which was locked, and was attempting to open it. * * * I went out and told him not to open the gate, that his hogs were outside of the gate, to take them away, but not to come inside and not to drive them in, and he proceeded to untie the gate and open it, and I took hold of the gate and closed it. He took hold of the other side, and we fought over that gate. * * * At least he struck or hit me, shoved me over against the fence, * * * and I backed up probably 20 or 25 feet, and Mr. Hunt all the time threatening me, saying he was coming in * * * He * * * said he would fix me, he would lay me out, such remarks as that, cursing me, and was in a violent temper. He reached for his back pocket. I didn't know what he was reaching for; and, when he did that, I turned around and started toward the house, and he after me, and at that he said, 'I will fix you.' I went up a few steps further to an old stove in the yard and got this revolver * * * and came back with the revolver in my apron pocket. He says, 'You have a gun, have you?' I says, 'Yes, I have a gun, and I hope I don't have to use it,' and at that he made a grab for my wrist, got hold of my hand with the gun in my hand, and said, 'You are under arrest.' * * * He showed me his badge, said he was a deputy sheriff of Yuba county, and I was under arrest."

The remainder of the story may be told in the language of the following findings, which are fully supported by the evidence, although the evidence is conflicting in some important particulars:

"That on September 9th, 1925, at the home of the plaintiff in the county of Yuba, state of California, the defendant, A. D. Hunt, did then and there violently assault the plaintiff, striking her with his fists, striking her with a black-jack or policeman's billy, and did then and there twist and wrench her right hand, thumb, and wrist, and then and there forced handcuffs upon her, and twisted and pulled said handcuffs violently, so that said handcuffs cut and bruised her wrists, and dragged her by said handcuffs from her said premises to a road, and then violently forced her into an automobile; that, while forcing her into said automobile, and while her legs protruded from the open door, defendant forcibly and violently slammed said door against her legs between the ankles and knees thereof, so that the metal parts of said door cut and bruised her said legs; that defendant then forced the plaintiff to ride with him in said automobile, and, while she was so handcuffed, through and along the most public street in Marysville, in said county of Yuba, to the courthouse in said city, and then forced plaintiff to go into said courthouse, and kicked and beat and roughly handled her. By reason of all thereof plaintiff was rendered sick and sore, her wrists became bruised, black and blue, her right thumb became bruised, stiff and sore, and the plaintiff's legs, where said automobile door was jammed against them, became bruised, black, sore, and painful, and that said bruises and soreness and pain remained, and that plaintiff suffered pain and injury therefrom, for a period of many days thereafter, and that one of the said bruises on plaintiff's leg still remains and is apparent in the form of a slightly swollen and black and blue mark. That other parts and portions of plaintiff's limbs and body became and were for a period of many days thereafter, as a result of said assault, bruised, sore, and painful. That plaintiff suffered, by reason thereof, a severe shock to her nervous system, so that she was for the period of a week thereafter sick and sore, and that she was, for a period of approximately a week thereafter, under the care of a physician for the treatment of said injuries that she then suffered. That plaintiff suffered great mental pain and anguish, and was greatly humiliated and suffered by reason thereof, great shame.

"That the said plaintiff, Carrie M. Lorenz, did * * * have on her person a loaded revolver and that she did exhibit the same, but that she did so in the rightful and lawful defense of her said home. That defendant then and there was attempting to use all the force that it was possible for him to use to drive and place a number of hogs into and upon the premises occupied by the plaintiff as her home, and of which she was in possession, and rightfully entitled to the possession, and that plaintiff, in exhibiting said loaded revolver, only used such means as were necessary to keep the defendant from coming upon the said premises and placing the said hogs thereon. * * *

"That the * * * defendant had, at that time, armed himself with his deputy's badge, his handcuffs, and his policeman's billy, and, with four other persons, proceeded to the premises occupied by the plaintiff as her home with the intention of using all force that might be necessary to depossess the plaintiff of a part of the said premises, and to place a large number of hogs upon the said premises. That defendant had no right to enter upon said property or to place his hogs thereon. That, when he met with resistance rightfully asserted by the plaintiff, he did, without any right or authority, and maliciously and oppressively, place the plaintiff under arrest, and did then and there maliciously and oppressively commit upon the person (of) the plaintiff the assault and various acts constituting the assault and battery hereinbefore set forth in these findings; and various of the acts constituting said assault were committed in the presence of the plaintiff's grown daughter.

"That by reason of the foregoing facts, plaintiff has been damaged in the sum of $1,500, and is entitled to the further sum of $1,000 as exemplary damages."

[1, 2] The original answer contains denials of the allegations of the complaint which show liability on the part of the defendant. As a second and separate defense it contained a history of the alleged rights and acts of the parties which culminated in the plaintiff's arrest by the defendant. It also contained an allegation that the defendant consulted "an attorney at law, and was by said attorney advised to gather up his said hogs and place them back in the said corral." The court sustained the plaintiff's demurrer to the second defense, with leave to amend. Thereaft-

er the defendant filed an amended answer, again denying the alleged acts showing wrongful conduct on his part, and, as a separate defense, he alleged that his arrest of the plaintiff was for a misdemeanor committed in his presence, in that she "did then and there in the presence of said defendant and two or more other persons, willfully and unlawfully draw and exhibit in a rude, angry, and threatening manner, and not in necessary self-defense, a certain deadly weapon, to wit, a loaded revolver." Appellant now complains that the court erred in sustaining the demurrer to the separate defense alleged in the original answer. As a general rule, the amendment of a pleading after the sustaining of a demurrer thereto is a waiver of any error in the action of the court. 21 Cal. Jur. 128. In this case, the separate defense, to which the demurrer was sustained, presented no issue which was not raised by the denials set forth in his first defense. In a case such as this, the defendant may show that he acted under the advice of counsel, based upon a full disclosure of the facts. Walker v. Chanslor, 153 Cal. 118, 124, 94 P. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61. The defendant, however, did not allege that he had informed his attorney of the facts or that the attorney had any knowledge thereof. Under such circumstances the advice of counsel is immaterial.

[3-5] The fact that the defendant was a deputy sheriff in no manner excuses his conduct, but rather aggravates his offense. Having no warrant or process of any kind, his entry in his official capacity would have been an abuse of official authority. His entry as a private citizen constituted a misdemeanor. Pen. Code, § 418. The plaintiff had the right to use reasonable force to prevent the forcible and unlawful entry of the defendant, and neither the evidence nor the findings show an unreasonable use of force on her part. People v. Hubbard, 64 Cal. App. 27, 220 P. 315; People v. Ross, 19 Cal. App. 469, 126 P. 375. Adapting the language of the opinion in the former of these cases, if it be assumed as alleged in the answer, that the plaintiff exhibited a loaded revolver in a "rude, angry, and threatening manner," and "not in necessary self-defense," still her act amounted to no more than a misdemeanor under section 417 of the Penal Code. She did not point the revolver at the defendant or any of his associates or attempt to shoot any of them, and the evidence indicates that she used it merely as a bluff.

[6] The appellant contends that plaintiff was committing a misdemeanor in his presence, and that, therefore, under the authority of section 836 of the Penal Code, in order "to preserve the peace and maintain order," he was justified in arresting the plaintiff without a warrant. Appellant overlooks the fact that he himself was engaged in the commission of a misdemeanor in the presence of the plaintiff, and that therefore she, as a private citizen, under section 837 of the Penal Code, was authorized to arrest him without a warrant. Under such circumstances it is unnecessary to determine which one had the superior right to arrest the other. The defendant was the first wrongdoer, and the court was justified in believing from the evidence that the arrest was not made in good faith "to preserve the peace and maintain order," as claimed by the appellant, but to serve his private purpose of unlawfully getting possession of the premises.

[7] A witness for the defendant testified that he had a conversation with the plaintiff on September 6th. He was then asked, "What was the conversation?" The court sustained the plaintiff's objection thereto. The ruling was clearly right. There was nothing in the question to indicate the subject-matter of the inquiry and the record is entirely silent as to what the defendant desired to prove by the witness. In his opening brief the appellant states what he sought to prove by this witness, but this statement should have been made to the trial court, and it avails appellant nothing to make it here for the first time.

[8, 9] The court sustained plaintiff's objection to proof of statements claimed to have been made by plaintiff's husband, but not shown to have been made in the presence of plaintiff. This was not error. Such evidence was not admissible as an admission against interest, because Lorenz was not a party to the action. Neither was it admissible for the purposes of impeachment, because no foundation had been laid therefor.

[10] Appellant attempts to show that the evidence is insufficient to support the findings by picking out such parts thereof as are most favorable to himself. Without stating appellant's contentions in detail, it is sufficient to call attention to evidence in opposition to the more important of them.

Relative to the possession of the premises by plaintiff and her husband the latter testified in part as follows:

"I did not have a lease to the property. I rented from month to month. * * * It was divided into two parts. We occupied all of it. * * * I first rented these premises from Haney, and in the month of September I also rented from Mr. Hunt, the defendant in this case. I occupied all the premises on the 9th of September, and I resided in a cabin on the south end of the premises. At one time, during the month of September, the north part of the premises, which was separated by a fence, contained a number of hogs. * * * They were supposed to belong to Mr. Hunt. * * * The hogs were not on the premises with my permission."

The plaintiff testified that:

"The cross fence * * * was about 18 inches high, and was not hog tight. Frank and I built it for chickens to keep the hens and baby chicks in. * * * I did not have any conversation with Mr. Hunt relative to any agreement to put his hogs on that property. I made no offer of any kind. There was no agreement and I told him repeatedly and told his men * * * to take his hogs out of there."

The court found that the defendant kicked the plaintiff. She first testified that he kicked her, and later she explained:

> "He didn't hit me with his foot but with his knee, and brought it against my rear as I went through the door."

The distinction does not seem to be material, viewed in the light of the many acts of violence with the court found the defendant committed.

The plaintiff testified:

> "He did not strike me *at the time he put the handcuffs on;* he did not hit me with his fist; he just pummeled me."

Appellant quotes all of this statement, except the words herein italized, and then argues that the statement shows that the court was in error in finding that the defendant struck the plaintiff with his fists. The very sentence, of which appellant quotes a part only, without indicating that anything was omitted, limits the answer to "*the time he put the handcuffs on.*" Relative to other stages of the struggle, the plaintiff testified that the defendant "struck or hit me"; "dragged me out the gate"; "struck me in the stomach"; "struck me with his fist on the chest"; and "knocked me against the fence."

Appellant's statement that "there is no evidence whatever that the defendant was attempting to use all the force possible to drive the hogs in plaintiff's home or any other place" is fully refuted by his own testimony hereinbefore quoted.

Further analysis of the evidence is unnecessary. A careful reading of the transcript thereof shows that the findings are supported by substantial evidence on every material issue. It is true that much of the evidence is squarely contradicted by other substantial evidence, but the trial court was in a better position to pass upon the weight thereof and the credibility of the witnesses than is an appellate court.

[11, 12] It cannot be held that the amount awarded the plaintiff as actual damages is excessive. In addition to plaintiff's physical injuries, she suffered gross indignities and great humiliation at the hands of defendant, according to the findings of the court, which, being supported by the plaintiff's testimony, must be accepted as true on this appeal.

[13, 14] The complaint contains no allegation of oppression, fraud, or malice on the part of defendant nor any demand for exemplary damages. There is no basis, therefore, for the award of punitive damages. 8 Cal. Jur. 894. It is true that there is sufficient evidence to show malice, and the court found that the defendant's assault upon the plaintiff and her arrest by him were malicious and oppressive, but it cannot be held that the case was tried upon the theory that the question of punitive damages was in issue, because the evidence tending to show malice and oppression was admissible in support of the allegation of actual damages. "It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. The court would not be authorized to consider it as establishing an issue that was not before it for trial. Even a finding upon such evidence would be disregarded in determining the correctness of the judgment." Riverside Water Co. v. Gage, 108 Cal. 240, 245, 41 P. 299, 300; Crescent Lumber Co. v. Larson, 166 Cal. 168, 171, 135 P. 502.

The amount of the judgment is reduced from $2,500 to $1,500, with interest thereon, and costs as therein provided, and, as so modified, the judgment is affirmed, appellant to recover his costs of appeal.

We concur: HART, J.; PLUMMER, J.

89 Cal. App. 75

NOBLE v. REID-AVERY CO. (Civ. 3403.)

District Court of Appeal, Third District, California. Feb. 7, 1928.

1. Contracts 🔑9(3)—Contract providing company should have exclusive agency for welding rods as long as it gave faithful service to trade held definite as to duration.

Contract by which it was agreed that company was to have exclusive sale of welding rods within certain territory as long as it was able to give faithful service to trade and produce business that warranted territory allotted to it and no longer *held* sufficiently definite as to time during which it was to be effective.

2. Appeal and error 🔑934(3)—On appeal from default judgment taken after failure to appear, allegations in answer are conclusively presumed to be true.

On appeal from a default judgment taken after failure to appear at time of trial, allegations in answer are conclusively presumed to be true.

3. Contracts 🔑9(3) — Generally failure of executory contract to state time for termination does not render it void for uncertainty.

Generally failure of an executory contract to state time presently definite for its termination does not render it void for uncertainty.

4. Specific performance 🔑28(1)—Greater certainty is required in agreement to be specifically executed in equity than in contract which is basis of action for damages.

Greater degree or amount of certainty is required in terms of agreement which is to be specifically executed in equity than is necessary in contract which is basis of action at law for damages.

5. Contracts 🔑10(2)—Contract for exclusive agency for welding rods, where company had made purchases and expended time and money in working up demand for goods, held not lacking mutuality.

Where, in compliance with contract granting it exclusive sale of welding rods within certain territory, company acting as exclusive agent made initial purchase and such additional purchases as were necessary and expended time and money in working up demand for goods, *held* that contract did not lack mutuality.

6. Contracts 🔑10(2)—Want of mutuality held no defense to action on executed contract for exclusive agency for welding rods.

Action on executed contract for exclusive agency for welding rods may not be defeated on ground contract was wanting in mutuality, since want of mutuality is no defense in case of executed contract.

7. Damages 🔑225—Judgment, awarding damages subsequent to commencement of action on contract for exclusive sale of welding rods, held proper under statute (Civ. Code, § 3283).

In action on contract for exclusive sale of welding rods, where judgment awarded damages subsequent to time of commencement of action, *held* such award was proper under Civ. Code, § 3283, providing damages for detriment after commencement of judicial proceeding.

8. Judgment 🔑143(7)—Refusal to reopen default judgment under statute after examination of conflicting evidence on confusion arising from substitution of attorney held not abuse of discretion (Code Civ. Proc. § 473).

Where attempt was made under Code Civ. Proc. § 473, to obtain relief from default judgment on ground of confusion arising from substitution of attorney for defendant, refusal of relief by trial court after examination of conflicting evidence *held* not abuse of discretion.

9. Appeal and error 🔑957(1)—Judgment 🔑139—Relief from default judgment is matter of discretion with trial court, which will not be interfered with on appeal unless abused.

Ground of relief from default judgment lawfully taken is matter of discretion with trial court which will not be interfered with on appeal unless abuse of discretion clearly appears.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by J. M. Noble, doing business under the firm name and style of the Noble Company, against the Reid-Avery Company, for damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Young & Young, Milton K. Young, Lyndol Young, L. R. Brigham, and William K. Young, all of Los Angeles, for appellant.

Goodwin Knight and Thomas Reynolds, both of Los Angeles, for respondent.

PULLEN, Justice pro tem. This is an appeal from a judgment by default in favor of the Noble Company, respondent herein, against the Reid-Avery Company, a corporation, appellant. The complaint alleges, in substance, that an agreement was entered into between the parties to this appeal, wherein the Noble Company was to purchase for resale from Reid-Avery Company a large quantity of welding rods, and would, from time to time, purchase additional amounts, as necessity required, and would pay for the same according to an agreed schedule of prices, and that, until the Noble Company had sold and completely disposed of said rods, and as long as it performed the terms of its agreement, the Reid-Avery Company would not sell similar rods or materials to any one in certain designated counties, in which counties the Noble Company was to have the exclusive and sole rights to sell such materials.

After the execution of said agreement, and while respondent had a large stock of rods on hand, appellant, Reid-Avery Company, so it is alleged, sold certain rods to others within the exclusive territory, whereby respondent sustained damage.

The answer of Reid-Avery Company denies that it entered into an agreement other than as set forth in its answer, and it is therein admitted:

> "That in May, 1923, there was an agreement made between the Reid-Avery Company and Atlas Foundry Company and the agent of Reid-Avery Company, for the Noble Company, to handle the output of the Reid-Avery Company of goods known as welding rods, on the terms and prices then agreed upon. * * *"

And in a separate defense it is further alleged, as being part of the terms and conditions of the agreement:

> "That it was distinctly understood at the time of the first order of goods by Noble Company, that they (Noble Company) should have the exclusive right to sell the goods and represent the Reid-Avery Company in that part of California known as Southern California, as long as they were able to give faithful service and a business management to the trade and produce the trade that was warranted in the territory allotted to them, and no longer."

Appellant contends that the judgment is erroneous by reason of the invalidity of the contract upon which the action is based; that damages were awarded which arose subsequent to the commencement of the action without the aid of supplemental pleadings, and justification of cancellation by appellant. Appellant also insisted that the trial court abused its discretion in refusing to set aside the judgment of default entered against it.

[1, 2] The principal reasons urged against the validity of the contract is that it lacks definiteness, certainty, and mutuality, in that it is claimed that it cannot be ascertained from the contract what period of time appellant was to refrain from transacting business in the allotted territory, nor the duration of the sales agency conferred upon respondent by appellant. However, the duration of the contract seems to be settled by the allegations in the answer hereinbefore set forth, which not only is conclusively presumed to be true for the purpose of this appeal, but is fully borne out by the testimony of the witnesses in the case.

[3] Such provisions for the duration of the contract are sufficiently certain and valid. As a general proposition the failure of an executory contract to state a time presently definite for its termination does not render it void for uncertainty. 13 Cal. Jur. p. 271. In Sutliff v. Seidenberg, 132 Cal. 63, 64 P. 131, the agreement was to remain in force "as long as our goods find ready sale on this coast," and the court said it was not so vaguely expressed as to be wholly unascertainable. In the case of Gallagher v. Equitable Gas & Light Co., 141 Cal. 699, 75 P. 329, the court upheld a contract wherein the defendant agreed to furnish plaintiff gas for lighting purposes for an indefinite length of time, and plaintiff, in reliance on the offer, agreed to take the gas to light his hotel, and expended considerable sums of money in installing necessary gas fixtures. The court upheld the contract, and ordered the defendant to furnish the plaintiff gas "as long as plaintiff will continue to operate and use the same in said hotel."

[4] Appellant cites, in support of its contention that the contract is invalid for uncertainty, the case of Kurtz v. De Johnson, 42 Cal. App. 221, 183 P. 588, in which case the court refused specifically to enforce a contract of personal service, on the ground that its uncertainty rendered it unfair in its terms, but that was an action in equity to compel specific performance of the contract for personal services, which is a distinguishing point from the case at bar, this being an action at law for damages for breach of contract. That a greater degree or amount of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages, is declared in the case of Durst v. Jolly, 35 Cal. App. 184, 169 P. 449:

> "The law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained."

See McIllmoil v. Frawley, 190 Cal. 546, 213 P. 971.

[5, 6] The objection that the agreement lacks mutuality is successfully met by the record, which shows that respondent obligated himself to do, and in compliance therewith did various things, such as to act as exclusive sales agent, make initial purchases of rods, to make additional purchases sufficient to supply the trade, to expend time and money in working up a demand for the goods; and it furthermore appears that the obligations were executed, and want of mutuality is no defense in the case of an executed contract. 13 Cal. Jur. p. 334; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086.

[7] Section 3283 of the Civil Code provides:

> "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

Under this provision, proof of damage extends to all matters up to the time of verdict, which are the net result of wrongs done, and in this action, the theory of the plaintiff was, and with which the court agreed, that the termination of the contract and the repudiation of its promise by the defendant constituted a breach of the contract. A leading case upon this point is Hicks v. Drew, 117 Cal. 305, 49 P. 189, wherein the court, speaking of section 3283 of the Civil Code, said:

> "By this section of the Code, plaintiff was entitled to recover damages suffered subsequent to the filing of the complaint. * * * Neither

was a supplemental pleading necessary to support such a recovery."

In Bryson v. McCone, 121 Cal. 153, 53 P. 637, the court says:

> "Damages which accrued after the suit was commenced were properly allowed. The plaintiff could not maintain another suit for damages which resulted from the breach which had already occurred. This cause of action was complete when the suit was begun, and the damages proved were the natural and necessary consequence of the wrong."

[8, 9] The final point urged by appellant is that they should be relieved from the default taken against them for failure to appear at the time of trial. Appellant moved for relief from the default judgment under section 473 of the Code of Civil Procedure. The briefs of the parties contained substantially all of the material evidence submitted to the trial court on this motion. All of the affidavits which were before the trial court are brought before this court for review, and the material portions of the oral testimony offered in support and in resistance of said motion are also brought to the attention of this court. The gist of appellant's motion, both in the trial court and on this appeal, seems to be that the confusion which occurred with reference to the filing of the substitution of attorneys was brought about through no negligence or culpability chargeable to defendant, and that the defendant was, through no fault of its own, prevented from being represented at the trial and from having its day in court by this misunderstanding. The trial court found, however, as a matter of fact, upon conflicting testimony, that defendant was not blameless in the matter of this substitution. Appellant endeavors to impress the court with the fact that the defendant and its agent were in nowise negligent, and seek to lay the blame upon a former attorney of defendant, stating that the substitution had been signed by the defendant and forwarded to the attorney, by whom it was received, and then, through the negligence of the attorney, lost or failed to find its way into the files of the court. This is one of the sharply disputed facts in the case, and the trial court on that issue of fact found against the contention of the appellant. Appellant is in no position to urge this court to believe a fact which the trial court found to be untrue. It is for the court below to say which it shall accept as the truth. It is fundamental that the grounds of relief from a default lawfully taken is a matter of discretion with the trial court, which will not be interfered with on appeal, unless an abuse of discretion is clearly shown.

We have carefully read and examined the affidavits and testimony offered in support of the motion to set aside the default, but we do not find that the court below abused its discretion.

From an examination of all of the authorities and the records in this case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

89 Cal. App. 219

PEOPLE v. BLACK. (Cr. 1582.)★

District Court of Appeal, Second District, Division 1, California. Feb. 10, 1928.

Rehearing Denied March 1, 1928. Hearing Denied by Supreme Court April 9, 1928.

1. Criminal law 🔑997—Court denying motion to dismiss amended petition for writ of error coram nobis was not bound to issue writ as prayed for.

Where defendant after conviction and sentence petitioned for writ of error coram nobis and thereafter filed an amended petition, court, in denying motion to dismiss amended petition, was not bound to issue writ as prayed for, where denial of motion to dismiss was not final determination of matter.

2. Criminal law 🔑1144(17)—In absence of record, it must be presumed that defendant was given hearing on amended petition for writ of error coram nobis.

Where, after sentence and conviction, defendant petitioned for writ of error coram nobis, and in hearing thereon testified as witness and introduced evidence and moved for permission to file amended petition, which was granted and case continued, since he was required to present any further evidence he had in support of amended petition at hearing, and since the record includes no statement of evidence received in superior court, it must be presumed that court denied writ after hearing evidence as shown by minute order.

3. Criminal law 🔑1141(2)—Record presented must be sufficient to enable reviewing court to determine if error was committed.

It is appellant's duty to present to reviewing court a record which will enable it to determine whether error has been committed.

4. Jury 🔑21(1)—Petition for writ of error coram nobis is not proceeding in which jury trial can be demanded as matter of right.

A petition for writ of error coram nobis is not proceeding in which a jury trial can be demanded as a matter of right.

5. Jury 🔑25(6)—Request for jury trial, made after hearing was commenced and evidence received, was too late.

Request for jury trial in hearing on petition for writ of error coram nobis came too late, where it was first requested after hearing had commenced and evidence was received.

6. Criminal law 🔑997—Writ of error coram nobis cannot be invoked in case in which petitioner was party to fraud.

While writ of error coram nobis may be invoked to correct error of fact on proper show-

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★Rehearing denied. Hearing denied by Supreme Court.

ing that error was occasioned by duress or fraud, it cannot be invoked in case in which petitioner was party to fraud.

7. Criminal law ⚷997—Writ of error coram nobis could not be invoked where petitioner made false statements to shield party promising to pay his fine.

Where defendant on plea of guilty of selling intoxicating liquor was sentenced to fine and imprisonment, he could not invoke writ of error coram nobis, alleging his plea of guilty was entered through duress, fraud, and deception, where, in accordance with prearranged plan, defendant made false statements to court concerning charge in endeavor to shield his employer, who had promised to pay his fine.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

S. H. Black was, on plea of guilty of selling intoxicating liquor, sentenced to pay fine and imprisonment. Writ of error coram nobis was denied, and he appeals. Affirmed. See, also, 264 P. 346.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WOOD, Justice pro tem. Appellant was accused by information filed by the district attorney of selling intoxicating liquor. He entered a plea of guilty on July 6, 1927, and on July 9, 1927, was sentenced to imprisonment for six months. On July 25, 1927, he filed in the superior court of Riverside county a petition for a writ of error coram nobis, in which he set forth that his plea of guilty had been entered by him "through the agency of duress, fraud, and deception." He alleged that one William Rush had been his employer at the Oasis pool hall in the city of Blythe; that Rush had told him before the entry of his plea that, if he would state to the court that he (appellant) had a lease on the premises and was running the business where the liquor was alleged to have been sold, it would avoid implicating the said Rush; that he (Rush) would pay any fine that would be imposed; and that appellant would not receive a jail sentence. The petition further sets forth:

> "And he, your petitioner, believing that the said William Rush would be able to do the things that he said he would do, all of which were believed by your petitioner which have hereinbefore been related and all of which the said William Rush has failed to do and all of which William Rush was without right of authority to promise to do or to perform and all of which the said William Rush knew, all of which was a deception upon your petitioner and all of which caused your petitioner to make the statements which he did make in the superior court, county and state aforesaid. Your petitioner further states, avers, and alleges the facts to be that the statements made by him in such superior court were inaccurate and untrue and caused the court to render a judgment which it did upon an assumed existence of fact and condition which in truth did not exist and the nonexistence of which would have prevented the rendition of a judgment that was rendered."

It appears from the clerk's transcript that on July 26, 1927, the petition came regularly on for hearing, at which time appellant testified as a witness and certain documentary evidence was admitted. The cause was argued and petitioner's attorney moved for permission to file an amended petition. The motion was granted and the matter continued to August 5, 1927. An amended petition was filed on July 30th, to which an answer was filed by the district attorney on August 5, 1927. A motion to dismiss the amended petition was filed by the district attorney on August 5th. The record shows that this motion was argued and denied on August 5, 1927, whereupon the court made an order that the matter be continued to August 11, 1927, "for further hearing." The minutes of August 11th show that the motion for a writ was argued and submitted. Nothing further appears to have been done until October 8, 1927, at which time this minute order appears:

> "This matter having heretofore come on regularly for hearing and the court having heard the testimony of witnesses, and arguments of counsel and having taken said matter under submission for further consideration. Therefore the court at this time renders its decision in open court and orders that the writ of error coram nobis be and the same is hereby denied. Petitioner at this time through his counsel gives notice of appeal. * * *"

[1] In appellant's brief appears this statement:

> "As heretofore stated, there is only one question involved, and it is this: When an amended petition for a writ of error coram nobis has been held sufficient or where a motion to dismiss the same has been denied, is the superior court bound and obliged to issue the writ of error coram nobis as prayed for in said amended petition?"

It is argued that the denial of the motion of the district attorney to dismiss the petition left no course open for the court to pursue other than to grant the writ. With this contention we cannot agree. The denial of the motion to dismiss was not a final determination of the matter. The court still retained jurisdiction of the petition which was still pending. At the time of the denial of the motion, the court might have wanted to consider the matter further; or it might have concluded that the proper procedure would be to deny the writ by minute order rather than to grant the motion to dismiss. The denial of the motion might be likened to the overruling of a demurrer, an act which would not prevent the court from sustaining an objection to the introduction of any evidence at the trial on the ground of insufficiency of the complaint to state a cause of action.

[2, 3] Although appellant states that the only question involved in this appeal is the one which we have just given consideration, a careful reading of his brief discloses that he makes complaint that he has not been given a hearing upon his amended petition. The record discloses, however, that on July 26th he was given a hearing and evidence introduced, including the testimony of appellant himself. After the answer to the amended petition was filed, the matter was continued to August 11th "for further hearing." The record is silent as to whether there was further evidence introduced or offered. If appellant had any further evidence to present to the court it was his duty to offer it at the time provided for the hearing or make appropriate showing of his desire to do so at some other time. Appellant has not furnished this court with a statement of the evidence received in the superior court. For aught that appears it may have fully covered all the issues and fully justified the ruling of the court. It is the duty of appellant to present to this court a record which will enable us to determine if error has been committed. In the absence of such a record, it must be presumed that the action of the lower court was correct. Moreover, a comparison of the petition with the amended petition discloses that the facts upon which appellant seeks relief were sufficiently set forth in the original petition. The main reason for the filing of the amended petition seems to have been the desire on the part of the appellant to retract or explain certain statements he made to the court under oath at the time of the hearing on July 26th. This is apparent from the following statements taken from the amended petition:

> "Petitioner further states and alleges the fact to be that on July 25, 1927, in department 2, superior court of the state of California, in and for the county of Riverside, the Honorable W. H. Ellis, judge presiding, your petitioner did take the stand and testify all of which is well known to the court. Your petitioner further shows and states that at the time, as is well known, he was greatly overcome by grief and weight of conscience, that, while he understood a great deal of what was said and addressed to him, he was for much of the time while he was on the witness stand confused, and in a state of mind that did not permit him to function normally and as evidence of this fact your petitioner states that this is the first time that he ever was in any court except once as a witness, and he draws to the court's attention the fact that A. M. Haynes, the official court reporter, had great difficulty in understanding what your petitioner was endeavoring to say. Your petitioner further states and alleges the fact to be that he did make an answer to a question propounded to him by the district attorney in the matter of his conscience and that he did reply in the negative thereto that such was by no means his intention, that one of the principal factors in the matter of this your petitioner's petition was to relieve your petitioner's conscience. Your petitioner further states, alleges, and avers the fact to be that he is not a man of extended education, that he did not understand what was meant by the terms 'coerce' and 'duress.' Your petitioner further states that he did not make it clear he is satisfied, that it was not his purpose to protect William Rush and keep him out of jail and keep him from having to pay a fine, but that the real agency which governed your petitioner's conduct was the wholesome fear of the dire results that would result to your petitioner if he did not do as the said William Rush directed and demanded."

[4, 5] A trial by jury of the issues presented by the petition was demanded by appellant on August 1, 1927. He now contends that the denial of the jury trial was error. This is not a proceeding in which a jury trial can be demanded as a matter of right. Moreover, the request for trial by jury came too late, the hearing having been commenced and evidence received before the jury was requested.

[6, 7] There is another and very good reason why the petition should be denied, for the facts as shown by the petition itself disclose that this is a case in which it would not be proper to grant the writ. Both the original and amended petitions contain this statement:

> "Your petitioner further states, avers, and alleges the facts to be that the statements made by him in such superior court were inaccurate and untrue and caused the court to render a judgment which it did upon an assumed existence of fact and condition which in truth did not exist and the nonexistence of which would have prevented the rendition of a judgment that was rendered."

While it is well settled that the writ of error coram nobis may be invoked to correct an error of fact upon a proper showing that the error was occasioned by duress or fraud, the writ cannot be invoked in a case in which the petitioner is a party to the fraud. Here it is alleged that an individual not clothed with the authoriy of an officer of the law induced petitioner to believe that he would receive only a fine, which would be paid by some one else. Believing that the judge would be lenient, he pleaded guilty, and, in accordance with the prearranged plan, made false statements to the court concerning the charge in an endeavor to shield the party who had promised to pay his fine. In such a case the writ should not be granted.

The order is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

89 Cal. App. 225

PEOPLE v. BLACK. (Cr. 1581.)★

District Court of Appeal, Second District, Division 1, California. Feb. 10, 1928.

Rehearing Denied March 1, 1928. Hearing Denied by Supreme Court April 9, 1928.

1. Criminal law 🔑997—"Writ of error coram nobis" issues to correct errors of fact made in court issuing writ.

The "writ of error coram nobis" is issued from a court to correct errors of fact made in court issuing the writ.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Writ of Error Coram Nobis.]

2. Criminal law 🔑1004—"Writ of error coram vobis" issues to correct errors of fact made in inferior tribunal.

The "writ of error coram vobis" is issued to correct certain errors of fact made in an inferior tribunal.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

S. H. Black pleaded guilty in justice court to possession of intoxicating liquor, and was sentenced to pay fine or be imprisoned. Defendant's petition for writ of error coram nobis was denied by the superior court, and he appeals. Affirmed.

See, also, 264 P. 343.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WOOD, Justice pro tem. A complaint was issued by the justice of the peace of Riverside township, in which the appellant was accused of the possession of intoxicating liquor. To this charge he entered a plea of guilty on July 5, 1927, and was sentenced to pay a fine of $500 or be imprisoned six months. The fine not being paid, he was remanded to the custody of the sheriff. A petition for a writ of error coram nobis was filed by appellant in the superior court of Riverside county on July 25, 1927, in which he sought to vacate the judgment of the justice court on the ground, as alleged, that he had entered his plea through duress and fraud. He set forth in his petition that one William Rush, his employer, had induced him to enter the plea of guilty upon Rush's assurance that only a light fine would be imposed, which Rush would pay. Upon his plea of guilty he made untrue statements to the court, in which he falsely exonerated Rush from responsibility in the matter of the possession of the liquor. The superior court made an order on October 8, 1927, denying the writ, and, from this order, petitioner appeals.

[1, 2] In his petition to the superior court appellant asks for a "writ of error coram nobis." This term is not accurately used. The writ coram nobis is issued from a court to correct certain errors of fact made in the court that issues the writ. The writ coram vobis is issued to correct certain errors of fact made in an inferior tribunal. Therefore the writ in the present case should have been termed "coram vobis." However, the two terms have been used interchangeably by good authority, and we feel justified in regarding the matter as if the proper nomenclature had been used.

This case might be called a companion case to People v. Black (Crim. No. 1582) 264 P. 343, in which our opinion is this day filed. In that case a plea of guilty was entered in the superior court, while in the instant case the plea was entered in the justice's court. In both cases relief was sought in the superior court on the same day; the allegations of the facts upon which relief is sought are the same in both cases; and the superior court took the same action in both cases. The reasons for our disposition of the matter are set forth in the opinion filed in case No. 1582.

For the reasons therein given, the order in the present case should be and is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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88 Cal. App. 799

R. K. CROSBY and Rose Crosby, Plaintiffs and Respondents, v. PICKWICK STAGES, NORTHERN DIVISION (a Corporation), W. W. Grove and Jane Doe Isola, Defendants; Pickwick Stages, Northern Division (a Corporation), Defendant and Appellant. (Civ. 3405.)†

District Court of Appeal, Third District, California. Jan. 30, 1928.

Hearing Denied by Supreme Court March 29, 1928.

Appeal from Superior Court of Los Angeles County; John M. York, Judge.

W. I. Gilbert and B. P. Gibbs, both of Los Angeles, for appellant.

W. G. Van Pelt, of Los Angeles, and William R. Miller, for respondents.

PULLEN, Judge pro tem. This is an appeal from a judgment upon a verdict awarding plaintiffs and respondents damages for personal injuries sustained by the respondent Rose Crosby while riding as a passenger for hire in a motorbus operated by appellant as a result of the negligent operation of the stage by appellant.

The points on this appeal are based upon an instruction, requested by respondent and given by the court, which appellant contends is erroneous, and also that such instruction is in conflict with other instructions given by the court and tended to confuse and mislead the jury to the prejudice of the defendant.

★Rehearing denied. Hearing denied by Supreme Court.

†Hearing denied by Supreme Court.

This case is a companion case with another action arising out of the same accident, entitled "John J. Schropshire v. Pickwick Stages, Northern Division, a Corporation, et al.," reported in 258 P. 1107, and the same points here urged were there very carefully and fully briefed and considered therein and no good purpose would be accomplished in a further review of the points.

Therefore, upon the authority of Schropshire v. Pickwick Stages, etc., supra, the judgment is affirmed.

We concur: HART, J.; FINCH, P. J.

203 Cal. 347

MARTIN v. FEIGENBERG et al.
(S. F. 12020.)

Supreme Court of California. Feb. 7, 1928.

1. Action 🔑6—Where plaintiff sued for whole property and damages for detention, return of portion did not render questions moot.

Where plaintiff sued for possession of whole of detained property and damages for its detention, return of portion of property to him did not render question of his rights moot or preclude recovery.

2. Judgment 🔑651—Annulment of execution by court on agreement of parties was conclusive on parties to agreement in subsequent action by one interested in prior action.

Where execution was annulled by the court by agreement of parties, this was conclusive on parties to agreement that annulled execution was void and of no force and effect in subsequent action by one not party to agreement, but interested in prior action.

3. Estoppel 🔑118—Evidence held to sustain finding that plaintiff, suing as lessee to recover personalty sold on execution and damages for detention, was estopped to claim property.

Evidence *held* sufficient to sustain finding of trial court that plaintiff, suing as lessee to recover possession of personal property sold on execution and resold and damages for its detention, was estopped to assert any right, title, claim, or interest in property.

4. Replevin 🔑72—Evidence held to sustain finding that plaintiff, suing as lessee to recover personalty sold under execution and damages for detention, had consented to taking.

Evidence *held* sufficient to sustain finding of trial court that plaintiff, suing as lessee to recover possession of personal property sold on execution and resold, and damages for its detention, had consented to taking of property, precluding recovery of damages.

Department 1.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action to recover personal property and damages by C. Martin against John Doe Feigenberg and another doing business under the firm name of Feigenberg Bros. and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

See, also, 264 P. 478.

John T. Wentz, of San Leandro, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

CURTIS, J. Action brought to recover possession of certain personal property of the alleged value of $1,250, and for $10,000 damages for the unlawful detention thereof. Plaintiff claimed to have been in possession of said personal property by virtue of a lease from C. H. Coddington, the owner thereof, and that defendants, on the 15th day of June, 1925, without plaintiff's consent and wrongfully, entered upon the premises on which said personal property was situated, and removed the same therefrom. The defendant Bercovich asserted title to said personal property through an execution sale thereof in an action wherein E. Sorensen was plaintiff and the said C. H. Coddington was defendant; that at said sale, held on June 15, 1925, the defendants Feigenberg Bros. became the purchasers of said personal property, and immediately thereafter sold the same to defendant Bercovich. The court rendered judgment for defendants and plaintiff has appealed.

[1, 2] The writ of execution under which said property was sold is the same writ which was the subject of consideration by the District Court of Appeal, First District, First Division, in the case of Sorensen v. Coddington (Cal. App.) 249 P. 37. From the facts stated in the opinion therein it appears that the appellant herein, although not a party to said action of Sorensen v. Coddington, after the rendition of the adverse judgment from which the present appeal was taken, made a motion in the superior court of Alameda county where said action of Sorensen v. Coddington was pending, to set aside said writ, which motion was denied. Thereafter the defendant Coddington made a similar motion, which was also denied. However, after the denial of said motions, by an agreement between Sorensen, Coddington, Feigenberg Bros., and Bercovich and their attorneys, said writ of execution was annulled, and said personal property, or a large portion of it, was returned to Martin, the appellant herein. It does not appear, however, from the report of said action that Martin was a party to said agreement. It does appear, however, that he appealed from the order of court denying his motion to vacate said order of execution, and that this said appeal was dismissed on the ground that the question, to determine which said appeal had been taken—that is, the validity of said writ of execution—had, by the subsequent order entered upon the stipulation of the parties to said action annulling the same, become moot. It appears, therefore, from the decision of the District Court dismissing said appeal, in which all of the parties hereto were parties, that the writ of execution under which the personal property was sold, which is sought to be recovered in this action, was vacated, and the greater part of said personal property was returned to appellant herein. Appellant, however, by this action seeks to recover all of said personal property and damages for the detention of the same. Therefore, the return of a portion of said personal property only did not satisfy appellant's claim to the whole thereof and damages for the detention of the same. Ac-

cordingly, the subsequent proceedings taken in the case of Sorensen v. Coddington, which resulted in a portion of said personal property being returned to appellant, did not have the effect of rendering moot the questions arising in this action, nor of defeating the appellant's right to recover herein. On the other hand, they somewhat strengthen appellant's position regarding his right to the possession of all of said personal property, for by those proceedings the writ of execution under which the respondents claim they purchased said property was annulled by the court by agreement of said respondents, which must be conclusive on the respondents that the same was void, and of no force or effect. Were this the only barrier which stands between the appellant and his success on this appeal, it would be our duty to grant him the relief asked for herein.

[3, 4] But appellant bases his right to recover possession of said personal property, and damages for its retention, upon the allegations of his complaint that defendants "without plaintiff's consent and wrongfully and unlawfully entered upon the premises above described so belonging to plaintiff, and forcibly and wrongfully entered the building in which said personal property was located and removed the same from said premises." This allegation of the complaint was denied by respondents, who also pleaded that appellant was estopped from asserting any right, title, claim, or interest in said personal property by reason of his conduct prior to, during, and subsequent to, the sale of said personal property and the purchase thereof by the respondents. Upon these issues the court found for the respondents. There is no question of the sufficiency of the evidence to support the findings of the court. In brief, the evidence shows that before the issuance of said purported writ of execution the appellant informed the attorney for Sorensen, the plaintiff in said action, that said personal property was in his possession, and that it belonged to Coddington, the judgment debtor in said action. Thereupon the attorney suggested that he would have execution issued in said action, and levy upon and sell said personal property under said writ of execution. This was done, and appellant was present at said sale, and made no claim to said personal property. The purchasers at said sale were respondents Feigenberg Bros., who bid $130, and said property was sold to them for said sum. They afterwards sold the same to the respondent Bercovich. Bercovich, about a week before the sale under the execution, visited the appellant, and the latter pointed out the personal property which he now claims, and, in answer to a question asked by Bercovich as to whether he (appellant) was interested in it, the latter replied: "I don't want this junk. I am not interested in it," and, after the sale, the appellant disconnected the pumps (a portion of the personal property claimed was a number of pumps used at gasoline filling stations) and helped load them and the other personal property upon a truck which the respondent Bercovich had sent to appellant's place of business for the purpose of removing said personal property from the premises of appellant. This evidence, as we have said before, is ample to support respondents' plea of estoppel. It also disproves the allegations of appellant's complaint that the property was taken from him without his consent. It shows, on the other hand, that appellant not only acquiesced in its taking, but that he disclaimed any interest in it, and assisted in its removal. Under this state of facts the appellant has no legal claim for damages for the taking of said personal property from his possession, nor for the detention thereof by the respondent Bercovich.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

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203 Cal. 351

MARTIN v. HOOD et al. (S. F. 12076.)

Supreme Court of California. Feb. 7, 1928.

1. Attorney and client ⚷129(2)—Complaint of client demanding assignment of notes purchased by attorney held insufficient in not alleging tender of consideration paid by attorney.

Complaint alleging that attorneys were employed by plaintiff to prepare lease and assumed trust relationship, and that they advised plaintiff against purchase of lien notes, and that one of them purchased such notes 18 months after employment for valuable consideration, and praying that they be required to assign such notes to plaintiff, *held* insufficient to state cause of action, since it at most showed that attorney was involuntary trustee, and did not allege tender of consideration paid for notes.

2. Attorney and client ⚷129(2)—Complaint of client alleging attorneys' advice and acts and demanding damages held insufficient for failure to show damage (Civ. Code, § 3440).

Complaint, alleging that attorneys employed by plaintiff advised him not to file notice of intended sale under Civ. Code, § 3440, and that property leased to him was sold under execution issued on judgment against third party obtained on publication of summons without attaching property, in action wherein one of said attorneys represented the plaintiff, and demanding damages from attorneys, *held* insufficient to state cause of action, since showing that judgment was void, and hence that sale was void, and that plaintiff sustained no damage.

3. Pleading 🔑18—Complaint of client seeking assignment of notes from attorneys and damages based on their advice and acts held uncertain in alleging professional relation (Civ. Code, § 3440).

Complaint, alleging that attorneys were employed by plaintiff to prepare lease, and at all times thereafter mentioned remained plaintiff's attorneys, that they advised plaintiff against purchasing notes, and that 18 months after employment one of attorneys himself purchased notes, and that they advised plaintiff against filing notice under Civ. Code, § 3440, and that property leased to plaintiff was subsequently taken under execution issued at instance of one of attorneys and demanding assignment of notes *held* uncertain in alleging professional relation.

4. Pleading 🔑18—Complaint of client seeking assignment of notes by attorneys held uncertain in alleging date of attorneys' advice.

Complaint, alleging that attorneys were employed by plaintiff to prepare lease and assumed trust relationship, and that they advised plaintiff against purchase of lien notes, and that one of them, 18 months after employment, purchased such notes, and praying that they be required to assign them to plaintiff, *held* insufficient as uncertain in alleging date when attorneys gave advice.

Department 1.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action to compel transfer of promissory notes and to recover damages brought by C. Martin against J. E. Hood and another, as copartners doing business under the firm name and style of Hood & Smith, and individually. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

See, also, 264 P. 477.

John T. Wentz, of San Leandro, for appellant.

Calkins, Hagar, Hall & Linforth, of San Francisco, and Edward J. Smith, of Oakland (William W. Hoffman, of Oakland, of counsel), for respondents.

CURTIS, J. The first amended complaint in this action (which we will hereafter refer to as the complaint) purported to set forth two causes of action against the two defendants, each of which was separately stated and set out in a different or separate count. The defendants appeared separately, and each filed both a general and special demurrer to each cause of action set forth in said first amended complaint. The court sustained both demurrers, with leave for plaintiff to amend. Plaintiff chose to stand upon his pleading, and, no amendment thereto having been filed, the court rendered judgment in favor of defendants. From this judgment the plaintiff has appealed.

The first count of the complaint set forth that the defendants were at all of the times mentioned therein attorneys at law, licensed to practice in this state, and were copartners doing business and practicing law as such attorneys under the firm name of Hood & Smith, with offices in the city of Oakland; that on or about October 19, 1923, plaintiff retained and employed said firm of attorneys to advise him and to prepare the necessary legal instruments required for the purchase of the Bungalow Garage, and for a lease of the real property upon which said garage business was being carried on and the personal property used therein; that, by virtue of said employment, defendants prepared a lease to said premises and to said personal property, which was executed by the parties thereto, and that plaintiff thereupon purchased said business, and entered into possession of said real property and the personal property used in connection with the operation of said Bungalow Garage, said personal property, consisting not only of a stock of oils, greases, tires, and garage supplies, but also of a stock of groceries; that said purchase was made and said lease was obtained from the former owner of said real property and business, one Charles H. Coddington, and by virtue of said employment said defendants "became the attorneys for plaintiff, and assumed a relation of trust and confidence to this plaintiff, and that at all times thereafter and in this complaint mentioned said defendants remained, and were, plaintiff's attorneys, confidential advisers and trusted agents in all matters in relation to the transaction hereinafter set out"; that under said lease plaintiff entered into the possession of said property, performed all covenants of said lease on his part to be performed, and ever since and does now occupy the said real property [the above allegations are set forth in paragraphs I to V of the first count of the complaint]; that, at the time of said negotiations and of the execution of said lease, said real property was subject to two trust deeds, one to secure the payment of a promissory note for $2,500 in favor of Bank of San Leandro, and the other to secure a promissory note of $188.57 in favor of F. I. Lemos; that defendants, by reason of their employment by plaintiff, learned of the existence of said trust deeds; that plaintiff notified defendants that he was able, ready, willing, and desired to purchase said notes secured by said trust deeds, but was advised by defendants not to do so, and that, relying upon such advice, he did not purchase said notes, but that he would have done so except for the advice given him by defendants; that thereafter, and between May 14, 1925, and June 5, 1925, the defendant J. E. Hood secretly and without plaintiff's consent and against plaintiff's will purchased the notes secured by said deeds of trust, respectively, and still continues to hold the same against plaintiff's will and consent; that immediately after the

5th day of June, 1925, plaintiff demanded of defendants that they assign to plaintiff said notes upon the payment to them of the actual amount expended by defendants in the purchase thereof; that defendants have refused, and still refuse, to assign to plaintiff said notes or either of them; that the value of the real property given to secure said notes is $7,500, and that defendant Hood purchased said notes for a sum not exceeding $2,300. The second count of said complaint incorporates and makes paragraphs I to V of the first count of the complaint a part of said second count. It is then alleged in said second count that plaintiff was advised by his attorneys that no "Notice of Intended Sale" as provided by section 3440 of the Civil Code need be recorded, and for this reason plaintiff did not execute or record any such notice in the office of the county recorder; that a short time after plaintiff took possession of said real and personal property a portion of said personal property was levied upon and sold under an execution issued in the case of Sorensen v. Coddington (Cal. App.) 249 P. 37, which execution was issued under a judgment rendered in said action upon the publication of summons, and not by personal service thereof upon the defendant in said action, and without any prior attachment being issued or levied upon said personal property; that said defendant Smith was the attorney for the plaintiff in said action, and caused said personal property to be levied upon and sold under said writ of execution; that said personal property was then and there forcibly taken and removed from plaintiff's place of business, and from plaintiff's possession, without plaintiff's consent and against his will, and plaintiff has ever since been deprived of the use and possession of said personal property; that the value of said personal property was the sum of $930.87, and plaintiff, by reason of the removal of said personal property as aforesaid, has been damaged in the sum of $10,000. The prayer of the complaint is for judgment against the said defendants and each of them for the sum of $10,930.87, for a decree of the court that plaintiff is the absolute owner of said two promissory notes; that defendants have no right, title, or interest in said notes or either of them; that defendants be required to transfer to plaintiff said notes, and defendants have not "any right or rights ordinarily existing in favor of a trustee or trustees and that the said defendants are not, nor is either one of them entitled to reimbursement from this plaintiff of any money or monies expended by said defendants, or either of them in the procuring of the assignments of the deeds of trust and notes in the manner aforesaid," and for general relief and costs.

The demurrer of the defendant Hood was both general and special. The general demurrer was directed against each count of the complaint and the complaint as a whole. His special demurrer specifies that the complaint was uncertain, in that it could not be ascertained therefrom "how or in what manner or by what arrangement defendants Hood & Smith became or were, as alleged in paragraph III of the first alleged cause of action * * * 'at all times thereafter and in this complaint mentioned, said defendants remained and were plaintiff's attorneys, confidential advisers, and trusted agents, in all matters in relation to transactions hereinafter set out' "; nor could it be ascertained from said complaint how or in what manner plaintiff has been damaged in the sum of $10,000. The special demurrer also set forth that the complaint was ambiguous and unintelligible for the same reason that it was alleged to be uncertain.

The general demurrer of the defendant Smith was directed against each count of the complaint. It also specified that the complaint was uncertain, in that it could not be ascertained therefrom when plaintiff advised defendants that he was able, ready, and willing and desired to purchase said notes, and when plaintiff was advised by defendants not to purchase the same. The special demurrer of Smith also set forth that the complaint was ambiguous and unintelligible, for the reason that it was alleged to be uncertain. Other grounds of uncertainty were specified in the special demurrer of Smith, but we deem it unnecessary to refer to them.

[1] The first count of the complaint fails to state a cause of action, and the general demurrers interposed thereto were properly sustained. It seeks to compel an assignment to plaintiff of the two promissory notes purchased by the defendant Hood, and which were secured by deeds of trust upon the real property leased by plaintiff without payment by plaintiff to said defendant of the amount paid by said defendant for said promissory notes. Plaintiff seeks to bring himself within the rule laid down in McArthur v. Goodwin, 173 Cal. 499, 160 P. 679, in which action it was held that, where an attorney representing the plaintiff had, during the pendency of an action, fraudulently purchased certain tax deeds to the real property which was the subject of litigation, he was not entitled to be reimbursed for any money expended by him in making such purchase, before the client's title to said real property would be quieted against the claims of the attorney by reason of the purchase by him of said tax deeds. In the present action, the defendants did not represent the plaintiff in any pending action, but, so far as the complaint shows, were employed simply to prepare a lease of the real and personal property which plaintiff contemplated acquiring. He desired to purchase the two outstanding liens against the real property, represented by the two trust deeds, in order to protect the lease

which he was then acquiring, but was advised against said action by the defendant Smith. There is no allegation that this advice was not, at the time, the proper advice to be given under the circumstances then existing. Neither is there any allegation that the then owners of said promissory notes were willing to sell or assign them. Some 18 months thereafter the defendant Hood purchased these two promissory notes for a valuable consideration. At most, defendant Hood might be held to be an involuntary trustee of said notes, and in a proper proceeding compelled to assign them to plaintiff upon tender and payment of the consideration paid by him for the same. No such a proceeding is before us. No tender is alleged, and the complaint is drawn upon the theory that defendants are in duty bound to assign said promissory notes to the plaintiff without payment by plaintiff of the consideration paid for said notes by defendants. Plaintiff alleges that he demanded of defendants a transfer and assignment to him of said notes upon payment by him of the actual amounts of money expended by defendants, but that defendants refused to make such assignments. This refusal may have been based upon plaintiff's refusal to pay defendants the amount expended by them. The allegation of demand contained in the complaint is not equivalent to, nor can it be considered a substitute for, an allegation of tender.

[2] We will now take up for consideration the general demurrers to the second count of the complaint. It appears from the face of said complaint that the purported writ of execution under which plaintiff claims the personal property covered by his lease was sold was absolutely void, as it was issued in pursuance of a judgment obtained in said action by publication of summons, and without any attachment of the personal property claimed by plaintiff. The sale, therefore, under said writ of execution was void, and the purchaser at such sale took no interest by virtue thereof to any of said personal property. Plaintiff, therefore, would have had a right of action against the officer making said purported sale, and also against the purchasers thereunder for the removal of said property from the possession of plaintiff. The plaintiff sustained no injury, therefore, by reason of defendants' advice to him not to file a notice of intended sale, as provided by section 3440 of the Civil Code. Neither was he damaged by any action taken by the defendants in the action of Sorensen v. Coddington. Plaintiff was by none of these acts deprived of any right possessed by him in said personal property. This complaint was, therefore, subject to a general demurrer. Before leaving this subject, we wish to call attention to the fact that this is the same writ of execution involved in the action of Martin v. Feigenberg (S. F. No. 12020) 264 P. 477, this day decided. That action was brought by plaintiff against the purchasers of this same personal property to recover possession of the same and damages for its detention upon the ground that said writ of attachment was void, for the reason that there was no personal service of summons in said action. We sustained this contention of plaintiff, but affirmed the judgment against him in the action of Martin v. Feigenberg, for the reason that the trial court found in said action that plaintiff was estopped from claiming the possession of said personal property, in that he had encouraged the purchasers to bid at such sale, consented to its removal from his premises, and actually assisted in loading the same upon a truck sent by the purchasers for the purpose of removing said property from plaintiff's premises. There was ample evidence to sustain this finding, and for that reason we were compelled to affirm the judgment based thereon.

[3, 4] We also think the special demurrers for uncertainty were well taken, especially two of them. The court properly sustained the demurrer of the defendant Hood wherein it was set forth that the complaint was uncertain in alleging that "at all times thereafter and in this complaint mentioned, said defendants remained and were plaintiff's attorneys, confidential advisers, and trusted agents, in all matters in relation to transactions hereinafter set out." The only allegation of employment was that the defendants were consulted regarding the lease of the property by plaintiff and the preparation of a proper form of lease to consummate these negotiations. Just how defendants thereafter remained plaintiff's attorneys during the following 18 months does not appear from the complaint, and cannot be ascertained therefrom. In this respect, therefore, the complaint was without doubt uncertain, and the demurrer interposed on that ground was properly sustained. The special demurrer of defendant Smith upon the ground of uncertainty was also well taken. The uncertainty in the complaint relied upon to sustain this ground of the demurrer was that it could not be ascertained from said complaint when the defendants advised plaintiff not to purchase said promissory notes. As we have already seen, something over one year and a half intervened between the employment of defendants to advise plaintiff regarding the lease of said real and personal property, and the purchase by the defendant Hood of the promissory notes. During this time, at some period therein, the complaint does not state when, the plaintiff alleges the defendants advised him not to purchase the notes. The defendants may wish to deny that they ever gave such advice. If they do, it will be necessary for plaintiff to prove the allegation. To allow plaintiff on the day of trial to select some date within this year and one-half as the

date when such advice was given him would compel the defendants to meet this evidence of the plaintiff without any previous notice as to just what might be required of them. Of course, we do not mean to hold that the exact date is material, or should be alleged in the complaint, but plaintiff should be required to set forth at least an approximate date on which he claims defendants advised him on the subject of the purchase of the notes.

The demurrers having been properly sustained, and the plaintiff having refused to amend within the time allowed by the court for that purpose, the judgment should be, and it is hereby, affirmed.

We concur: PRESTON, J.; SEAWELL, J.

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203 Cal. 359

UNITED BANK & TRUST CO. OF CALIFORNIA v. BROWN et ux. (Sac. 3913.)

Supreme Court of California. Feb. 8, 1928.

1. Mortgages 🔑356—Sale under trust deed held void for failure to post notice required by amended statute, though deed, executed before amendment, provided for notice required by law (Code Civ. Proc. § 692, as amended by St. 1923, p. 754; Civ. Code, § 2924).

Sale under trust deed *held* void for failure to post notice of sale on property as required by 1923 amendment to Code Civ. Proc. § 692 (St. 1923, p. 754), notwithstanding that trust deed, which was executed before such amendment, provided, in conformity with Civ. Code, § 2924, for notice of sale in manner required by law, since such provision must be interpreted to mean law existing at time of enforcement.

2. Constitutional law 🔑191—Legislature held authorized to amend statute governing sale under trust deed to require posting of notice on property sold (Code Civ. Proc. § 692, as amended by St. 1923, p. 754).

1923 amendment to Code Civ. Proc. § 692 (St. 1923, p. 754), governing sale of real property under trust deed, requiring that notice of sale should be posted on property to be sold, *held* purely remedial and procedural provision which was within power of Legislature, since it merely designated place on which one of notices required under statute as it read prior to amendment should be posted.

3. Mortgages 🔑330—Amending statute governing sale under trust deed held not retroactive in applying to enforcement of deed executed before its enactment (Code Civ. Proc. § 692, as amended by St. 1923, p. 754).

1923 amendment to Code Civ. Proc. § 692 (St. 1923, p. 754), requiring that notice of sale under trust deed should be posted on property to be sold, *held* not retroactive in application to remedies yet to be invoked at time of its adoption, where contract of parties contemplated such change in statutory procedure as might occur prior to enforcement of obligation.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the United Bank & Trust Company of California against C. Walter Brown and wife to foreclose a deed of trust. From a judgment for defendants, plaintiff appeals. Affirmed.

Louttit, Stewart & Louttit, of Stockton, for appellant.

O. C. Parkinson and Parkinson & Parkinson, all of Stockton, for respondents.

RICHARDS, J. This is an appeal from a judgment in the defendants' favor. The complaint in the action was in two counts, each relating to a different cause of action. In the first alleged cause of action the plaintiff sought to recover a balance due upon two promissory notes dated, respectively, January 13, 1920, and April 6, 1920, each of said notes being secured by a deed of trust executed by C. Walter Brown, the maker of said notes and the defendant and respondent herein. On May 7, 1924, notice of default in the payment of said notes and of election to sell the property described in said trust deed was filed pursuant to the terms thereof. Notices of such sale were published and were also posted on August 13, 1924, and the sale of the property was had thereunder on September 10, 1924. It is for the balance alleged to remain due upon said notes after such sale and the application toward the payment of the toal amount due upon said notes that the plaintiff counts upon in its first alleged cause of action. The second count or cause of action arises out of a similar transaction, being for a balance due upon two other notes dated, respectively, November 14, 1919, and May 10, 1922, and which were also secured by a deed of trust, the sale under which was conducted at the same time and upon the same notices as those published and posted upon the sale under the first trust deed. The defense which the said defendant urged in his pleadings and upon the trial related to an alleged insufficiency in the notices given of the sale of his property under each of these deeds of trust, and which, as he contended and here contends, rendered the said sales thereunder void and hence this action as to both its counts premature and nonmaintainable. The trial court found in the defendants' favor upon the defense and gave judgment accordingly against the plaintiff upon both causes of action.

[1] The question thus presented upon appeal arises out of the following situation: At the time these promissory notes were given and the trust deeds securing them were executed, respectively, the latter each contained a provision that in case of default in the payment of said promissory notes the beneficiary under said trust deeds "shall record

in the office of the recorder in the county wherein said property or some part thereof is situated a notice of such breach and of election to cause said property to be sold to satisfy said obligations. After three months shall have elapsed following said recordation of said notice the trustees, without demand on the parties of the first part shall sell said property in such parcels and at such times and places as they shall deem best to accomplish the objects of these trusts, having first given notice of the time and place of said sale in the manner and for the time not less than that required by law for sales of real property upon execution." At the time of the execution of said trust deeds containing the foregoing provision the manner provided and required by law for sales of real property upon execution was that embraced in section 692 of the Code of Civil Procedure. By the terms of that section as it then read it was provided that "in case of sales of real property upon execution notice thereof must be given by posting the notice in the form required therein" for 20 days in three public places of the township or city where the property is situated and also where the property is to be sold, and publishing a copy thereof "for the period prescribed in said section." In the year 1923 (St. 1923, p. 754), however, this section of the Code of Civil Procedure was amended by the addition to its former language of the following proviso:

> "Provided that where real property is to be sold under the provisions of any deed of trust the copy of said notice shall be posted in some conspicuous place on the property to be sold at least twenty days before date of sale."

The sale of the property covered by the two deeds of trust above referred to was made in each case after the taking effect of the foregoing amendment, and it is an admitted fact on this appeal that in neither case was a copy of the notice of sale posted upon the property to be sold, respectively, under said trust deeds as required by the terms of said amendment. It was for that reason that the trial court held each of said sales under said trust deeds to have been void, and hence this action prematurely brought.

It is the contention of the appellant herein that since said trust deeds were executed prior to the amendment made to section 692 of the Code of Civil Procedure in 1923, and since said trust deeds contained the specific provision that the procedure for the sale of the property described therein should as to the notices of such sales be that required by law for sales of real property upon execution, and since the sales of said properties were conducted as to such notices in strict conformity to the provisions of said section of the Code relating to sales of real property under execution as said section read regarding such sales prior to said amendment and as said section still reads as to sales of real property under execution, these sales were valid notwithstanding the admitted fact that they were not conducted as to the notices thereof in conformity with the terms of the amendment to said section of the Code enacted in 1923. The appellant further contends that said amendment should not be given retroactive effect upon said trust deeds so as to change the procedure specifically agreed upon by the parties thereto with relation to the remedies to which the beneficiary thereunder was to be entitled in event of default. In making the first of these contentions the appellant seems to have lost sight of a quite well-established principle applicable to the interpretation of written instruments of the character of these trust deeds in so far as the remedies provided therein for their enforcement are concerned. That principle is this: That when parties to such instruments provide therein that as to the method of their enforcement it shall be in accordance either with law generally or with the terms of a particular procedural statute, the provisions in such instrument thus providing must be interpreted to mean the law or the statute in the form in which it exists at the time of such enforcement. The leading case upon this subject is that of James v. Stull, 9 Barb. (N. Y.) 482, and it has been followed generally by the courts of all states. Webb v. Lewis, 45 Minn. 285, 47 N. W. 803; Scott v. Dist. Court, 15 N. D. 259, 107 N. W. 61. The case of International B. & L. Ass'n v. Hardy, 86 Tex. 610, 26 S. W. 497, 24 L. R. A. 284, 40 Am. St. Rep. 870, upon which the appellant most strongly relies, recognizes the existence of this principle and, in fact, expressly restates it, but holds it inapplicable to the particular case before that court for the reason that the statute referred to in that case purported by its later amendment to change the time and place of the sale to be made under the trust deed there under review, and in so doing affected the period after default within which sales thereunder could be made. The case of Taylor v. Stearns (59 Va.) 18 Grat. 244, from which the appellant quotes extensively, resembles the Texas case above cited in the respect that the amended statute therein referred to suspended the time within which the beneficiary under the trust deed there in question could exercise his rights after default for a longer period than that provided for in the trust deed and thus affected the substantial rights of the parties to the trust deed. These cases have no application to the facts of the instant case, wherein the only question presented relates to the form of notice required for the trust sale.

[2] It is to be noted in this connection that the provisions in the trust deeds here under review are in exact conformity with the provisions of section 2924 of the Civil Code as that section read prior to its amendment in

1923 (St. 1923, p. 755) with respect to notices of sales of property under powers of sale conferred upon mortgagees, trustees, or other persons to be exercised after breach of the obligation which the mortgage or other transfer secures. This section of the Civil Code, in so far as it relates to notices of sales under mortgages and trust deeds, was in force at the time of the execution of the trust deeds here in question, and its provisions were incorporated in hæc verba in these trust deeds. This being so, we are of the opinion that the principle above referred to as declared in the cases of James v. Stull and Webb v. Lewis, above cited, is to be given full application to the case at bar, and hence that the amendment to section 692 of the Code of Civil Procedure enacted in 1923, wherein it was expressly provided that in case of sales of real property under the provisions of a deed of trust a copy of the notice of such sale "shall be posted in some conspicuous place on the property to be sold," must be given application to sales under trust deeds subsequent to said amendment, and hence to the sales under the trust deeds assailed in this case. By such amendment no substantial rights of the parties were affected, nor was the time within which the contractual rights of the parties thereto either enlarged or diminished. The amendment merely designated a definite place upon which one of the notices required to be given under the statute as it read prior to such amendment should be posted. It was purely a remedial and procedural provision which did not enlarge, but only defined the duty of beneficiaries under deeds of trust as to the posting of notices of sale thereunder for the further protection of the obligors under such instruments. It was therefore such a change of the statute as to be not only within the power of the Legislature, but also to be held to be within the contemplation of the parties when they incorporated in these deeds of trust the provision substantially that sales thereunder were to be made in accordance with law.

[3] As to the second contention of the appellant that the amendment to section 692 of the Code of Civil Procedure made in 1923 is not to be given retroactive effect, we think that such contention has been sufficiently answered by the views heretofore expressed in this opinion, since such a procedural amendment would not be retroactive in its application to remedies yet to be invoked at the time of the adoption thereof if, as herein held, the contracts of the parties contemplated such changes in statutory procedure as might occur prior to the enforcement of the obligation.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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203 Cal. 403

MARTINE v. INGALLS et al. (L. A. 9017.)

Supreme Court of California. Feb. 17, 1928.

1. Municipal corporations 🔑706(6)—Evidence of negligence of truck driver making right-hand turn and colliding with bicycle on which deceased was riding held insufficient for jury.

In action for death of minor, evidence that defendant's truck passed deceased child riding on bicycle about 150 feet from street intersection, that deceased continued on right side of truck, and that deceased was seen throwing up his arms when truck driver was proceeding to make right turn on wet pavement, but not showing failure to signal by truck driver, failed to show any facts from which inference of actionable negligence could be reasonably drawn or fix any legal responsibility for death on driver of truck, and hence judgment of nonsuit was properly rendered.

2. Negligence 🔑121(1), 134(2)—Negligence must be proved, though it may be established from facts and circumstances from which inference of negligence reasonably follows.

Negligence must be proved, and cannot be presumed, though it may be established by facts and circumstances from which inference of negligence reasonably follows.

Department 1.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Irving W. Martine against Carl Ingalls and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Dorsey & Campbell, of Bakersfield, for appellant.

Rowen Irwin and Rollin Laird, both of Bakersfield, for respondents.

SEAWELL, J. This appeal is taken from a judgment of nonsuit entered in an action brought by Irving W. Martine against Carl Ingalls in his personal capacity and also as doing business under the firm name and style of Commercial Transfer Company to recover damages for the death of his son, John Irving Martine, alleged to have been caused by the negligence of the respondent on the 3d day of March, 1924.

At the time of his untimely death, the youth was but a few months past 16 years of age, and he was employed in the messenger service of the Western Union Telegraph Company, at the city of Bakersfield, this state. While thus employed he was crushed to death upon being thrown from or after falling from a bicycle which he had been riding, by a truck drawing a trailer, operated by R. L. Verrell, an employee of respondent, passing over his body.

At the time the accident occurred, the paved roadbed was wet from intermittent showers. The accident, as recounted by the witnesses, occurred while both the driver of the truck and the deceased were traveling northerly on Union street, near the point where said street is intersected by Sumner street. The combined length of the truck, coupling, and trailer was approximately 50 feet. The course of the truck was northerly upon Union street to Sumner street and thence easterly upon said Sumner street. The truck passed the deceased to the left some 150 feet distant from the southerly line of Sumner street and continued its course until within a position to make a right turn into Sumner street. The driver was proceeding to make the turn when the youth, who was riding at the right of the truck near the rear wheels, was seen to throw up his arms and apparently clutching at the side of the truck went down beneath its wheels and was instantly killed. Two persons, seemingly disinterested witnesses, gave testimony as to what they saw. Their positions were not such as to enable them to give a very satisfactory account as to the proximate cause of the fatality. Neither was able to say that the driver of the truck did not give a timely signal of his intention to turn to the right into Sumner street upon approaching it. Neither saw him give a signal. One of said witnesses did not observe the driver of the truck with respect to the question of signals until the proper time to give a signal had passed, while the other, who doubtless observed the driver in a casual way only, said that he did not see the driver indicate with his hand his intention to turn into Sumner street, but he would not say that a signal was not given. The evidence, so far as any was given on the subject, was to the effect that the truck passed the youth some distance south of Sumner street, moving at the rate of 12 or 15 miles per hour. Just what the position of the youth was with relation to the truck immediately upon being overtaken by it cannot be definitely determined. It does appear, however, that he did not undertake to pass the truck to the left, but continued to travel to its right either near the rear wheels or the coupling which connected the truck and trailer. His position was between the truck and the edge of the roadway. There is some ground to sustain the contention that he gained upon the truck after it had passed him, riding to its right. It is very questionable from the youth's position whether he would have been able to have seen a signal had one been given. The driver of the truck was called to the witness chair by the plaintiff, but he was not interrogated on the subject of signals. It is not wholly improbable that the youth, who was riding to the right of and close to the rear wheels of the truck, with no thought of its turning into Sumner street, became surprised or bewildered at the movement of the truck and, in his attempt to extricate himself from the peril of his position, by sudden movement of his bicycle caused it to skid or slip on the wet pavement, thus precipitating him to the ground. The day was described by witnesses as a "slippery day." This, of course, is not more than a probability, or perhaps a possibility. Something caused him to extend his arm or arms as if grasping for the rear of the truck for support. It is possible that an impact with the rear of the truck may have overbalanced the bicycle. There was sufficient road space accessible to the youth's right to have enabled him to avoid a collision with the truck, as it was moving slowly even after it began to turn into Sumner street, which makes it possible that some unexplained cause intervened to his misfortune.

[1, 2] We have read the record carefully and are forced to conclude with the trial court that whatever may have been the real proximate cause of the injuries which resulted in death, there is a failure of evidence to fix the legal responsibility thereof upon the truck driver. No facts of a substantial character were adduced from which the inference of actionable negligence may be reasonably drawn. Negligence must be proved and cannot be presumed. By this we do not mean to say that it may not be established by facts and circumstances from which the inference of negligence reasonably follows. The facts and circumstances, however, which satisfy the law are lacking in the instant case. In arriving at this conclusion we have not lost sight of the rule which courts should apply in considering a motion for nonsuit, as announced in Berger v. Lane, 190 Cal. 443, 213 P. 45, Estate of Arnold, 147 Cal. 583, 82 P. 252, Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381, and other cases cited by appellant.

Judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.

203 Cal. 374

DE LA TORRE v. JOHNSON et al.★

(S. F. 12228.)

Supreme Court of California. Feb. 10, 1928.

Rehearing Denied March 8, 1928.

1. Abatement and revival 🔑58(1)—Personal injury action abates as to defendant for whom verdict was directed dying after trial.

Personal injury action abates as to defendant for whom verdict was directed and who died subsequent to trial.

2. Trial 🔑296(4, 5) — Instruction that contributory negligence would prevent recovery held not erroneous, in view of other instructions requiring such negligence to proximately cause injury.

In action for personal injuries in collision between plaintiff driving truck out of private road into highway and defendant driving automobile, instruction that if plaintiff did not exercise care and diligence of ordinarily prudent man under such circumstances, he would be

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★Rehearing denied.

guilty of negligence preventing recovery, was not erroneous as excluding from consideration fact that contributory negligence must have contributed proximately to accident, especially in view of other instructions and evidence that any contributory negligence must have proximately contributed to plaintiff's injuries.

3. Trial 🔑295(9)—Instruction that plaintiff had burden to establish to "satisfaction of jury" facts necessary to entitle him to recover for injuries, used synonymously with "by preponderance of evidence," held proper.

In action for personal injuries in automobile collision, instruction that plaintiff had burden to establish to satisfaction of jury facts necessary to entitle him to recover, and that issues submitted were to be decided according to preponderance of evidence, and that decision must be made according to preponderance of evidence was not erroneous as requiring degree of proof higher than by preponderance of evidence, through use of term "to satisfaction of jury," since it was used synonymously with "by preponderance of evidence."

4. Municipal corporations 🔑706(8)—Instruction that automobilist on highway had right of way over truck coming from private road into highway held proper under evidence.

In action for personal injuries in automobile collision, instruction that defendant automobilist driving along public highway had right of way over plaintiff truck driver coming out of private road into highway *held* proper under evidence.

5. Appeal and error 🔑1047(5)—Where photographs were admitted in plaintiff's evidence, he cannot complain that court was more exacting of him than of defendant under similar circumstances.

In action for personal injuries in automobile collision, where photographs offered by plaintiff were admitted in evidence, he cannot complain on appeal that court was more exacting of him than of defendant under similar circumstances.

6. Appeal and error 🔑1068(4)—Instruction as to medical expense, even if erroneous, held not available to plaintiff suing for injury, where jury found against him on issue of negligence.

In action for personal injuries, where jury found against plaintiff on issue of negligence, instruction as to medical expense, even if erroneous, cannot avail plaintiff on appeal.

Department 1.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by Albert De La Torre against W. P. Johnson and George Smith. Verdict directed for the first-named defendant, who died subsequent to the trial. From a judgment for defendant George Smith, plaintiff appeals. Affirmed.

W. H. Metson and E. B. Mering, both of San Francisco, and Bardin & Scott, of Salinas, for appellant.

Pillsbury, Madison & Sutro, Goodfellow, Eells, Moore & Orrick, Walter H. Linforth, and Edwin V. McKenzie, all of San Francisco, and Hudson, Martin & Jorgensen, of Monterey, for respondents.

PRESTON, J. [1] This is an action for personal injuries. The court instructed a verdict for the defendant W. P. Johnson, and the jury, of its own accord, returned a verdict for the defendant George Smith. Defendant Johnson having died subsequent to the trial, the action has abated as to him (De La Torre v. Johnson, 254 P. 1105), except perhaps for certain purposes which, in view of our conclusions, need not here be considered.

Plaintiff was operating a truck and defendant Smith was driving a Lincoln automobile owned by defendant Johnson at the time of collision between the two vehicles on Fremont street in the city of Monterey, a street formerly part of the main highway leading from Del Monte to the town of Carmel. Plaintiff, driving said truck, came onto the highway from a private road or right of way, and the collision occurred at the intersection of this private road with the said highway. The evidence is in sharp conflict. As to defendant Smith, no point is made by either party respecting its sufficiency or insufficiency, and it will not be further noticed unless some part thereof be considered in passing upon the assignments of error.

Plaintiff registers his complaints under several heads, practically all of which are aimed at the instructions given by the court to the jury. His chief complaint, however, seems to be that the atmosphere of the courtroom was not proper, and that a long line of small abuses should be considered in the aggregate and, when so considered, warrant a reversal of the judgment. The record is made up under section 953a of the Code of Civil Procedure, and is in poor condition for the examination of any questions of law. No supplement of any kind is printed and no evidence of any consequence appears in appellant's brief. However, we have examined carefully the several assignments of error and find each of them to be entirely without merit. We shall discuss a few of the more important of them in order that it may abundantly appear that no reversible error is present.

[2] The court instructed the jury as follows:

"You are instructed that it was the duty of the plaintiff, Albert De La Torre, before proceeding from the private road on to the highway, Fremont street, if you should find he did so proceed, to exercise that degree of care and diligence in so doing which an ordinarily prudent man would have exercised under the circumstances in which he then found himself, and failure on his part so to do would constitute negligence, which would bar any recovery by him in this action."

Respondent, however, sets forth that in connection with this instruction two other instructions were given, reading as follows:

> "If you find from the evidence that the plaintiff, Albert De La Torre, was guilty of contributory negligence, and that such contributory negligence was a concurring and proximate cause of the accident, it does not matter how negligent the defendant may have been, for under such circumstances your verdict must be against the plaintiff, Albert De La Torre, and in favor of the defendant."
>
> "If you find that the defendant was not negligent, or if you find that the defendant was negligent, but that the plaintiff, Albert De La Torre, was also guilty of contributory negligence, which contributed to and was a proximate and concurring cause of the accident in question, then these instructions relating to damages should be ignored by you."

Relying upon the so-called "formula" rule discussed in such cases as Starr v. L. A. Ry. Co., 187 Cal. 270, 201 P. 599, and coupling this doctrine with the pronouncements of this court in Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066, error is claimed because the instruction first quoted excluded from consideration the important fact that such contributory negligence must have contributed proximately to the accident in question. Admittedly, however, the court in other instructions amply covered this point, as above noted. We cannot declare said instruction to be a "formula" statement. It is not contradictory to all other instructions on the subject. It is at most incomplete and is not at hopeless variance with the rest of the charge of the court. Robinet v. Hawk, 252 P. 1045; Collom v. Bloch, 70 Cal. App. 33, 40, 232 P. 486. Furthermore, we agree with respondent that inasmuch as the evidence in the cause was all confined to the immediate happenings at the time of the collision between the two vehicles at an intersection, where defendant had the right of way, if any contributory negligence was there present it must of necessity have contributed proximately to plaintiff's injuries.

[3] The court instructed the jury as follows:

> "* * * The burden of proof rests upon the plaintiff to establish to the satisfaction of the jury the facts necessary to entitle him to recover, and that the issues submitted to you are to be decided according to the preponderance of the evidence, and that your decision must be made according to the preponderance of the evidence, and after fairly and impartially considering and weighing all the evidence in the case you are at liberty to decide that the preponderance of evidence is on the side which, in your better judgment, is sustained by the more intelligent and better informed and the more credible and disinterested witnesses."

Appellant claims that by the words, "satisfaction of the jury," a greater degree of proof was required by the court of the plaintiff than a "preponderance of the evidence," and in that behalf he cites the following cases: People v. Miller, 171 Cal. 649, 654, 154 P. 468; Mathes v. Aggeler, etc., Co., 179 Cal. 697, 702, 178 P. 713; Estate of Ross, 179 Cal. 629, 633, 178 P. 510; Campbell v. Bradbury, 179 Cal. 364, 372, 176 P. 685. But apparently the phrase was used by the court in a sense synonymous with the word "preponderance," and it is therefore unobjectionable. Boa v. S. F. etc., Co., 182 Cal. 93, 187 P. 2; Kruse v. White Bros., 253 P. 178.

[4-6] Complaint of instructions such as the one which forbade the jury to speculate as to the facts, or the one which announced the lawful rate of speed, when coupled with the further instruction that the driver of an automobile on a public highway in this state shall operate and drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper with regard to the traffic and use of the highway, etc., cannot avail appellant, as the law upon these questions is well settled and in accord with the action of the trial court. Neither was there any error made by the court in declaring that as between the plaintiff and the defendant, under the evidence, defendant was entitled to the right of way (Uhl v. Fertig, 56 Cal. App. 718, 725, 206 P. 467); nor can we predicate error upon the claim that preliminarily to the introduction of certain photographs offered by plaintiff the court was more exacting of him than of the defendant under similar circumstances, where the ultimate fact appears that the photographs in both cases were admitted in evidence. Likewise, an instruction as to the medical expense, be it ever so erroneous, cannot avail appellant, where the jury found against him upon the issue of negligence.

These views render it unnecessary to pass upon the question of the propriety of directing a verdict in favor of the deceased defendant W. P. Johnson, for his alleged liability is predicated solely upon the doctrine of respondeat superior.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

203 Cal. 384

SUPERIOR WHEELER CAKE CORPORATION v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY et al. (L. A. 10039.)

Supreme Court of California. Feb. 13, 1928.

1. Mandamus ⟹57(1)—Mandamus lies to compel superior court to entertain appeal by defendant from judgment of small claims court (Code Civ. Proc. §§ 927–927p).

If Code Civ. Proc. § 927j, providing for appeals by defendants from justice's court while sitting as small claims court, but making its judgments conclusive against plaintiffs, is valid, writ of mandate should issue to require superior court to entertain an appeal regularly taken by defendant, under sections 927–927p.

2. Appeal and error ⟹1—Grant of right of appeal, being statutory, is valid, provided Constitution is not violated (Const. U. S. Amend. 14; Const. Cal. art. 1, § 11; art. 4, § 25).

Right of appeal is statutory and may be granted or withheld, and, if given, it is valid, provided constitutional safeguards of Const. U. S. Amend. 14, Const. Cal. art. 1, § 11, and article 4, § 25, are not violated.

3. Constitutional law ⟹249—Statutes ⟹74(2), 85(4)—Statute granting appeal to defendants from judgment of justice's court, sitting as small claims court, and denying right to plaintiffs held valid and not discriminatory (Code Civ. Proc. § 927j; Const. U. S. Amend. 14; Const. Cal. art. 1, § 11; art. 4, § 25).

Code of Civ. Proc. § 927j, in so far as it provides for an appeal by the defendant from the judgment of a justice's court sitting as a small claims court and makes such judgment conclusive upon plaintiff, *held* valid and not in contravention of equal protection clause of Const. U. S. Amend. 14 or Const. Cal. art. 1, § 11, and article 4, § 25, requiring uniformity and prohibiting special laws, inasmuch as procedure in small claims court gives plaintiff distinct advantages and plaintiff has alternative of entering regular jurisdiction of justice's court, advantages voluntarily accepted being complete compensation for loss of right of appeal.

4. Statutes ⟹72—Laws designed to operate upon certain class of persons only are valid if some natural, intrinsic, or constitutional distinction exists.

Laws designed to apply to or operate upon a certain class of persons only are valid if it appears that Legislature was warranted in finding some natural, intrinsic, or constitutional distinction between the classes so legislated about and other classes.

In Bank.

Application by the Superior Wheeler Cake Corporation for mandamus prayed to be directed to the Superior Court for Los Angeles County and Hon. Hartley Shaw, Judge thereof, to require respondent to entertain an appeal from a justice's court sitting as a small claims court. Writ granted.

Charles H. Goebel, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

PRESTON, J. This is a proceeding in mandamus to compel the superior court of the county of Los Angeles to entertain an appeal regularly taken thereto from a justice's court while sitting as a small claims court in said county, under the provisions of sections 927–927p of the Code of Civil Procedure.

[1] Admittedly the sole question involved is the validity of so much of section 927j of the Code of Civil Procedure as provides for an appeal by defendant, but makes the judgment in the court below conclusive upon the plaintiff. The section in this behalf reads:

> "The judgment of said court shall be conclusive upon the plaintiff. If the defendant is dissatisfied, he may, within five days from the entry of said judgment against him, appeal to the superior court of the county in which said court is held. * * *"

If this provision is valid, the writ of mandate should issue. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978; Edwards et al. v. Superior Court, 159 Cal. 710, 115 P. 649; Peacock v. Superior Court, 163 Cal. 701, 126 P. 976.

[2] The contention of respondent is that the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person the equal protection of the law, has been violated by this section, as well as article 1, § 11, of the Constitution of California, which requires that laws of a general nature shall have a uniform operation, and article 4, § 25 thereof, which prohibits the Legislature from passing special laws regulating the practice of courts of justice. The contention, in short, is that a discrimination results by withholding the right of appeal from plaintiff while conceding it to defendant. The right of appeal is statutory and may be granted or withheld and, if given, is valid, provided the above-mentioned safeguards in the Constitution are not overthrown. Estate of McPhee, 154 Cal. 385, 97 P. 878.

[3] A word of explanation as to the structure and operation of the small claims court will be profitable at this point. The court is presided over by a justice of the peace and is a summary method of expediting causes where the amount involved is $50 and less and arises upon a claim against a party residing in the township where the action is filed. The ordinary jurisdiction of the justice's court is in no wise changed. A cumulative remedy only is given to the plaintiff in certain classes of cases. If a plaintiff desires the advantages of this abbreviated procedure he must lodge with the justice of the peace an affidavit setting forth the nature and

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amount of the claim, the fact that a demand for payment has been made, and the name and residence of the party indebted to him. With this affidavit as a basis, the court makes an order fixing date and place of hearing and notifying the defendant to appear at said time and place with books, papers, and witnesses needed in his defense, the time for appearance to be not less than five nor more than fifteen days from date of the order. Service of the order, which takes the place of summons, is made personally or by mail. Upon the hearing date the cause is heard informally without the presence of attorneys on either side and without formal pleadings. Writs of attachment and garnishment are denied the plaintiff also. After the informal hearing judgment is entered as in other cases.

Thus it will be seen that a quick and inexpensive method of trial and judgment is provided largely in the interest of complaining plaintiffs; that the right of jury trial is denied the defendant in such cases and service by mail upon him is deemed sufficient without actual personal notice. These and perhaps other things are present showing the advantage plaintiff may have or may think he has over the defendant by resorting to this special remedy. The plaintiff, in other words, comes under the yoke of this system voluntarily, but the defendant comes thereunder only by the strong arm of the law. The parties therefore do not enter the forum upon equal terms. If the plaintiff does not feel that he will be benefited by the procedure, he has the alternative of entering the regular jurisdiction of the justice's court, where the right of appeal is equal and reciprocal. Having this unmistakable choice in the premises, we fail to find discrimination within the meaning of any of said constitutional provisions. The advantage voluntarily accepted must be held a complete compensation for the loss of the right of appeal.

This is not a case where the plaintiff enters the court upon equal terms with defendant, as was held in Hecker v. Ill. C. R. Co., 231 Ill. 574, 578, 83 N. E. 456, 458. It is rather more like in principle the case of Sanitary District v. Bernstein, 175 Ill. 215, 51 N. E. 720 (cited in the Hecker Case), which involved certain provisions of the eminent domain act, which authorized allowance to the defendant of an attorney's fee upon dismissal of the proceeding by petitioner. The court held the distinction reasonable, saying, among other things:

> "Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights, and it is true that a discrimination between different classes of litigants which is merely arbitrary in its nature, is a denial of that right and of the equal protection of the law. If, however, there be a reasonable ground of distinction, so that the discrimination does not appear to be purely arbitrary or evasive of constitutional rights, we think that the Legislature has a discretion to impose conditions or restrictions which they may deem in furtherance of justice. That discretion cannot be controlled by the courts, but its exercise must be left to the wisdom and sense of justice of the Legislature."

A provision similar to the one above referred to is found in our own eminent domain proceedings. Code Civ. Proc. § 1255a. The validity of this provision was before the court and exhaustively treated in City of Sacramento v. Swanston, 29 Cal. App. 212 et seq., 155 P. 101, to which reference may be had by those desiring to further pursue the subject. See, also, to the same effect, Silver Lake, etc., Irr. Co. v. Los Angeles, 32 Cal. App. 123, 162 P. 432.

[4] It may be summed up in a word that laws which are designed to apply to or operate upon a certain class of persons only are valid if it can be seen that the Legislature was warranted in finding some natural, intrinsic, or constitutional distinction between the class so legislated about and other classes. City of Pasadena v. Stimson, 91 Cal. 238, 251, 27 P. 604. In Mordecai v. Board of Supervisors, 183 Cal. 434, 438, 192 P. 40, 41, it is said:

> "The meaning and effect of the provision of our Constitution requiring uniformity of operation on the part of general laws have been before our courts on numerous occasions, and the general rule applicable is too plain and too well established to require or to justify a discussion of the authorities. The many times reiterated statement of our decisions is that, while the requirement that a general law must have a uniform application does not mean that it must have a universal operation, and it is valid if it applies alike to all persons or objects within a class—or, what is the same thing, there is excepted from its operation a class—founded upon some 'natural, intrinsic, or constitutional distinction,' yet if the statute operates only upon a class, or there is excepted from its operation a class, not founded upon a 'natural, intrinsic, or constitutional distinction,' its operation is not uniform, and it is discriminatory legislation of the sort which the Constitution purposed to prohibit and is invalid."

A case somewhat similar to the instant case as to facts is Cecill v. Grant, 27 Ohio Cir. Ct. R. 442, where an appeal was provided for defendant upon a motion to discharge an attachment, but was denied to plaintiff in the same action, plaintiff having only the right of review by proceedings in error. The court in that case said:

> "What specific article of the Constitution is thus violated is not pointed out, but counsel has intimated that in some way section 1, art. 1, of the Bill of Rights is violated. That by the statute referred to, classes of citizens, to wit, defendants in attachment cases, have certain rights, privileges and remedies, which are denied

to other classes of citizens, to wit, plaintiffs in attachment cases.

"We apprehend, however, that no classes of citizens are thus created or favored; rather, the Legislature has seen fit to regulate according to a plan of its own, the various methods by which the rulings of justices of the peace in a certain class of cases and in certain contingencies may be reviewed. As the right to have any judgment or order reviewed, either on error or by appeal is wholly a statutory right, there can be no constitutional objection to the method provided therefor in attachment cases, by the statute under consideration."

It should be noted that we have not here before us the question as to the validity of so much of said section 927j as provides for the imposition of the sum of $15 as an attorney's fee in the event judgment of the court below is affirmed. The conclusions above announced render unnecessary a consideration of the question as to whether the small claims court is an independent court or is only a constituent part or department of the justices' court.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

203 Cal. 406

MOOG v. MOOG et al. (L. A. 9181.)★

Supreme Court of California. Feb. 17, 1928.

Hearing Denied in Bank March 15, 1928.

1. Divorce 🔑236—Trial court has large discretion to allow permanent support to wife granted divorce even in face of settlement contract.

In actions for divorce there is a very large discretion vested in the trial court to allow permanent support for wife where she is granted divorce, even in the face of contracts of settlement between the parties, and such contracts must be subjected to the court's examination and derive their sanction from a decree made by the court with knowledge of all the facts.

2. Divorce 🔑236—Award of alimony in addition to support payment under separation agreement held proper, where wife became blind and afflicted with tuberculosis.

Where husband gave wife a lump sum as advance payment of monthly support payments under separation agreement entered into without fraud or undue influence, and thereafter wife became totally blind and afflicted with tuberculosis so that she required the services of a nurse and was without means, trial court had discretion to award alimony in addition to amount received under the separation agreement.

Department 2.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Therese Blebois Moog against Albert Moog, defendant, and Jennie Taylor, corespondent. Judgment for plaintiff, and defendant appeals. Affirmed.

Earl E. Moss, of Los Angeles, for appellant.

Tipton & Cailor and Geo. M. Varnum, all of Anaheim, for respondents.

LANGDON, J. This is an appeal by the defendant from that portion of a judgment which allows to plaintiff as alimony the sum of $50 a month until further order of the court. Defendant does not appeal from the portion of the judgment granting to plaintiff a decree of divorce, nor from that portion which divides the community property between the parties; but it is contended that plaintiff and defendant have settled, by contract, their property rights, and that such agreement should be binding in the divorce action.

The facts found by the court are that in July, 1921, plaintiff commenced an action for separate maintenance against defendant, and shortly thereafter, on July 26, 1921, the parties met at the residence of defendant's sister and entered into a written agreement, by the terms of which defendant agreed to give and plaintiff agreed to accept "$50 per month as her separate support." Plaintiff also agreed to dismiss her action for separate maintenance, which she did. On April 8, 1924, plaintiff acknowledged receipt of "$600, being payment at the rate of $50 per month for one year in advance on property settlement agreement"; that since the date of the said receipt the defendant has paid to and for the benefit of plaintiff the sum of $1,205. The court further found that plaintiff was not induced to enter into the said agreement of July 26, 1921, through fraud or undue influence on the part of defendant or of any other person, and that payments made as set forth hereinabove were made by defendant and accepted by plaintiff as payments upon and under said contract of July 26, 1921.

In the present action the custody of the minor children was awarded to the defendant, and he was charged with their support.

The amount of alimony allowed by the court was the same amount mentioned in the contract between the parties, but the dispute arises because of the fact that the judgment was entered in January, 1926, and the plaintiff had received, under the findings, all payments due her under the contract until March, 1927. It is vigorously contended that as the court has found the parties entered into the contract relied upon by defendant, and that plaintiff was not induced by fraud or undue influence to enter into the same and has accepted the benefits thereof for six years, she should be bound by the same

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★Hearing denied in bank.

and the court should not nullify this agreement between the parties without requiring the plaintiff to return the money which she has received in advance payments.

[1, 2] With reference to ordinary contracts, the position of appellant is sound, undoubtedly; but in actions for divorce there is a very large discretion vested in the trial court in the allowance of permanent support for the wife, where she is granted a divorce, even in the face of contracts of settlement between the parties. Such contracts must be subjected to the examination of a court in the divorce action and derive their sanction from a decree made by the court with knowledge of all the facts. Loveren v. Loveren, 106 Cal. 509, 39 P. 801; McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460; Roberts v. Roberts (Cal. App.) 256 P. 826. The rule stated in Corpus Juris, vol. 19, p. 218, is to the effect that where provision has been made by the husband for the wife, by separation agreement, the wife is not entitled to temporary alimony, unless she offers to return what she has received or shows that the amount provided for in the agreement is not sufficient for her needs. The latter condition existed in the instant case. While the court found that the agreement was entered into without fraud or undue influence, it, nevertheless, found that the plaintiff had become totally blind since it was entered into and had become afflicted with tuberculosis and was in need of the services of a nurse, and that she was without means. It was this unfortunate condition, doubtless, which influenced the court in making the award of alimony in addition to what had already been received by plaintiff. Under the circumstances, we see no reason to interfere with the exercise of discretion vested in the trial court.

The judgment appealed from is affirmed.

We concur: SHENK, J.; RICHARDS, J.

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89 Cal. App. 264

FREEMAN ELECTRIC CO. v. MacMILLAN.
(Civ. 4735.)

District Court of Appeal, Second District, Division 2, California. Feb. 15, 1928.

1. Sales 🔑181(11)—In action for price of electrical fixtures, evidence held to show defendant was damaged by plaintiff's failure to obey shipping instructions.

In action for purchase price of certain electrical fixtures alleged to have been sold by plaintiff to defendant, evidence *held* sufficient to show that defendant was damaged by plaintiff's failure to obey shipping instructions as to steamship company on which goods were to be shipped and as to marking of bill of lading.

2. Sales 🔑161—Seller's failure to obey shipping instructions and marking bill of lading held to justify rejection of electrical fixtures sold.

In action for price of certain electrical fixtures, seller's failure to obey shipping instructions as to steamship company on which goods were to have been shipped and as to marking bill of lading *held* to justify buyer's rejection of electrical fixtures, and hence seller could not recover for purchase price.

3. Appeal and error 🔑1052(8)—Admitting evidence in action for price of electrical fixtures, if error, held harmless where defendant was entitled to judgment.

Admitting certain evidence in action for purchase price of electrical fixtures, if error, *held* harmless where plaintiff admitted that he had not followed shipping instructions as to shipping with certain steamship company and marking bill of lading, since such failure alone called for judgment for defendant.

4. Appeal and error 🔑931(1)—On appeal, all intendments must be indulged in favor of judgment.

On appeal, all intendments must be indulged in favor of judgment.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action to recover the purchase price of certain electrical fixtures by the E. H. Freeman Electric Company against John W. MacMillan. Judgment for defendant, and plaintiff appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

Norman A. Bailie, of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This is an action to recover the alleged purchase price of certain goods described as electrical fixtures, alleged to have been sold by plaintiff to defendant. The trial court found that the defendant was justified in refusing to accept the goods because plaintiff had failed to follow the shipping instructions contained in the orders given by defendant, and rendered judgment accordingly. Plaintiff appeals on the ground that the evidence does not sustain the findings and judgment.

The orders in question contained, among other things, the following instructions:

> "Ship us via c/o Williams S. S. Co.," "Ship as elec. fixtures and mark bill of lading 'Part of Carload,'" and "Boats sail from Philadelphia from Drexel Bldg."—giving the dates.

It is admitted that these instructions were not followed, and that defendant refused to accept and did not accept the goods.

Appellant does not explain why the goods were not shipped by the Williams Steamship Company, nor why the bill of lading was not marked, "Part of Carload." The court found that by reason of such failure to follow shipping instructions said goods, wares, and merchandise were not included in a consolidated car of freight then and there in process of consolidation and shipment to the defendant, and the evidence sustains this finding. In a letter in evidence the defendant explains in detail to plaintiff the reasons for and materiality of the instructions as to shipping by the Williams Steamship Company and as to marking the bill of lading "Part of Carload." A brief quotation from this long letter will suffice:

> "I stated previously, which statement should not have been necessary, the writer assembles carloads himself. I use the Williams Steamship Company as they are a little more elastic than any other boat company. They own all of their ships, therefore are not controlled by the United States Shipping Board. It is with much difficulty that the writer is able to assemble a minimum car in the 45 days allotted by the boat companies, and the people like yourself, when you disobey shipping orders, make me pay the carload rate on the minimum car without securing the entire weight; also, you make me appear to the Steamship Company like I was trying to put something over, as they allow me the carload rate on the shipments on the first boat instead of holding it out on the final boat, and rebating me at that time. In fact, I think it is absolutely rotten for you to disregard shipping instructions when so plainly written. * * *"

The failure or nonpreformance of time or place of shipment as set out in a mercantile contract justifies the party aggrieved in repudiating the whole contract. Norrington v. Wright, 115 U. S. 118, 6 S. Ct. 12, 29 L. Ed. 366; Tilley v. Pope, 115 U. S. 213, 6 S. Ct. 19, 29 L. Ed. 372. This same doctrine has been adopted and followed in California. Western Ind. Co. v. Mason M., etc., Co., 56 Cal. App. 355, 360, 205 P. 466. Upon failure of plaintiff to obey shipping instructions, he cannot recover damages from defendant. Young v. Rocha, 65 Cal App. 15, 222 P. 861.

[1] From the correspondence between plaintiff and defendant in evidence, and the defendant's testimony, which the trial court evidently believed, it appears that in this case the method of delivery was at least as important as the time, and materially affected the time. The defendant testified:

> "Why, getting 36,000 pounds on three consecutive boats I was able to secure a rate of about $1.25. If I didn't get 36,000 pounds at least, I had to pay about $2.78 or $3 a hundred for maybe 30,000 pounds or 27,000 pounds. We had to get the 36,000 pounds or pay for it anyway."

This also answers appellant's contention that defendant suffered no damage by reason of plaintiff's failure to obey shipping instructions.

[2, 3] There are nine specifications urged by appellant, all relating to the insufficiency of the evidence. We believe the above covers all the material points raised, without further detailed discussion.

Appellant contends that the court erred in the admission of certain testimony as to the contents of the contract with Williams Steamship Company and the contents of a certain letter. Assuming, for the sake of the argument, that the court erred, the error was harmless and not prejudicial for the reason that the court was bound, under the evidence, to render judgment for defendant under the unavoidable finding that the instructions as to shipping were not followed. The appellant admits that it did not follow the shipping instructions of the defendant. The defendant informed them of the reasons for and the materiality of these instructions. There being evidence to this effect, the findings are sufficiently supported.

[4] We find no other points raised by the appellant which demand discussion, bearing in mind the rule that all intendments must be indulged in favor of the judgment. Rocha v. Garcia (Cal. Sup.) 263 P. 238.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

89 Cal. App. 202

URBAN v. YOAKUM et al.

YOAKUM et al. v. URBAN et al.

(Civ. 6121.)

District Court of Appeal, First District, Division 2, California. Feb. 10, 1928.

1. Vendor and purchaser ⚷144(2)—That mortgage note was not paid as agreed before vendor tendered deed and demanded payment held no defense to action to quiet title (Civ. Code, §§ 1437, 1498).

That mortgage note for amount exceeding agreed incumbrance on land sold was not paid before vendor tendered deed and certificate of title, subject only to such incumbrance, and demanded payment of amount due, *held* no defense to action to quiet title, vendor not being in default until purchaser made payment and demanded deed and certificate, under Civ. Code, §§ 1437, 1498.

2. Vendor and purchaser ⚷187—Vendor's acceptance of overdue installments held not waiver of right to refuse to deliver deed until paid, though incumbrances exceeded amount agreed (Civ. Code, §§ 1437, 1498).

Vendor's acceptance of purchase-money installments after they fell due *held* not a waiver of right to refuse to deliver deed until paid, though incumbrances on land had not been reduced to agreed amount as required before buyers were bound to accept deed, either party having right, under Civ. Code, § 1498, to tender performance and demand performance by other on date fixed for payment and delivery of deed, which were concurrent conditions under section 1437.

3. Evidence ⚷441(8)—Testimony as to vendor's statement before contract was signed that payment could be made after due date on receiving 30 days' notice held inadmissible (Civ. Code, §§ 1498, 1625).

In action to quiet title, defendant's testimony as to plaintiff's statement before contract for sale of land to defendant was signed that payment could be made after due date on receiving 30 days' notice, under Civ. Code, § 1498, *held* properly stricken as relating to conversation merged in contract under section 1625.

4. Evidence ⚷445(2)—Evidence of conversation between vendor and purchaser after contract was signed held inadmissible to alter written instrument (Civ. Code, §§ 1498, 1698).

In action to quiet title, testimony as to conversation, wherein plaintiff told defendant after contract for sale of realty was signed that payment could be made after due date on receiving 30 days' notice, under Civ. Code, § 1498, *held* inadmissible to alter written instrument, under section 1698; such oral agreement not being executed nor supported by consideration.

5. Vendor and purchaser ⚷296—Action to quiet title held proper remedy on purchaser's failure to make payments as required by land contract.

Action to quiet title *held* proper remedy of vendor on purchaser's failure to make payments as required by contract to purchase land.

6. Vendor and purchaser ⚷185—That vendor could have conveyed good title without wife joining in deed held no defense to his action to quiet title on ground of defendants' default in payments.

That vendor could have conveyed good title, though his wife did not join in deed, *held* no defense to his action to quiet title, where he took position that no duty rested on him to convey anything to defendants because of latters' default in payments.

7. Equity ⚷23—Equity courts will relieve parties to contracts from defaults only when equitable grounds are shown.

Courts of equity will relieve parties to contracts from defaults only when equitable grounds therefor are shown.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by F. A. Urban against F. B. Yoakum and others, who filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Ernest U. Schroeter and D. L. Di Vecchio, both of Los Angeles, for appellants.

Dana R. Weller, of Los Angeles, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to quiet title to a tract of land in Los Angeles county. The defendants appeared and answered and filed a cross-complaint. The plaintiff answered the cross-complaint, and the parties went to trial on the issues so framed. The trial court made findings in favor of the plaintiff, and a judgment was entered thereon. The defendants made a motion for a new trial, the motion was denied and they have appealed from the said judgment under section 953a of the Code of Civil Procedure.

Prior to the 6th day of July, 1922, Marie Verch owned lots 26, 28, and 30, and the easterly 18.735 feet of lot 32 in block 23 of "Park tract," in the city of Los Angeles. On that date the plaintiff purchased the said lands from Marie Verch through F. B. Yoakum as a broker. Thereafter, on the 10th day of July, 1922, the plaintiff sold to the said F. B. Yoakum about one-half of said tract. When the plaintiff purchased he paid Marie Verch $1,000 down and executed to her a mortgage for the balance, which mortgage secured three notes, each bearing interest at 6 per cent.—one for $3,500 payable September 1, 1922, one for $4,500 payable December 1, 1922, and one for $7,625 payable on or before July 6, 1925. By the terms of the contract between the plaintiff and the defendant F. B. Yoakum, the plaintiff agreed to sell for $8,312.50, payable $4,500, together with interest December 1, 1922, plus one-half of 6 per cent. interest on $3,500 from September 1, 1922, to December 1, 1922, plus one-half of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6 per cent. interest on $1,000 from July 6, 1922, and to December 1, 1922. The defendant did not make his payments according to the terms of the contract. He paid in all a little over $100.

A comparison shows that the dates when the plaintiff was bound to make his payments to Marie Verch coincided with the dates when the defendant was bound under the terms of his contract to make payments to the plaintiff.

If the defendant made his payments pursuant to the terms of his contract, and if the plaintiff in turn paid the moneys over to Marie Verch, then it would have transpired that the entire tract would have been incumbered in the sum of $7,625 and no more, and on December 1, 1922, the defendant would have been entitled to a deed to the portion so purchased by him, free and clear of all incumbrances except his pro rata of the said sum of $7,625. The defendant did not make his payments on time. The plaintiff claimed that he made numerous requests. The defendant contended that he did not. The defendant also contended that the plaintiff waived the provisions of the contract fixing the dates of payments by accepting certain payments after the date on which the payments were, according to the terms of the contract, due and payable. These respective contentions will be hereinafter referred to.

On January 15, 1924, Marie Verch demanded payment by the plaintiff of the installment which was due under his contract with her. He did not have the money to make the payment, and therefore sacrificed some properties by making a sale at a loss, obtained the moneys, and made the payment. Thereafter, on January 25, 1924, defendant having failed to make his payments, the plaintiff served on him a notice of rescission. By the terms of that notice the defendant was notified that unless he made his payments within ten days thereafter, his contract would be canceled. Nevertheless he did not make his payments, but on the 20th day of February, 1924, he conveyed or attempted to convey a one-half interest in his contract to E. A. Yoakum, his wife. That purported contract was acknowledged and was thereafter recorded. On March 10, 1924, this action was commenced.

The defendants call to our attention the fact that the contract between the plaintiff and the defendant did not contain a covenant to the effect that time was of the essence thereof. Thereupon they also call to our attention that at the time of the trial they tendered to the plaintiff the said sum of $4,500, together with all items of interest then due, and that the plaintiff refused to accept it, and that thereupon they deposited the same in court conditioned upon the execution of a deed by the plaintiff and a certificate of title showing that the land was subject to an incumbrance of $7,625, and no more.

The plaintiff's complaint pleaded in the ordinary form a cause of action to quiet title. The defendants interposed an answer which contained denials of the material allegations of plaintiff's complaint. It also pleaded as an affirmative defense the execution of the contract hereinabove mentioned, dated July 10, 1922, and the assignment of an undivided one-half interest therein by F. B. Yoakum and E. A. Yoakum, and that the defendants had fully performed said contract. The answer also pleaded another affirmative defense, in which they alleged that they had repeatedly demanded a deed and tendered the payments provided in their contract and that they had at all times been ready, willing, and able to pay the said sums, but that the plaintiff had refused to execute to them the deed provided for in the contract. Then followed the allegation: "That by reason of the foregoing facts plaintiff ought to be and is in fact estopped from quieting his title in and to said lands against the defendants or either of them." The defendants filed a cross-complaint, in which they alleged the execution of the contract dated July 10, 1922. full performance by them, their ability, etc., their demand, the refusal of plaintiff to execute a deed and that plaintiff was unable to execute a deed because the property was mortgaged at all times for a sum in excess of $7,625. Thereupon in their cross-complaint the defendants demanded the specific performance of the contract just mentioned. The plaintiff answered the cross-complaint, and the trial was had on the issues so framed. The trial court made findings in favor of the plaintiff on all of the allegations contained in his complaint. It also found that the defendants did not perform all the conditions of the contract dated July 10, 1922, and that they were not ready, able or willing at all times to pay the $4,500; that subsequent to the 10th day of July, 1922, and until shortly prior to the commencement of the action, the defendant F. B. Yoakum received one-half the income of said property; that the defendant F. B. Yoakum on February 20, 1924, conveyed an undivided one-half of his interest to his wife, E. A. Yoakum, and that said assignment was without any consideration; that the defendant F. B. Yoakum paid interest and taxes until December 1, 1923, and that a large portion of such payments were made out of the income from said property; that the plaintiff never refused to execute a deed: that the defendants never demanded a deed or tendered or offered to pay to plaintiff the said sum of $4,500 and were never ready, willing and able to pay said sum; that subsequent to the 10th day of July, 1922, the plaintiff made numerous demands for payment and on the 25th day of January, 1924, the plaintiff, in writing, tendered to the defendant F. B. Yoakum a deed, together with the certificate of title made by the Title Guarantee & Trust Company showing the title to be vested in the plaintiff subject only to the mortgage to Marie Verch in the sum of $7,625, and demanded the payment of $4,500 by the defendant; that the defendant neglected and refused to pay said sum; that the plaintiff was at all times ready, willing and able to convey; that on the 23d day of March, 1925, after the commencement of the trial of the action, the defendant F. B. Yoakum tendered to the plaintiff the sum of $5,200 and thereafter deposited said sum with the clerk of the court; that the defendant's failure to comply with his agreement was inexcusable and that his delay therein was unreasonable and inexcusable.

[1] The defendants assert that the mortgage note for $4,500 was not paid before the plaintiff made his tender and demand, and therefore the defendant was within his rights in not paying to the plaintiff $4,500 and in refusing to accept a deed to property that was mortgaged for more than $7,625. The point is without merit. He should have made the payment as demanded and, at the same time, seen to it that he got a deed together with a certificate showing the land not to be incumbered in any greater sum than $7,625, all as set forth in the contract. Until he did so the plaintiff was not in default and the facts were insufficient to constitute a defense for the defendants. Maloney v. Houston, 51 Cal. App. 585, 197 P. 661; Griesemer v. Hammond, 18 Cal. App. 535, 541, 123 P. 818; Mills v. Garner (Cal. App.) 259 P. 479; Lemle v. Barry, 181 Cal. 6, 9, 183 P. 148.

[2] In the next place he asserts that time was not of the essence of the contract between the defendant and the plaintiff, and, whether it was or not, by accepting installments after they fell due, the plaintiff waived the due date, December 1, 1922, and therefore before the plaintiff could make any legal demand on the defendant he was bound to reduce the indebtedness to $7,625. The point is illogical and it is a commixture of several points, all of which must be ruled against the defendants. The issues and findings present no question of waiver. Wienke v. Smith, 179 Cal. 220, 225, 176 P. 42. If there was a waiver as to the date when the defendants should have made their payment, such waiver was pertinent to the time of payment, but was not pertinent as to the amount of incumbrance remaining on the property on the date the deed should have been delivered—the contract still provided the covenant on that subject. Under the terms of the contract, the defendants were not bound to accept a deed to the property subject to an incumbrance in excess of $7,625. Such was the clear wording of the contract. The plaintiff has never contended to the contrary. On the other hand, the plaintiff was not bound to deliver a deed until he was paid. The two acts were concurrent conditions. Civ. Code, § 1437. Either party, on and after December 1, 1922, could have tendered performance and could have demanded, at the same time, performance by the other (Civ. Code, § 1498), provided, that if the contract date had passed and the payments were overdue, "* * * the purchaser should be notified that if such payments were not made on or before a fixed date far enough in the future to give him reasonable time and opportunity to comply with his contract, the contract will be terminated and a forfeiture will take place" (25 Cal. Jur. 619, § 119). That notice was given, and no claim is made that it was not regular in all respects.

[3, 4] According to the terms of the contract the defendants should have made their payment December 1, 1922. The defendant F. B. Yoakum testified that in conversations, before and after the contract was signed, the plaintiff told him the payment could be made upon receiving 30 days' notice. The trial court struck out that portion of the testimony. As to the conversation held before the contract was signed, it was merged in the contract. Civ. Code, § 1625. As to the conversation held after the contract was signed, it could not alter the written instrument. Civ. Code, § 1698. If it be claimed that the latter constituted an executed oral agreement, it is clear that the agreement was not executed and that there was no consideration therefor. Benson v. Shotwell, 103 Cal. 163, 167, 37 P. 147.

[5] The next point presented by the defendants is that the facts of this case are such that an action to quiet title was not the proper remedy. They cite Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681. That case involved a set of facts that is quite different from the instant case. It is not helpful.

[6] Then the defendants assert that under the facts the plaintiff could have conveyed to them a good and sufficient title even though the plaintiff's wife did not join in the deed. The assertion may be accepted, but it leads nowhere. The position taken by the plaintiff was that no duty rested on him to convey to the defendants anything, not that he did not have the power.

[7] Finally the defendants assert that forfeitures are not favored and that courts of equity will relieve parties from defaults. That is true when equitable grounds therefor are shown. Here none is shown. Quite a different set of facts is shown. Miller v. Cox, 96 Cal. 339, 347–348, 31 P. 161.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

89 Cal. App. 153

BROWN v. KLEIN et al. (Civ. 6068.)

District Court of Appeal, First District, Division 2, California. Feb. 9, 1928.

1. Partnership ⚷273—Dissolution of partnership for defendants' misrepresentations will not be denied because adventure was speculative.

Dissolution of copartnership on ground of defendants' misrepresentations will not be denied because adventure was speculative, since character of business, if lawful, does not soften effect of misrepresentation.

2. Pleading ⚷398—Variance is not material unless prejudicially misleading, and where not material court may direct the fact to be found according to evidence (Code Civ. Proc. §§ 469, 470).

No variance between allegation in pleading and proof is deemed material unless it actually misled adverse party to his prejudice in maintaining action or defense on merits under Code Civ. Proc. § 469, and where variance is not material court may direct the fact to be found according to evidence, under section 470.

3. Contracts ⚷93(1), 94(1)—Party may rescind contract if consent was obtained through mistake or fraud (Civ. Code, § 1689, subd. 1).

Party to contract may rescind if his consent was either given through mistake or obtained by fraud under Civ. Code, § 1689, subd. 1.

4. Partnership ⚷273—Innocent misrepresentations of material fact, inducing partnership contract, are ground for rescission.

Innocent misrepresentations of material fact, inducing execution of contract of partnership, are considered constructive fraud, which is ground for rescission.

5. Partnership ⚷344—In suit for rescission of partnership contract, court having found against plaintiff's contention of willful misrepresentation can decree rescission on ground of mistake pleaded by defendants.

In suit for rescission of partnership contract on ground of willful misrepresentation and fraud, court having found no willful misrepresentation or fraud to exist may decree rescission on ground of innocent mistake, where defendants plead such mistake, as against contention that there was variance.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Elbert J. Brown against William Klein and others. From a judgment for plaintiff, defendants William Klein and others appeal. Affirmed.

Arthur H. Barendt, of San Francisco, for appellants.

Byron Coleman, of San Francisco, for respondent.

LUCAS, Justice pro tem. Appeal is taken from a judgment in favor of plaintiff decreeing rescission of a contract of copartnership and requiring defendants to refund to plaintiff the money paid by him on account thereof.

The complaint alleges that plaintiff and defendants entered into a contract whereby plaintiff agreed to buy and the defendants agreed to sell an undivided one-third interest in and to a certain copartnership known as the Universal Specialty Company, subject to existing liabilities as of October 27, 1923. Plaintiff agreed to pay, and did pay, defendants the sum of $3,000 for such interest. It is also alleged that at the time plaintiff entered into said agreement, and for the purpose and with the intent of persuading and inducing plaintiff to purchase said undivided one-third interest, defendants represented that the liabilities of said copartnership on October 27, 1923, did not exceed the sum of $1,952.57; that plaintiff believed said representation, relied thereon, and would not have entered into the agreement to purchase had he not believed said representation to be true; that said representation was false and fraudulent, and known to defendants to be false and fraudulent; and that as a matter of fact the liabilities of said copartnership as of the date in question were not less than $4,890.55.

Defendants in their answer admit the payment of the $3,000, and admit that they represented to plaintiff that the liabilities of the copartnership did not exceed $1,952.57, but allege that at the time they made the statement they believed it was true, that said representation was the result of an error in addition, and that the corrected addition of the whole liabilities should have shown an indebtedness of $2,952.57 or thereabout. They specifically deny that there was any intentional misrepresentation or fraudulent misstatement of facts.

They set up as a further and special defense that all books and accounts were freely placed at the disposal of plaintiff, and that every opportunity was afforded him to make a full and thorough investigation of the partnership business, and that after a full and thorough investigation plaintiff freely entered into said copartnership. The new matter in the answer was, of course, deemed denied (Code Civ. Proc., § 462), and the case went to trial on the issues framed by the pleadings.

The court found the amount of the indebtedness in question to be $3,300, that the misrepresentation complained of was the result of error instead of fraud, and that plaintiff neither investigated the business nor had an opportunity so to do. On the remaining issues the court found with plaintiff.

It is the contention of appellants that plaintiff was an experienced business man, was not free from negligence, and that, having the means of knowledge, the law imputes knowledge to him.

In view of the findings that the plaintiff did not make an independent investigation and did not have the opportunity of doing so, we attach but little or no significance to this part of the argument. While the testimony was conflicting, the finding of the court was amply sustained by the evidence.

[1] Appellants advance another theory, namely, that the adventure was a speculative one and that for that reason the purchaser cannot be heard to complain. There is nothing in the point. The character of a business, if lawful, in no wise softens the effect of misrepresentation.

No question is raised as to materiality of the false representation, diligent offer to return, or material change in the situation of the parties.

[2-5] The sole question is whether or not in a suit for rescission of a contract on the grounds of willful misrepresentation and fraud, the court, having found no willful misrepresentation or fraud to exist, can decree rescission on the ground of mistake, where the defendants themselves pleaded such mistake. In this respect, appellants allege a material variance between pleading and proof.

The general rule is that no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Code Civ. Proc. § 469. Where the variance is not material the court may direct the fact to be found according to the evidence. Code Civ. Proc. § 470.

A party to a contract may rescind if his consent was either given through mistake or obtained by fraud. Civ. Code, § 1689, subd. 1; Canadian Agency v. Assets, etc., Co., 165 App. Div. 96, 150 N. Y. S. 758; Story's Commentaries on Equity Jur. (13th Ed.) p. 213.

A late expression of this court on the subject is to be found in Scott v. Delta Land & Water Co., 57 Cal. App. 320, 207 P. 389, where it is held that in a civil action the good faith of the party who procures the assent of another to the making of a contract by material misrepresentations is of no moment.

In 12 Ruling Case Law, at page 343, par. 98, referred to in the above decision, the principle is advanced that innocent misrepresentations of a material fact are considered as constructive fraud because of its effect of imposing upon and deceiving the person to whom it is made.

It is therefore clear that defendants' plea of innocent mistake, rather than being available as a defense in a suit for rescission, is itself a generally recognized ground for rescission.

Can they then be heard to complain in equity on the purely technical plea of variance, because the trial court, after finding with them on the facts, applied well-established rules of law thereto which resulted in their discomfiture? We think not. There is no variance. The facts proved were not foreign to the issues, but were raised by them. The relief granted was the relief prayed for.

The language used by the court in the case of Schenck v. Hartford Fire Insurance Co., 71 Cal., at page 29, 11 P. 808, is particularly applicable:

> "By the choice of the defendant, the fact, which was essential to the plaintiff's recovery, which had been omitted to be pleaded in his complaint, was so pleaded in the defendant's answer, with a view to defeat the plaintiff's recovery, that a jury was enabled, upon evidence before it, to pass upon the issue raised and tendered by the defendant. If the defendant has been beaten upon its own chosen ground of battle, which but for its pleading could not have been there fought, we cannot see any good reason to reverse the judgment here in order that the plaintiff may plead in his complaint and tender as an issue to the defendant, to be retried, that which, of its own choice, the defendant, in its answer, has already tendered to the plaintiff, upon which the controversy has been tried before a jury, and by it determined, as we must suppose, properly."

In Lombardi v. Sinanides, 71 Cal. App. 272, 235 P. 455, the court held that the complaint, *supplemented by the answer*, stated facts sufficient to constitute a cause of action on the ground of mutual mistake although the complaint sought rescission on the ground of willful misrepresentation.

Judgment affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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89 Cal. App. 86

D'ARCY v. D'ARCY. (Civ. 6066.)

District Court of Appeal, First District, Division 2, California. Feb. 8, 1928.

1. Appeal and error 🔑931(4)—It may be assumed that court found that allegations of cross-complaint for separate maintenance were true, where findings were waived.

Court of Appeals may assume that trial court found that all of allegations of cross-complaint for separate maintenance, alleging extreme cruelty, were true, where findings were waived by parties.

2. Husband and wife 🔑298¾—Award of all community property to wife in granting separate maintenance held authorized (Civ. Code, § 137).

Civ. Code, § 137, as formerly existing, providing that court granting separate maintenance shall make same disposition of community property as if marriage had been dissolved, authorized trial court to award all of community property to wife in granting separate maintenance.

3. Husband and wife 🔑298¾—Award of community property in granting separate maintenance can be sustained only on theory that it is necessary and reasonable for maintenance of wife and children.

Award of community property, in granting separate maintenance without dissolution of marriage relation, can be sustained only upon theory that it is necessary and reasonable for maintenance and support of wife, or of wife and children.

4. Husband and wife 🔑298¾—Awarding community property to wife in granting separate maintenance held not error on ground that cross-complaint did not allege necessity, where case was contested and court had jurisdiction.

Awarding all of community property to wife in granting her judgment for separate maintenance *held* not error, on ground that her cross-complaint for separate maintenance did not allege that community property was necessary for maintenance of herself and minor children, nor ask for disposition of such property, where cross-complaint asked for monthly payments, case was contested, and court had jurisdiction of parties, property, and children.

5. Husband and wife 🔑299½—Agreement between parties to action for separate maintenance was void as to support of children.

Agreement between parties to action for separate maintenance, respecting payments which should be made, was void as concerned minor children, since court's authority to make necessary orders for their support is statutory and cannot be limited by parties.

6. Husband and wife 🔑299(1)—Parties to action for separate maintenance could not bind court by agreement as to payment of accrued alimony.

Agreement between parties to action for separate maintenance as to installment payments on accrued alimony could not bind court.

7. Judgment 🔑222—Judgment for money must be stated with certainty and should specify amount.

General rule is that judgment for money must be stated with certainty and that it should specify the amount.

8. Husband and wife 🔑299(1)—Provisions of judgment of separate maintenance, requiring husband to pay taxes, insurance, interest on mortgage, and cost of renewing mortgage, held not void for uncertainty where following stipulation of parties.

Provisions of judgment granting separate maintenance, which required husband to pay sufficient money to pay taxes due or to become due upon certain real property, cost of fire insurance, amount of interest payable on mortgage or upon renewal mortgage, and cost of renewing mortgage, *held* not void for uncertainty where it followed stipulation of parties.

9. Divorce 🔑101—Where husband sues for divorce, cross-complaint for separate maintenance need not allege that he is resident (Civ. Code, § 128).

Where husband brings suit for divorce, cross-complaint of wife for separate maintenance need not allege that he is resident of state, under Civ. Code, § 128.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for divorce, by Charles A. D'Arcy against Gertrude Claire D'Arcy, and cross-action for separate maintenance. From a judgment in favor of defendant and cross-complainant denying divorce and granting separate maintenance, plaintiff and cross-defendant appeals. Affirmed.

Rudolph J. Scholz, of San Francisco, for appellant.

George A. Connolly, of San Francisco, for respondent.

LUCAS, Justice pro tem. Plaintiff and cross-defendant appeals from a judgment of separate maintenance rendered in an action originally brought by him for divorce.

Under the terms of the judgment appellant was denied a divorce; separate maintenance in favor of respondent and of the three minor children of the parties was decreed; the custody of the said children was awarded respondent; the appellant was directed to pay respondent $200 per month for the support and maintenance of respondent and said children; judgment was given respondent for $2,150 unpaid alimony; certain described community property (constituting all of the community) was awarded respondent; and appellant was required to pay all taxes assessed against the community real property, together with interest on the existing mortgage or deed of trust thereon, and the cost of renewing the same.

In reference to the payment of taxes and mortgage interest, the judgment provides:

> "It being expressly understood that the provisions contained in this paragraph of the decree are made in conformity with the written agreement of the parties to the above-entitled action, executed by them on the 22d day of December, 1924."

Findings were waived.

It is the contention of appellant that a judgment is not valid which awards all of the community property to one party to a suit for separate maintenance; that it was error to incorporate part of the separation agreement in the judgment without including the whole thereof; that the judgment for taxes and interest is too indefinite; and that the court was without jurisdiction over the subject of the action in so far as the cross-complaint was concerned.

These contentions will be considered in the order named.

[1, 2] 1. The cross-complaint for separate maintenance alleges extreme cruelty. Findings being waived, it may be assumed the

court found all of the allegations to be true. As it stood at the time judgment was rendered, section 137, Civil Code, provided:

> "The court, in granting the wife permanent support and maintenance of herself, or of herself and children, in any such action, shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction."

This section furnishes ample authority for the trial court's action in making the community property award.

The case of Johnson v. Johnson, 33 Cal. App. 93, 164 P. 421, relied upon by appellant, is not applicable, since it interpreted section 137, Civil Code, as it stood before the clause in reference to the disposition of community property was inserted.

[3] With respect to the disposition of the community property, appellant attacks the validity of the judgment on the ground that the award of $200 a month was the only award made for support and maintenance, claiming that the award of the community property was not for support and maintenance, but was in addition thereto. He cites as authority the case of Sherman v. Sherman, 47 Cal. App. at p. 210, 190 P. 465, where the court says that when "the community property is awarded to plaintiff without dissolution of the marriage, such award can be sustained only upon the theory that it is necessary and reasonable for the maintenance and support of the wife or for the wife and children where such relief is sought."

[4] While the rule is correctly stated, we cannot agree with appellant's contention. The cross-complaint for separate maintenance stated a cause of action on the ground of extreme cruelty (there being allegations specifying acts of cruelty which bear no relation to those which might be construed as constituting desertion), referred to the community property, alleged the sum of $350 a month to be a reasonable sum to be paid respondent by appellant for the support and maintenance of respondent and the minor children, prayed for a decree of separate maintenance requiring appellant to pay that sum, for a decree awarding the custody of the children to respondent, and for general relief.

The Sherman Case was a default case, and the court there held that the trial court erred in assigning the entire community property to the plaintiff because there was no allegation that the community property was necessary for support and maintenance and no notice was given to defendant that any disposition of the community property was sought. The rule is entirely different in contested cases. "In contested cases the relief granted is not limited to that specifically prayed for, as is the case where judgment goes by default. Any relief authorized by the facts alleged and proved or admitted may be awarded." 14 Cal. Jur. p. 986, and cases cited.

It is true that in the case at bar the cross-complaint did not specifically allege that the community property was necessary for the maintenance of respondent and her minor children, nor was disposition of the community property specifically asked. However, the court had complete jurisdiction of the parties, their property, and their children. Both parties were in court, the case was strenuously contested, and the respective needs of those over whom jurisdiction was exercised were fully inquired into.

It may well be that when the evidence disclosed that appellant's salary was reduced and he was unable to pay the $350 a month which respondent prayed for, the court found such sum was nevertheless reasonably necessary for the support and maintenance of respondent and her children, and thereupon awarded as its equivalent the sum of $200 a month and the home place, free of taxes, interest, and insurance. While the decree does not specifically say that the community property is awarded respondent "for the support and maintenance of herself and her minor children," it is clear from a reading of the entire judgment that its provisions were made for that purpose.

[5] 2. The separation agreement above referred to was signed by the parties after the trial of the cause and submitted to the court prior to the rendition of judgment. It became a part of the record on appellant's motion for diminution of the record. Under the terms of said agreement appellant agreed to pay $800 in cash on account of the sum of $3,300 due by virtue of an order for the temporary support and maintenance of respondent and her minor children, together with the further sum of $50 per month until the unpaid balance was fully paid. He agreed to pay the further sum of $200 per month for support and maintenance instead of the sum of $300 per month previously ordered by the court, agreed to pay and discharge all taxes, insurance, interest, and other charges accruing or that might accrue upon or against the community real property of said parties, and to renew all mortgages outstanding against said property. He also agreed that the payments due under the terms of said agreement should be made directly to respondent by appellant's employer.

Respondent agreed that the previous allowance of $300 per month for support and maintenance be reduced to $200, and that the court might make an order modifying its former order in that respect. It was agreed by both parties that they were left free to pursue their legal rights in said action or in any other action or proceeding with the one limitation that so long as the appellant's yearly salary remained at $5,000, his liability for the support and maintenance of respondent and her minor children should be the sum of $200 per month.

In so far as the minor children are concerned this agreement is void. The authority of the court to make necessary orders for the support of the minor children of the marriage is conferred by statute, and its exercise cannot be limited or abridged by the parties. 9 Cal. Jur. p. 803; Lewis v. Lewis, 174 Cal. 336, 163 P. 42.

[6] Appellant and respondent further agreed that said agreement should be approved by appellant's employer, and that the moneys payable thereunder should be paid by the employer so long as appellant remained in his employ, and that upon the execution of the agreement, appellant, who was then in custody by reason of having failed to comply with the court's order for the payment of temporary support and maintenance, might be released from custody.

It will be noted that the court included in the judgment appealed from that portion of the agreement having to do with payments for the support and maintenance of the respondent and her minor children, and also the provision in reference to the payment of insurance, interest and taxes.

With reference to the payment of the $800 cash and $50 a month on account of back payments due for support and maintenance, the judgment gave respondent a money judgment for $2,150, that being the amount due under the terms of the previous order at the time judgment herein was rendered.

It will be seen that all of the provisions with which the court was concerned were included in the judgment. The parties could not bind the court in reference to installment payments on account of accrued alimony. The judgment in respect to the unpaid balance merely stated the sum due under the former order. The parties did not stipulate that such order be modified; they simply agreed as to the manner of payment. Neither did any reference to appellant's employer, nor to appellant's release from custody, have a place in the judgment.

[7] 3. The attack on that portion of the judgment which provides that appellant pay to respondent "sufficient money to pay all taxes due or hereafter to become due upon the real property hereinabove described, the cost of fire insurance on the improvements erected thereon up to the full value of said improvements, the amount of all interest payable on the mortgage or deed of trust which is now a lien upon said real property, or upon any mortgage or deed of trust which may hereafter be placed upon said real property for the purpose of renewing the present mortgage or deed of trust thereon, and the cost of renewing the said mortgage or deed of trust," on the ground of uncertainty, presents a more troublesome problem.

The general rule is that in case the judgment is for money it must be stated with certainty (Freeman on Judgments [5th Ed.] vol. 1, par. 84); and a money judgment should specify the amount (14 Cal. Jur. p. 956).

[8] The rule laid down by Mr. Justice Shaw, in the case of Title Insurance Co. v. Miller & Lux, 183 Cal. at p. 89, 190 P. 440, however, should be applied. There the court said:

> "The contention that the decree is void for uncertainty is also untenable. The claim for which the lien was imposed was for moneys to become due in the future, the amount of which could not be determined in advance. If the lien existed it could be enforced when the moneys become due to Miller & Lux under the provisions of the agreement of 1888 aforesaid, and the agreement of October 6, 1898, aforesaid, both of which were referred to in the decree of distribution. The amount thereof could be established at that time, but not before. The plaintiff argues that the decree leaves it to Miller & Lux to be the sole judge of the amount of expenses to be incurred, and therefore delegated to that corporation the functions of the court. This, however, is obviously not the case. The decree of distribution merely imposed the lien for whatever amount should legally become due thereafter to Miller & Lux on account of the agreements referred to. It would, of course, be necessary, if there was any dispute about these amounts, or their validity, or legality, that Miller & Lux should resort to a court of competent jurisdiction to establish and enforce its lien. That corporation would not be the sole judge of the legality or extent of the charges to be imposed. If they were not justified under the contracts referred to, if they were improper charges, or if the contracts do not authorize Miller & Lux to charge the expenses claimed against the owner of the land, then, of course, the court to which the matter was submitted would refuse to declare or enforce a lien therefor."

In that case the parties to be bound by the lien were present in court and agreed to the distribution made and to the imposition of the lien. In the present case the appellant agreed in writing to make the payments on account of taxes, insurance, and interest, and we believe the court was justified in including the terms of the agreement in its judgment.

[9] 4. The remaining question is that of the jurisdiction of the court to hear the matters and things alleged in respondent's cross-complaint. In this regard appellant contends that the cross-complaint is fatally defective in that it does not allege that the cross-defendant was a resident of the state of California. It was neither necessary to allege nor prove this fact. Section 128 of the Civil Code provides that:

> "A divorce must not be granted unless the plaintiff has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action; provided, that a

cross-complainant in an action for divorce need not be or have been a resident of the state or of the county in which the action is brought or pending in order to entitle such cross-complainant to a divorce in said action."

The cross-complainant alleged that she was a resident of the state, plaintiff alleged that he was a resident of the state, and both allegations were proven true.

Judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

89 Cal. App. 227

MacGRUER et al. v. FIDELITY & CASUALTY CO. OF NEW YORK. (Civ. 6230.)★

District Court of Appeal, First District, Division 1, California. Feb. 11, 1928.

Hearing Denied by Supreme Court April 9, 1928.

1. Insurance ⇨425—"Pay roll," as used in pay roll robbery policy, means fund or sum of money on hand in cash for disbursement to pay wages at designated time and place.

Term "pay roll," as used in pay roll robbery policy, means fund or sum of money on hand in cash to be disbursed in payment of wages at designated time and place which is ordinarily transported in private custody and in lesser exchange denominations.

2. Insurance ⇨425—Pay roll policy insuring against robbery inside or outside insured's premises with riders and modifications held, under evidence, to cover loss in city other than where insured's office was located.

Policy insuring plastering contractor against loss by robbery of pay roll inside or outside premises, in view of fact that insured had requested insurer's agent to increase policy to cover job in another city, and it had issued a separate policy, which, with first, made insurance in amount asked by insured, and riders providing for four custodians of pay roll instead of one and for different premium rates in event of renewal, protected against robbery of pay roll in city where work was being done, though insured's office was not located there.

3. Insurance ⇨425—"Inside or outside" in policy usually gives idea of whole and without qualification indicates no limitation.

Expression "inside or outside" usually gives idea of a whole and used without qualification in pay roll insurance policy indicates no limitation.

4. Insurance ⇨425—Company held estopped to assert that pay roll policy did not cover loss in city other than where insured's office was located.

Where in answer to request of plastering contractor that his pay roll insurance policy be increased from $3,000 to $8,000, to cover work in city other than that where his office was situated, company's agents issued additional policy for $5,000 and attached certain riders to $3,000 policy, company was estopped to set up that $3,000 policy did not cover loss in city other than where insured's office was located.

5. Insurance ⇨371—Estoppel arises from acts and conduct of company's duly authorized representative foreclosing defenses on policy otherwise permissible.

Estoppel arises from acts and conduct of duly authorized representatives of insurance company and operates to foreclose defenses on policy otherwise permissible.

6. Appeal and error ⇨1050(1)—If insurance contract was as indicated by unauthorized communication, admitting such communication in evidence was not error.

If contract insuring against pay roll robbery was as indicated by unauthorized communication, admitting such communication in evidence in action on pay roll policy was not error, since no harm could result from fact that person expressing such conclusion had no authority to bind insurance company.

7. Insurance ⇨425—Taking pay roll held "robbery" within pay roll insurance policy (Pen. Code, § 211).

As respects pay roll robbery policy, that stranger took money from custodian without display of force but shot at him to prevent recapture and hindrance of escape showed felonious taking, conforming to definition of "robbery" by Pen. Code, § 211, and was within policy protecting against felonious and forcible taking by violence inflicted on person in actual care and custody of property, by putting such person in fear of violence, or by overt or felonious act committed in presence of such person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

8. Robbery ⇨1—Taking without force or fear is not "robbery," but felonious taking by means of force or fear constitutes "robbery."

Though taking without means of force or fear is not robbery, felonious taking by means of force or fear constitutes "robbery."

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George S. MacGruer and another, copartners doing business under the firm name and style of MacGruer & Simpson, against the Fidelity & Casualty Company of New York. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chickering & Gregory, of San Francisco, for appellant.

Chalmer Munday, of San Francisco, for respondents.

PARKER, Justice pro tem. The action was brought to recover upon a policy of insurance, and, judgment being entered for plaintiffs, the defendant appeals. The case was tried by the court sitting without a jury.

The facts of the case follow, and through-

★Hearing denied by Supreme Court.

out the recital the parties will be referred to merely as plaintiff and defendant, following the plan adopted by counsel in the briefs.

The plaintiff is a copartnership as alleged, and no question arises concerning this or as to the capacity to sue. Defendant is a New York corporation duly authorized to transact business and transacting business of insurance against loss by burglary and pay roll robbery and other similar causes in the state of California. The business of plaintiff is and was at all of the times embraced within this controversy that of plastering contractor, and the principal place of business of plaintiff was at 266 Tehama street in the city and county of San Francisco. It may here be added, unnecessarily, perhaps, that in the very nature of such a business operations or work thereunder was conducted wherever plastering contracts were obtained in the construction of buildings, and in all cases without and away from the premises named. In other words, the business enterprise of plaintiff was not of the character such as contemplated activity in any one particular house or lot. The plaintiff in the course of business employed many men, and had established certain pay days, at which time the wages of the men employed were paid, and the usual place of payment was at the place of employment.

[1] In May of 1922 plaintiff applied to defendant for insurance protecting it against loss of its pay roll; the particular hazard against which it desired insurance being that of robbery. The term "pay roll" in the usual and ordinary acceptation means a fund or sum of money on hand in cash, to be disbursed in payment of wages at a designated place and time, and ordinarily transported in private custody and in lesser exchange denominations. Upon this application in due time defendant, through its admittedly authorized agents and officers, issued to plaintiff a policy of insurance designated, "Pay Roll Robbery Policy (Standard)." It will be unnecessary to detail here all of the provisions of the policy. Such features thereof as are pertinent will be developed hereinafter.

The amount of the obligation assumed by the terms of the policy was $3,000. As stated, this policy was executed and delivered as of May, 1922, and by its terms the coverage was to be for a term of one year. At the end of the period thus designated the policy was renewed to cover the intervening period to May, 1924. No question is presented as to payment of premiums; it being admitted that the same were paid and the contract in full force up to May, 1924. The insurance was negotiated through one William A. Newsom, Jr., concerning whom more will appear hereafter. In January, 1923, the plaintiff became engaged upon a contract involving the plaster work on the Biltmore Hotel at Los Angeles, and in the course of this work employed many men. In January, 1923, plaintiff addressed a letter to Scott & Newsom (being the same Newsom referred to before), which letter specifically referred to the subject of "Fidelity & Casualty of N. Y., Pay Roll Policy." The letter verbatim is as follows:

> "In view of our present pay rolls on the Biltmore Hotel, Los Angeles, we desire you to cover us immediately with additional insurance. Our policy now calls for three thousand ($3,000.00) dollars. We wish this extended to eight thousand ($8,000.00) dollars. Inasmuch as our pay rolls will perhaps only run this amount for some three or four months, we wish you to inform us if we can raise the coverage for that period of time and then return to the original coverage of $3,000.00. You might inform us of the minimum time we can raise a pay roll policy; also if this procedure is permissible. Supply us with the premium rates for the above information, copy of original policy, and rider thereto."

Receiving no reply to this letter within a reasonable time, plaintiff addressed another letter to Scott and Newsom under date of February 7, 1923, attention of Mr. Newsom, which letter is as follows:

> "Referring to our letter of the 22d of January, please give this matter your immediate attention and advise us what you have done in the matter of raising our pay roll insurance to $8,000.00. Trusting you will appreciate the importance of protecting us as we have requested."

Both of these letters were dated at and mailed from Los Angeles.

Before proceeding further, the various parties acting on behalf of defendant may be here identified. It is admitted by defendant that one Treganowen was office manager and assistant resident manager of the Fidelity & Casualty Company, defendant, and his authority to represent the company defendant is conceded. William Newsom, Jr., was referred to as a special agent of defendant. Under his certificate of authority issued to him by defendant, he was designated as an agent in San Francisco and vicinity to act in all lines and to countersign policies and renewals thereof, and to perform such further acts as are incidental to the prosecution of the company's business and as are authorized by the written contract by which he was appointed. This certificate of authority was issued out of the main office of defendant, in New York, under the seal of the company and duly executed. The office of Newsom was immediately adjoining the main San Francisco office of the company, there being a door between, and the company paid the rent of Newsom's room.

When Newsom received the letters set forth hereinbefore he personally submitted the same to Treganowen and discussed the situation with him many times. Treganowen had issued the policy then in effect. Newsom told Treganowen that he had an inquiry from plaintiff for additional insurance, and that plaintiff was then operating in Los Angeles as well as in San Francisco and Fresno; also explaining to him that it was possible that at some time plaintiff might get a job at some unforeseen place. Newsom suggested and requested that the plaintiff should have coverage for at least four places. Treganowen assured Newsom that he would take care of the matter, and his method of thus handling the situation was to issue a new policy for and in the amount of $5,000, and attach certain riders to the then outstanding policy of $3,000. We have nothing before us indicating the provisions of the second policy for $5,000, and no issue seems to have been raised concerning it. It would no doubt have been helpful to the trial court and to us had this last policy been made a part of the record. However, as liability was admitted and discharged to the extent thereof under the last policy, we may assume that it did specifically cover the Los Angeles job. This brings us back to the original policy here involved.

This policy, as hereinbefore indicated, was in a standard form. By its terms it agreed to indemnify assured against all loss by robbery occurring during the hours beginning at 7 a. m. and ending at 7 p. m. of property intended for the sole use of the pay roll of the assured, from a custodian while inside or outside of the premises, engaged in any of the regular duties devolving on the custodian in connection with the pay roll of the assured. The term "premises" within the meaning of the policy is limited to the interior of the assured's office, store, or factory, occupying the ground floor of 266 Tehama street, San Francisco. By the terms of the policy, the pay roll is to be taken from bank to location where work is being carried on. Paragraph or clause 9 of the policy provided:

> "There will not be at any one time more than one custodian having in his care and custody property insured hereunder."

On the policy as originally executed and delivered there was an attached rider providing that for a premium of $18.22 the company would continue the policy in force for the period of another year, and then, upon payment of $12.15, the policy would be continued for still another year. After the application for increased insurance had been received and considered, the defendant, through its admittedly authorized representative, Treganowen, in addition to issuing the $5,000 policy referred to, made changes in the original $3,000 policy by attaching riders thereto, which will be now discussed.

The first rider provided that for an additional premium of $15.92 (50 per cent. increase) clause 9 of the policy is amended to provide that there may be at one time more than one custodian, namely, four custodians having care and custody of property insured. The next rider provided for different premium rates in the event of renewal. By the terms of this rider the original rates on renewal were doubled.

It may be here repeated that all of these changes and the execution of the new policy were in response to the letters received from plaintiff hereinbefore set forth, and were delivered to Newsom after all of the requirements of plaintiff had been thoroughly discussed.

Upon receipt of the new policy and the changed riders for the first policy, Newsom, under date of February 27, 1923, forwarded to plaintiff at Los Angeles the riders with directions to attach same to the policy, and in the letter of transmittal assured plaintiff that, under the rider amending clause 9 as to custodians, the policy then provided for four custodians in four different locations.

This sufficiently sets forth the record. It is conceded, for the purposes of this branch of the case, that, if the policy as amended covered the plaintiff's pay roll while operating in Los Angeles, defendant is liable. No question arises as to loss or due proof thereof at this time. The contention of appellant is that the policy as changed provided for extra custodians, but all confined to San Francisco, and by the terms of the policy are tied to the premises in San Francisco, described as 266 Tehama street.

Appellant argues that, if it be conceded that plaintiff asked for and defendant intended to give to him a policy covering the loss here involved, nevertheless, such a policy was not executed, and that, if plaintiff has any remedy, it is to seek a reformation of the contract and then sue upon the policy as reformed. The argument of appellant continues to the effect that the policy specifically designates the premises at Tehama street, and by implication confines the liability to business done from those premises. In support of this it urges the facts and circumstances surrounding the execution of the original policy, and the further contention that the company had a right to believe, and did believe, that its risk would be confined to San Francisco, and with this in view accepted the risk insured against. Many authorities are cited to establish the principle that an insurer is liable only to the extent of his contract, and with these authorities we need have no quarrel. We may concede that the courts have been in general accord on the principle that no new or additional liability shall be placed on an insurer beyond the terms of its written policy. Insurance, as a legitimate branch of modern business life, is essential to economic progress and is encouraged under the law. Notwithstanding this, whether it be a policy of insurance or any other form of contract, the law still retains its one dominant characteristic as a means of promoting justice. Accordingly, the law undertakes two inquiries. First, What was the actual contract; and, secondly, what has been the conduct of the parties with reference thereto?

[2, 3] Here the actual contract is in itself vague and ambiguous. The main clause in the contract provides against loss by robbery from a custodian *inside or outside* of the premises, engaged in any of the regular duties in connection with said pay roll. Appellant concedes this, but claims that after describing the premises the term "outside" meant immediately outside. That this is a forced construction is apparent from the further provision of the policy that the pay roll insured is to be taken from the bank direct to the location where the work is being carried on, with no reference whatsoever to the premises. The phrase "inside or outside" usually gives the idea of a whole, and without qualification indicates no limitation. In passing it might be observed that, if the policy had referred to San Francisco, and had specified the liability as attaching to the pay roll "inside or outside" of San Francisco, it could not be seriously contended, in the absence of some qualification, that the liability extended only to places immediately adjoining the city named. When appellant argues that at the time of the execution of the policy the facts and circumstances surrounding were such as to induce the company to believe that the extent of liability incurred was confined to San Francisco, and that if an ambiguity appears it is to be resolved by carrying out the intent of the parties, such an argument but admits the liability here, for the reason that, when the policy was altered and re-executed, the facts surrounding demonstrated the intent of all concerned and left no uncertainty therein. The company knew just exactly what plaintiff desired in the way of protection. It knew that he required and requested protection for his Los Angeles pay roll to the extent of $8,000. By no stretch of the language of the letter of plaintiff can it be inferred that plaintiff was seeking $5,000 for Los Angeles, and then wanted the privilege of four custodians instead of one for the San Francisco pay roll. There are but two conclusions which can be drawn from the fact of change in the original policy. One is that the policy was changed and the premium raised pursuant to a desire and intent to give the insured the additional protection desired, and the other is that the change was made for no reason at all but just out of a clear sky.

We adopt the first conclusion. There is nothing in the policy itself indicating that its effect was limited to San Francisco; and even in its original form providing for one custodian and not requiring payment from the premises described, but specifically waiving that payment be from such place, it might well be construed as covering a Los Angeles pay roll.

Appellant urges then that, if plaintiff was covered on the Los Angeles pay roll, why did he seek the change in the form of contract? Then comes to appellant the unanswerable question that, if the policy did not cover Los Angeles, what purpose could there have been in the modifications and additions other than to cover the last-named place? The usual form of printed policy contains general clauses, followed by exceptions to be inserted governing each particular case. These exceptions when inserted override general terms inconsistent therewith pursuant to elementary rules of construction.

[4, 5] Without taking up each line of argument advanced by appellant, or pointing out the inconsistencies apparent, we hold that the contract itself with its riders and modifications is sufficient to embrace the plaintiff's claim here. And further still we hold that, if there should be the slightest doubt remaining on that score, the defendant should be and is estopped under the admitted facts from urging a defense on that ground. Reid v. Northern Assurance Co., 63 Cal. App. 114, 218 P. 290; Steil v. Sun Insurance Co., 171 Cal. 795, 155 P. 72. The cases cited, containing the same facts, confirm the settled law of this state that an estoppel arises from acts and conduct of duly authorized representatives of insurance companies, and operates to foreclose defenses upon the policy otherwise permissible.

[6] What has been said disposes of the points urged by appellant regarding alleged errors in the admission of certain correspondence. If the contract was as indicated by an unauthorized communication, no harm could result from the fact that the person expressing such a conclusion had no authority to bind the company. Provident G. Mining Co. v. Manhattan Co., 168 Cal. 304, 142 P. 884.

Finally, appellant contends that, should it be determined that the policy in question covered loss by robbery of the pay roll in Los Angeles, still no liability accrued under the policy, for the simple reason that the loss claimed did not result from robbery.

[7] This brings us to an examination of the facts surrounding the loss; it being conceded that there was a loss, and due proof thereof made sufficient to warrant recovery in case of robbery. The facts are these: Simpson, one of the plaintiffs, testifies:

> On February 5, 1924, about 3 p. m., I took a pay roll from Bank of Italy in Los Angeles to Biltmore Theater; the points mentioned being but a few blocks apart. The pay roll contained some $7,951 lawful money of the United States, and was to be used exclusively in paying the wages then due to employees of the assured. I took the money to the job and turned it over to the foreman to pay off. During the conversation with the foreman, I handed him the money, and both of us were standing close togeth-

> er, and as I handed him the money there was a hand that came between us and took the money, and a voice said, "I'll take this." It was the hand and voice of a stranger, and as the hand grabbed the money the stranger started to go. At first I did not realize what happened, but before the stranger had gone 20 feet I knew it was something wrong, and ran after the fellow. The fellow pulled a gun and fired two shots. Between dodging around I managed to gain on the holdup man, and as I would get closer he would shoot. Finally, after advancing and backing and after many shots had been fired, I got up face to face with him, and he put the gun right in my face, and as I jumped to one side he fired again, and I stopped, and the holdup man escaped. His method of escape was to jump in a standing automobile, and under threat of the gun he compelled the driver to proceed. I never got the money back, and the exact amount I lost was $7,949.15.

Appellant contends that these facts do not show the commission of any robbery. It concedes the taking to be felonious, but characterizes it as larceny or any other form of theft exclusive of robbery, and particularly is it urged that the acts detailed do not constitute robbery as the term is defined in the policy itself.

The policy limits the liability to a felonious and forcible taking (a) by violence inflicted upon the person in the actual care and custody of the property at the time; (b) by putting such person in fear of violence; (c) by an overt felonious act committed in the presence of such person or persons and of which they were actually cognizant at the time.

The felonious taking thus described conforms to the definition of robbery as found in the Penal Code of this state, section 211. All parties here concede that, if the offense committed in the taking of the pay roll was larceny, or any offense other than robbery, plaintiff cannot recover.

We hold that the taking was of a character sufficient to bring it within the terms of the policy and fasten liability on defendant. The entire transaction from the appearance of the hand to the last shot immediately preceding the escape constituted but one connected occurrence. And surely in that transaction we find unmistakably a characteristic of robbery, namely, putting a person in fear of violence.

[8] There is a sharp conflict of authority on the question. Many courts hold that the actual taking must be accomplished by means of force or fear; that the physical act resulting in a change of possession must be so accomplished. A digest of all of the authorities would serve no useful purpose. As is not unusual, no case can be found exactly corresponding in facts. All of the authorities, however, agree that a taking without means of force or fear is not robbery. And, likewise, all agree that the felonious taking by means of force or fear constitutes the crime of robbery. The point then arises as to just what constitutes a taking. If the felonious taking is completed without force or fear, then subsequent force or fear employed in resisting recovery has been held by some of the authorities to be so far separated from the taking as to change the character of the offense. No more fertile field for argument can be found than on this very topic. In our opinion, with the facts of the instant case as stated, to hold that the taking here in question was without the use of force or fear, and therefore not a robbery, would be to hold against both the letter and the spirit of the law. The law grades offenses proportionate to the wrong done and the injury resulting or likely to result to the body politic. The classification is not an arbitrary one, but is founded upon centuries of human experience. Throughout the law deprecates violence, and through no niceties of construction should it be favored. As before stated, there are many of the older authorities that adopt a forced reasoning in attempting to segregate and individualize each step in the commission of an offense. But we feel that under present conditions this overnicety should be abandoned. In the case at bar the predominant elements in the taking were force and fear. The thief was armed at all times, and the actual physical act of gaining possession was obviously with the intent to assert and enforce that possession even at the expense of human life. The loss of the pay roll was not in any sense due to the mere gaining possession, but was the result of the violence used and fear engendered thereby. Without pursuing the subject further, we hold that the facts showed a robbery within the meaning of the policy.

Incidentally, it might be added that the defendant company recognized this in paying the claim under the second policy of $5,000 and did not dispute that a robbery had occurred. This, of course, means nothing as a legal proposition. It does show, however, that a mere recital of the facts is quite convincing. Moreover, clause (c) of the policy fastens liability of the defendant for loss resulting from felonious and forcible taking "by an overt felonious act committed in the presence of the custodian and of which he was actually cognizant at the time."

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 311

E. CLEMENS HORST CO. v. SACRAMENTO COUNTY. (Civ. 3444.)★

District Court of Appeal, Third District, California. Feb. 17, 1928.

Rehearing Denied March 17, 1928.

Taxation ⚷543(6)—Complaint held not to allege hops were in course of exportation on first Monday in March so as to be tax exempt (Const. U. S. art. I, § 10).

Taxpayer's complaint, in action to recover taxes paid on hops, alleging that hops were sold October 1, 1923, and "that thereafter * * * the said 1,000 bales of hops were started and forwarded on their export journey," *held* not to allege hops had been started on their export journey on or before first Monday in March, 1924, so as to be in course of exportation at that time and therefore exempt from taxation, under Const. U. S. art. 1, § 10, prohibiting state laying export duties; allegation that hops "were, on the first Monday in March, 1924, ever since have been, and still are exports" being mere conclusion.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the E. Clemens Horst Company against the County of Sacramento. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Q. Brown, Jr., of Sacramento, and Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Neil R. McAllister, Dist. Atty., and Alex. J. Ashen, Asst. Dist. Atty., both of Sacramento, for respondent.

FINCH, P. J. This is an action to recover money paid as taxes on 1,000 bales of hops. The trial court sustained the defendant's general demurrer to the complaint and granted the plaintiff 10 days to amend. Plaintiff elected to stand upon the complaint and judgment was thereupon entered in favor of the defendant. The plaintiff has appealed from the judgment. The allegations of the complaint material to the questions presented by the appeal are:

> "That said assessment was in violation of the provisions of article 1, § 10, of the Constitution of the United States, providing that no state shall lay any imposts or duties on imports or exports, because the said property, against which said assessment was levied, were, on the first Monday of March, 1924, ever since have been, and still are exports.
>
> "That on April 8, 1920, a contract was made, and entered into by and between the E. Clemens Horst Company, plaintiff herein, hops growers, of San Francisco, Cal., and Samuel Allsopp & Sons, Limited, of the city of Burton-on-Trent, England, whereby E. Clemens Horst Company was to sell and deliver to the said Samuel Allsopp & Sons, Limited, 1,000 bales of hops grown on any of E. Clemens Horst Company's ranches, said hops to be forwarded to Burton-on-Trent, and/or delivered at Pacific Coast shipping points.
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> "That said 1,000 bales of hops were grown on a ranch of the plaintiff in Sacramento county, Cal., generally known as the Brewer ranch, and were, on or about October 1, 1923, sold by the plaintiff to the said Samuel Allsopp & Sons, Limited, and title to said hops thereupon passed to said purchaser, but the possession of such hops was retained by the plaintiff for the purpose of forwarding and exporting the same to the city of Burton-on-Trent, England, for the said purchaser; and that thereafter and pursuant to such purpose and the said contract of the parties and with the intention on the part of the plaintiff and the said purchaser of exporting the said hops, the said 1,000 bales of hops were started and forwarded on their export journey, consigned to such purchaser, and were transported from the place of production thereof, to wit, the said Brewer ranch in Sacramento county, Cal., to Hopfen Railroad Station at Sacramento, Cal.
>
> "That heretofore, and prior to the said first Monday in March, 1924, a temporary embargo was imposed by the government of the United Kingdom of Great Britain and Ireland upon the transportation of hops into the said last-named country; that by reason of said embargo the exportation of said 1,000 bales of hops was temporarily interrupted, and said hops were temporarily left in possession and custody of the E. Clemens Horst Company and stored in the Lawrence warehouse, city of Sacramento, county of Sacramento, state of California, by said Samuel Allsopp & Sons, Limited, purchasers, owners, and consignees of said 1,000 bales of hops That said 1,000 bales of hops are now in the course of exportation from this country to the United Kingdom of Great Britain and Ireland, and by reason thereof are not subject to taxation by said county of Sacramento."

Respondent does not controvert appellant's statement that "goods in course of exportation from this state to foreign countries are not subject to taxation by the state." For the purposes of this opinion, at least, it may be conceded, as stated by appellant, "that from the moment when a shipper starts goods on a journey to a destination abroad with the intention that the journey shall be continuous and uninterrupted, the same are exports, and thereafter no temporary interruption of such a shipment alters its character as an export." The complaint, however, does not allege that the goods in question had been started on their journey on or before the first Monday in March, 1924. The allegation is that the hops were sold October 1, 1923, and "that thereafter * * * the said 1,000 bales of hops were started and forwarded on their export journey." If they were so started after the first Monday in March, they were properly assessed and taxed. Appellant concedes that "the mere intention of an owner to export goods is insufficient to make the shipment one in interstate or foreign commerce." The allegation that the hops "were, on the first Monday in March, 1924, ever since have

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★Rehearing denied.

been, and still are exports" is not a statement of fact, but a mere conclusion. It is alleged that the hops "are now in the course of exportation," but the plaintiff, throughout the complaint, has carefully refrained from alleging that they were in course of shipment or exportation on the first Monday of March, 1924. The complaint is so clearly defective by reason of the omissions mentioned that a consideration of the questions of law discussed in the briefs is deemed unnecessary.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

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89 Cal. App. 209

SLY v. ABBOTT et al. (Civ. 6122.)

District Court of Appeal, First District, Division 2, California. Feb. 10, 1928.

1. Appeal and error 🔑194(1)—Omission of prayer from answer held not ground for reversal, where first raised on appeal.

Omission of prayer from answer, treated as sufficient at trial of action for profits and accounting, *held* not ground for reversal, where point was first raised on appeal.

2. Pleading 🔑403(5)—Defective description in cross-complaint, alleging defendants' interest in certain lots described in complaint, without designating which, held cured by answer alleging plaintiff's half interest in all.

Defective description of lots in cross-complaint, alleging that defendants "have an interest in certain of the lots * * * described in the complaint," without designating which ones, *held* cured by allegation in answer to cross-complaint that plaintiff was absolute owner of undivided half interest in all such lots.

3. Judgment 🔑18(2)—In accounting action, judgment denying money recovery and quieting title against plaintiff held supported by pleadings, though not alleging abandonment, estoppel, or forfeiture.

In action for accounting, judgment denying money judgment asked by plaintiff and quieting title against him *held* supported by pleadings, though neither answer nor cross-complaint alleged abandonment, estoppel, or forfeiture.

4. Estoppel 🔑107—Quieting title 🔑34(1)—One relying on estoppel or other equitable facts for decree quieting title must allege such facts when opportunity presents.

One who relies on estoppel or other facts of equitable cognizance as basis for decree quieting title must allege such facts in his pleading when he has opportunity to do so.

5. Joint adventures 🔑4(1)—Plaintiff's default in payments divested him of title without regard to estoppel or other equitable facts not pleaded.

Default of one suing for accounting of profits from purchase and sale of realty by coadventurer in making payments as agreed for property purchased from defendant divested plaintiff of any title therein as matter of law, without regard to estoppel or other facts of equitable cognizance not pleaded.

6. Joint adventures 🔑1—Complaint, evidence, and plaintiff's briefs on appeal from decree quieting title against him held to justify conclusion that parties were coadventurers.

Complaint and evidence, in action for accounting of profits from purchase and sale of lots and plaintiff's briefs on his appeal from decree quieting title against him, *held* to justify conclusion that plaintiff was coadventurer with defendant in joint enterprise.

7. Joint adventures 🔑4(1)—Joint adventurer is beneficiary of constructive trust.

The nature of the title of a joint adventurer is that of a beneficiary of a constructive trust.

8. Joint adventures 🔑4(1)—Extent of joint adventurer's title is measured by extent of his interest in venture.

The extent of the title of a joint adventurer is measured by the extent of his interest in the venture.

9. Joint adventures 🔑1—Joint adventure in purchase and sale of realty may be formed and abandoned by parol agreement.

A joint adventure in the purchase and sale of real estate may be formed or abandoned by parol agreement.

10. Joint adventures 🔑1—Joint adventurer's statement that he was out of venture terminated his interest, and left others free to proceed without him.

When joint adventurer declared his inability to carry on, and stated that he was out of venture, his interest terminated, and other associates were free to go forward with enterprise without him.

11. Joint adventures 🔑1—Joint enterprise in purchase and sale held entire enterprise because success depended on payments being made by associates as class.

Joint enterprise in purchase and sale of realty *held* an entire one, as dependent for its success on purchase payments being made by associates as a class.

12. Joint adventures 🔑1—Joint adventurers' conveyance of property to trustee would not materially change their titles.

Conveyance of property, purchased by joint adventurers for sale at profit, to trustee for benefit of each in stated proportion, would not materially change character of title of each from that of coadventurer or beneficiary of constructive trust.

13. Joint adventures 🔑1—Title of one contracting to purchase realty before agreement making parties joint adventurers would be that of vendee, and terminate on unexcused default in payment, if contract were not superseded.

If executory installment contracts for purchase of real estate were not entirely superseded by subsequent agreement merging all previous contracts, and making parties joint adventurers, purchaser's title would be that of vendee, and terminate on his unexcused default and refusal to pay on demand.

14. Joint adventures ⚷1—Failure to pay amount due under agreements to purchase realty and pay vendor same amount for taking purchaser into joint adventure terminated latter's rights as joint adventurer and vendee.

Purchaser's failure to pay balance due by virtue of agreement to purchase realty and subsequent agreement to pay same sum to vendor, in consideration of latter and other associates taking purchaser into joint adventure for purchase and sale of realty, terminated latter's right to remain or become joint adventurer, as well as his interest as vendee.

15. Joint adventures ⚷5(2)—Testimony as to conference of joint adventurers in purchase and sale of realty with original owners of realty, purchased from one such adventurer by coadventurer, held admissible on issue of latter's readiness, ability, and willingness to perform.

In action for accounting of profits from purchase and sale of realty, testimony as to conference of plaintiff, defendant, and their coadventurers in purchase and sale of realty with original owners of property, which plaintiff had contracted to purchase from defendant, *held* admissible on issue whether plaintiff was ready, willing, and able to perform his obligations.

16. Evidence ⚷155(10)—Plaintiff having first offered evidence of conference, defendant could offer evidence of entire conversation thereat (Code Civ. Proc. § 1854).

Where plaintiff, in action for accounting of profits from purchase and sale of realty, offered evidence of conference held by himself, defendant, and their coadventurers with original owners of realty, purchased by plaintiff from defendant, latter could offer evidence to show entire conversation, under Code Civ. Proc. § 1854.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for accounting by Elmer R. Sly against William Abbott and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Joseph F. Seymour, of Riverside, and Frank J. McDougal, of Los Angeles, for appellant.

W. D. Van Nostran and Glen Behymer, both of Los Angeles, for respondents.

KOFORD, P. J. Defendant William Abbott was engaged in the real estate business. He contracted to purchase a large number of real estate lots from John A. Van Pelt and associates, and also from the Pen Bryn Land Company. Thereupon he turned about and associated with himself the plaintiff Sly, J. W. Allen, and later Richard Eagan. These four men, as a result of written and verbal agreements executed amongst themselves, became, as contended for by appellant, joint adventurers, with the object in view of completing the purchase of said lots from the original owners, and selling them out piecemeal to the public at a profit. The more important details of the steps taken by which these four men formed this syndicate, and later separated are as follows: First, there were four documents executed between the 18th and the 22d days of January, 1923, by which the plaintiff, Sly, and his associate J. W. Allen agreed to purchase said lots from defendant William Abbott by making an initial payment and agreeing to make subsequent installment payments extending over a considerable period of time. The first in date of these four documents is a memorandum of agreement made the 18th day of January, 1923. Time was expressly made the essence of the agreement. Therein plaintiff, Sly, and associate Allen paid $150 down, and agreed to pay, among other installments, the aggregate of $1,500 within 30 days, and the sum of $5,150 within 90 days, which would mean April 18, 1923. The other three documents were less formal; each being simply a receipt signed by defendant Abbott acknowledging receipt from plaintiff, Sly, and his associate Allen of a deposit and part payment on account of the purchase of certain groups of the said lots of real estate, and designating the total price and the times for the installment payments on the balance of the purchase price. These receipts contemplated a more formal contract to be made a few days later, when further payments were to be made. Thereafter plaintiff, Sly, persuaded Richard Eagan to join the enterprise. Eagan paid $4,000 for the privilege, and such agreements were had, oral and written, that all the previous contracts and agreements between the four parties were, on the 29th day of January, 1923, merged into one contract between the plaintiff, Sly, defendant Abbott, J. W. Allen, and Richard Eagan. Each of these four men then became, according to the findings, the owner of an undivided one-fourth interest in and to any rights, equities, or profits to accrue from the sale of the said real estate lots. As part of the consideration of said merger agreement, plaintiff, Sly, had theretofore agreed to pay defendant Abbott $5,150 on the 18th day of April, 1923. This is the same sum which he was obliged to pay under the memorandum agreement above referred to and dated January 18, 1923. Of this sum plaintiff, Sly, together with Allen, had previously paid $150. J. W. Allen, on the 1st day of April, 1923, withdrew from the syndicate assigning all his interest to the remaining three, Sly, Abbott, and Eagan.

On the 18th day of April, 1923, a conference was had at which all interested parties were present. What happened at this conference forms the important part of this case. Payments due to the original owners, Van Pelt and Pen Bryn Land Company, were in default. The payment of $5,000, which Sly had agreed to pay to Abbott on the 18th of April, 1923, had not been made. The clear weight of the testimony, and as found by the trial court, shows that at this meeting the following occurred: Mr. Lincoln, an attorney at law, representing the original owners, required and demanded of each of the members of the syndicate that the overdue payments due to the original owners be paid at once. The response of the members of the syndicate was as follows: Abbott said he was waiting for Sly to pay him the $5,000. J. W. Allen said that he had already sold out, and was present to collect a balance due him on that account. Richard Eagan said that he would not put up another cent; that he had gone into the syndicate under misrepresentations; that he wanted nothing so much as to get his money back and return to Boston. Plaintiff, Sly, said in effect: I have no money, and cannot borrow any, and cannot pay a cent, but, if you will take care of Eagan, I will be satisfied to drop out and surrender my interest. Thereupon Lincoln and defendant Gray, who was also present at the conference, and who subsequently bought out Abbott's interest. conferred together, and agreed to take care of Eagan. This was subsequently done. They bought out Eagan. The conference adjourned and thereafter Abbott, Gray, and successors carried on the enterprise with their own funds.

According to this version of the conference, all of the four members of the syndicate had withdrawn, except Abbott, and this was Abbott's attitude as expressed by his answer filed in this suit.

The plaintiff, Sly, however, denying the essential features of the conference as we have outlined them above, claimed that he had not withdrawn or surrendered, but that he still remained in the syndicate. He filed this action based upon that claim. The complaint alleged, in effect, that Abbott had taken matters into his own hands, and had made a large profit, of which the plaintiff's share was some $34,000; that plaintiff, Sly, was the owner of an undivided one-half interest in the syndicate, lots, and profits; that defendant Abbott had wrongfully secured and retained for himself certain commissions, and also a secret profit, by turning into the syndicate certain lots at a higher price than that which he had paid for the same; that, by reason of these two things, Abbott owed plaintiff in excess of the $5,000 which Sly was in default to Abbott under his contracts. The complaint followed this with an allegation that the plaintiff was ready, willing, and able to perform his obligations, and to pay any sums of money due to Abbott, if any be due to him.

The findings of the court were that it was untrue that Abbott had received any secret commissions, and found that it was untrue that said defendant Abbott had made a secret profit of $5,000, as alleged by the plaintiff. The court also found that the plaintiff was not ready, willing, and able to fulfill his obligations and make the payments as required by his agreements, particularly the contract of January 18, 1923, and, further, that plaintiff, Sly, defaulted in the payment of $5,000 due Abbott on the 19th of April, 1923, and further defaulted in the payment of his share of overdue payments of $3,600 to the original owners of the land. The court further found expressly and in detail upon the occurrences taking place at the conference of April 19, 1923, and these findings state the facts substantially as we have outlined them above, which include the statement that Sly had agreed to surrender his interest, if defendants Abbott and Gray would buy out Eagan, and that Abbott and Gray had done so.

Going further with reference to this conference, the court also found that Sly did then and there abandon and relinquish all his rights, and, still further, that the action of Sly in so abandoning his interest had created an estoppel, precluding him from asserting any interest in the property or in the profits.

[1, 2] Practically all of the points urged by appellant on this appeal are based upon the contention that the findings of the court of abandonment, relinquishment, and estoppel are outside of the issues raised by the pleadings. The pleadings were as follows: The complaint, as we have already set forth, was an action for profits and an accounting. The defendants' answer contained denials and admissions, but raised no new issues. The answer is criticized, in that the prayer was omitted. This point is raised for the first time upon appeal. The answer was treated as sufficient at the trial, and this defect is no ground for a reversal at this time. Hoffman v. Pacific Coast Constr. Co., 37 Cal. App. 125, 173 P. 776; Goldsmith v. Board of Education, 63 Cal. App. 141, 218 P. 296. Defendants Gray and Lena Abbott, the successors in interest by transfer from William Abbott, filed a cross-complaint, alleging that they "have an interest in certain of the lots which are described in the complaint on file herein"; that the plaintiff claims an interest in said lots adverse to said cross-complainants, which is without right. It prayed for a decree that their title be quieted against the plaintiff, Sly. This cross-complaint is criticized for the defective description of the property to which title is sought to be quieted. At the time the cross-complaint was filed, the original complaint had been superseded by an amended complaint. The reference in the description to the complaint may be therefore taken as a reference to the amended com-

plaint, but the description says "in certain of the lots," without designating which ones. No demurrer, however, was filed. The plaintiff answered, and in his answer to the cross-complaint he not only denied that the defendants William Abbott, John Gray, and Lena Abbott had any interest in any of the lots described in the complaint and amended complaint on file in the action, but also affirmatively alleged that he (the plaintiff) was the absolute owner of an undivided one-half interest in and to all the said lots. This affirmative allegation in the answer to the cross-complaint cures the defective description in the cross-complaint. Daggett v. Gray, 110 Cal. 169, 42 P. 568; Kreling v. Kreling, 118 Cal. 413, 50 P. 546.

[3] The appellant's claim that the findings are outside of the issues raised by the pleadings is not based, however, upon the minor defects which we have just noticed. The claim is based upon the failure of either the answer or cross-complaint to allege abandonment, estoppel, or forfeiture.

Respondents' reply to this point is simply that the findings thus attacked are superfluous, and that the judgment is easily supported without them. So far as the judgment is a mere denial of the money judgment asked for by plaintiff, respondents' answer is easily sufficient. The judgment, however, goes further, and quiets title against the plaintiff. Plaintiff is not only denied a money judgment, but it is determined by the judgment that he has no right, title, or interest in the property.

[4] The cross-complaint and the answer thereto merely raised the issues of an ordinary suit to quiet title, and do not by any express averment raise equitable issues such as estoppel. This fact raises the question of whether the facts occurring at the conference April 19, 1923, as found by the court, have the effect of divesting plaintiff of his legal title, if any he had, in the property, for it is well settled that one who relies upon estoppel or other facts of equitable cognizance as a basis for a decree quieting title must allege such facts in his pleading when he has the opportunity to do so.

[5] The default of the plaintiff, Sly, in making the various payments as agreed effectually divested him of any title in the property as a matter of law, and this without the aid of those findings on facts of equitable cognizance which apparently were not pleaded.

[6-11] The relationship of Sly to Abbott should be considered to be essentially that of a coadventurer in a joint enterprise. This is justified by the evidence, and is justified by the fact that the plaintiff's complaint is based upon that theory and it is also the appellant's claim, as set forth at length in his briefs, that the interest of plaintiff was that of joint adventurer. The nature of the title of a joint adventurer is that of a beneficiary of a constructive trust. Koyer v. Willmon, 150 Cal. 785, 90 P. 135. Obviously, the extent of his title is measured by the extent of his interest in the venture. To the extent that he is out of the venture he has no title. A joint adventure in the purchase and sale of real estate may be formed by a parol agreement (Koyer v. Willmon, supra), and so may be likewise abandoned by parol agreement. Consequently, when plaintiff declared his inability to carry on, and stated that he was out of the venture, his interest terminated. He was no longer a beneficiary of the trust. Thereupon, the other associates were free to go forward with the enterprise, leaving him out. A case much like this one upon this point is Commercial Bank v. Weldon, 148 Cal. 601, 84 P. 171. See, also, Miller v. Butterfield, 79 Cal. 62, 21 P. 543. This is not a case where one of the members of a joint adventure has performed his obligations with regard to some units of the enterprise undertaken and not as to others. Neither is it a case where one had made substantial contribution in labor or money up to a certain point and thereafter disassociated himself from his fellows. The plaintiff here defaulted almost at the beginning of the enterprise. The purchase of the lots called for some $87,000. Plaintiff's entire contribution was apparently a small portion of the initial payments upon some of the four contracts of purchase which he and Allen had made with Abbott. This enterprise was an entire one, inasmuch as it faced failure as an entirety on account of the purchase payments not being made. On April 19, 1923, the associates were faced with a crisis. Entire failure threatened them because the original and real owners of the land demanded prompt payment of overdue installments on pain of forfeiture. The associates, as a class, failed and refused to pay, and thereupon the real and original owners concluded the sale with Abbott, who first had the contracts in his name, and with Gray, who thereafter came into the deal. This was substantially the same conduct which is approved in Commercial Bank v. Weldon, supra.

[12] The agreement of January 29, 1923, which we have referred to as merging all previous contracts and making the parties joint adventurers, also recited that it was the intention of the parties that the property was to be transferred to a trustee to be held in trust for the benefit of the parties in the proportion of one-quarter each. It also stated that this should be done forthwith, and the trust formed on the mutual understanding of the parties. The record does not show any document purporting to transfer to such a trustee. Apparently it was not done, although the testimony shows that Mr. Eagan was sometimes referred to as the trustee. If such a conveyance to a trustee were ac-

tually made, the character of plaintiff's claimed title would not be thereby materially changed from that of a coadventurer or beneficiary of a constructive trust.

[13] If the first four executory installment contracts for the purchase of real estate by Sly and Allen from Abbott were not entirely superseded by the merger agreement of January 29, 1923, Sly's title would be that of a vendee, which would terminate upon his unexcused default in installment payments and refusal to pay upon demand. As vendee, therefore, he could not prevail in an action to quiet title brought against him by the vendor. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Oursler v. Thacher, 152 Cal. 739, 93 P. 1007; Darter v. Schuyler, 47 Cal. App. 457, 190 P. 827; Catterline v. Peterson, 60 Cal. App. 617, 213 P. 515.

[14] The court found that the $5,000 payment due from Sly to Abbott was not only due by virtue of the agreement of purchase of January 18, but also was due by virtue of Sly's agreement to pay said sum to Abbott in consideration of Abbott and the other associates taking Sly into the joint adventure January 29, 1923. Consequently, when Sly refused to make any further payments, he not only violated his agreement with his associates to contribute his share of expenses necessary to go forward with the enterprise, but also defaulted in making the payment agreed to be made by him in consideration of his becoming a joint adventurer at all. His failure to make this payment then terminated his right to remain or become a joint adventurer in the same way that this default would terminate his right as a vendee.

The conclusion of the court that plaintiff has no right, title, or interest in the property is therefore a proper one, independently of the finding of estoppel, and is supported by the pleadings appearing in the judgment roll brought here on appeal.

[15, 16] Error is assigned in the court's action in overruling plaintiff's objections to testimony and in denying his motions to strike out testimony. This testimony all relates to the conference of April 19. The objections and motions were made upon the ground that the evidence was outside of the pleadings, but the evidence was admissible upon the issue of whether plaintiff was ready, willing, and able to perform his obligations, and was also admissible upon the theory, as expressed by the trial court, that, plaintiff himself having first offered evidence of this conference, the defendants were at liberty to offer evidence in contradiction of that offered, and, in fact, to show the entire conversation which occurred at one time and one place. Code Civ. Proc. § 1854.

The judgment is therefore affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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89 Cal. App. 69

LYDON v. BEACH et al. (Civ. 6137.)

District Court of Appeal, First District, Division 2, California. Feb. 7, 1928.

1. Landlord and tenant 🔑127—Lessee held entitled to possession, and oral promise to quit was without effect, where unexecuted (Civ. Code, § 1698).

Lessee's unexecuted oral promise to the landlord to quit the premises, although his rent was paid at the time, and there was no consideration for such promise, *held*, because of Civ. Code, § 1698, not to have taken from lessee the right to possession.

2. Landlord and tenant 🔑277(2)—Provision that landlord could re-enter and dispossess tenant in default did not justify re-entry and dispossession without three days' notice to quit or pay rent (Civ. Code, § 791).

Where lease provided, and tenant agreed, that, in case at any time he was in default in payment of rent, it should be lawful for lessor to re-enter premises and remove all persons therefrom, covenant *held* not to justify landlord in re-entering and dispossessing tenant until the landlord had given three days' written notice to the tenant, as required by Civ. Code, § 791, to pay the rent or quit possession.

3. Landlord and tenant 🔑277(2)—Demand for rent of month already paid held insufficient as demand for following month to make three days' dispossession statute applicable (Civ. Code, § 791).

Landlord's demand for rent from the 24th of June to the 24th of July *held* insufficient as a demand for rent from July 24th to August 24th, to make the three days' dispossession notice, required by Civ. Code, § 791, applicable to give landlord right to possession on expiration of three days.

4. Landlord and tenant 🔑277(2)—Three days' notice to give landlord right to re-enter and remove tenant in arrears must be given after rent is due or lease is breached (Civ. Code, § 791; Code Civ. Proc. §§ 1161, 1162).

Under Civ. Code, § 791, and Code Civ. Proc. §§ 1161, 1162, the three days' notice conferring on the landlord the right to re-enter and remove tenant on ground that tenant is in arrears of rent must be given after rent is due or breach of the lease is made.

5. Appeal and error 🔑981—Appellate courts will not disturb order denying new trial for newly discovered evidence, merely impeaching in character.

Appellate courts will not disturb order of lower court denying motion for new trial based on newly discovered evidence, where evidence is of an impeaching character only.

6. Appeal and error ⚷1015(2)—Trial court's conclusion, on motion for new trial, based on conflicting affidavits, will not be disturbed on review.

Trial court's conclusion, relative to the granting or refusing of a new trial, will not be disturbed, on review, where based on conflicting affidavits.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Thomas Lydon against Maude Beach and others. Judgment for plaintiff, and defendants appeal from the judgment and an order denying a new trial. Affirmed.

Wm. U. Handy and W. H. Thomas, both of Los Angeles, for appellants.

Joseph Scott and Harold P. Huls, both of Los Angeles, for respondent.

WELCH, Justice pro tem. Action for damages for assault and battery by appellants on the respondent, and for exemplary and punitive damages.

The court rendered judgment for $297 actual damages and $500 by way of exemplary and punitive damages. A motion for a new trial was made and denied. The appeal is from the judgment upon the judgment roll and a bill of exceptions.

The complaint alleges that appellants Jefferson J. Loque and Myers, on August 28, 1923, violently and maliciously assaulted respondent; that they beat, kicked, choked, and struck him numerous blows; that they bit his right ear, and bruised him upon his body, neck, hip, and person; that each and all of said acts were done by said Loque and Myers under the direction and authority, and at the request of their codefendant Mrs. Beach Loque (whose name was Maude Beach at the time of the alleged battery); that each of said acts was done through ill will and malice toward respondent.

The appellants answered separately. Mrs. Loque denied specifically the allegations of the complaint. Myers denied specifically the allegations of the complaint, and set up as a separate defense that the respondent on the occasion alleged in the complaint first willfully and without just cause or any cause violently assaulted him; that he (Myers) resisted said assault, using only such force as was necessary to repel respondent, to wit, that he held respondent so that respondent could not strike or kick him, and carried respondent from the room in which the assault took place. In addition to his answer, Myers in a so-called cross-complaint claimed damages against respondent in the sum of $510. Appellant Loque in his answer denied making an assault upon respondent, and set up as a separate defense that on August 28, 1923, respondent was unlawfully on certain premises and in the house of Mrs. Beach (whom he afterwards married), in the city of Los Angeles; that Myers and he were guests of Mrs. Beach; that respondent was requested to leave said house and premises, but that said respondent refused so to do, but, on the contrary, violently assaulted Myers; that he (Loque) went to the assistance of Myers; and that he used such force only as was necessary to resist said assault of respondent, to wit, that he and Myers seized respondent so that he could not strike or kick them, and carried respondent from the room in which said assault took place.

We have thus set forth the essential averments of the pleadings of the parties for the purpose of showing that the findings of the court based upon contradictory evidence dispose of all the contentions of appellants here made, with the exception of one or two points which will hereafter be reviewed.

The decision of the court found generally that each and every allegation of the complaint is true, and that each and every allegation of the cross-complaint of Myers and each and every allegation of the separate defense of Loque is untrue. Besides these general findings, the trial court specifically found that Loque and Myers assaulted respondent, beat, kicked, and choked him, bit his ear, and bruised his body, neck, hip, and person, all under the direction and authority of Mrs. Beach, now known as Mrs. Loque; that each and all of said acts done by appellants was done through ill will and malice toward respondent; that respondent did not make any assault upon appellants or any one of them; and that respondent was in the lawful possession of the house and premises of Mrs. Beach on August 28th, the day and on the occasion of the assault.

We have examined the evidence brought up in the bill of exceptions, and find that it is sufficient to support the decision.

The finding of the court that respondent was lawfully in the possession of the house and premises of Mrs. Beach at the time of the assault is seriously attacked by appellants. While the court believes that the finding is binding on the parties and on this court, nevertheless we will briefly review the documentary evidence entering into the finding.

The respondent held a written lease from Mrs. Beach on her house and premises, commencing January 24, 1923, and ending January 23, 1924. The lessee went into possession under the lease on January 24, 1923, and almost from the beginning mutual dissatisfaction existed between lessor and lessee. Finally, on or about August 10, 1923, the parties to the lease had a further dispute about the payment of the rent and the condition of the house and premises. The lessee continued in possession of the premises until August 27th, when on that day appellants entered the house in the absence of respond-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ent, but while his wife was in the house, by removing a screen on the front window, and thereupon proceeded to remove, and did remove, all the furniture and belongings of respondent from the house to the adjacent lawn. Respondent returned to the house later in the day, and he and his wife stayed in the house that night. On the next day the respondent was by physical force removed from the house, as found by the trial judge. The respondent returned to the house, and remained there until August 31st, when he vacated the premises.

[1] The contention of appellants that the lease was canceled by a mutual oral agreement of the parties so as to take the case out of the operation of section 1698, Civil Code, cannot be sustained.

Respondent testified that in the conversation between him and Mrs. Beach on August 10th, "Mrs. Beach said, 'Why don't you get out if you are not satisfied?' and I said, 'That suits me fine. When I use up the money already paid you, I will move out at the end of the month' (August 23d)." The money here referred to was $60, the amount of one month's rent, which, under the terms of the lease, was paid to Mrs. Beach in advance. This money was then in her hands, unused and unapplied. It is not clear from Mrs. Beach's testimony that she agreed to the proposal. Three days after she caused to be served on respondent a notice intended to be the three days' notice required to be given to entitle a landlord to possession in case of default in the payment of rent. Again, on August 27th when respondent offered her $6 for rent for the three days he had been in possession since August 23d, she refused to receive it, unless he would pay the whole month's rent. There was no mutual agreement to cancel the lease. Certainly the lessor never agreed to release respondent from his obligations under the lease. Whatever the conversation may have been between the parties to the lease, it is clear that one of the things proposed to be done by respondent was that he would quit the possession of the premises at the end of the fiscal month. On August 28th, the day of the assault, he was in possession of the premises, in possession under his only right to the possession, the lease. It follows that his oral promise to quit was not executed, and was of no effect (section 1698, Civ. Code), and was without consideration.

[2-4] In any event, on August 28th, the day of the assault, respondent was in default in the payment of his rent. His lease provided, and he agreed, that in case he should at any time be in default in the payment of his rent, then it shall be lawful for the lessor to re-enter the premises and remove all persons therefrom. But this covenant in the lease does not justify the landlord in re-entering and dispossessing the tenant until the landlord shall have given a three days' written notice to the tenant to pay the rent or else quit the possession. Section 791, Civ. Code. Was this three days' notice given? It was not. The notice given and served on August 13th was of no effect, for the reasons: (1) That notice demanded the payment of $60 for rent from "the 24th of June, 1923, to the 24th of July, 1923." It is conceded that that month's rent had been fully paid, and that there was nothing due therefor. This notice was insufficient as a demand for the rent from July 24th to August 24th, even if it be conceded that such rent was unpaid and due. (2) The rent was fully paid to August 24th with the extra $60 of respondent's money which Mrs. Beach had in her hands at that time. The notice of August 13th, even if sufficient in form, was prematurely given and served. The three days' notice conferring on the landlord the right to re-enter and remove his tenant on the ground that the tenant is in arrears of rent must be given *after* the rent is due or the breach of the lease is made. Section 791, Civ. Code; sections 1161 and 1162, Code Civ. Proc.; Mossi v. Fairbanks, 19 Cal. App. 355, 125 P. 1071; J. B. Hill Co. v. Pinque, 179 Cal. 759, 178 P. 952, 3 A. L. R. 669.

Even on the theory that respondent was unlawfully in possession of Mrs. Beach's property on August 28th, at the time of the assault, appellants are not entitled to a reversal of this case on the ground that Mrs. Beach had the legal right to enter and remove respondent therefrom by physical force. Appellants pleaded no such justification for the assault made upon the respondent, and Mrs. Beach forbade both Myers and Loque to remove respondent from the property by physical force. The evidence shows, and the trial court found, that the force used was greater than was necessary to evict respondent from the premises.

[5, 6] The only remaining point is that the court erred in denying a new trial on the ground of newly discovered evidence. The matter set forth in the affidavits upon which the appellants base their motion for a new trial, if true, would tend to impeach the testimony of respondent and his witnesses. Counsel for appellants state in their opening brief that these "affidavits were offered for the purpose of impeaching the testimony of Mr. and Mrs. Lydon and discrediting the testimony of Marjory Watson." Appellate courts will not disturb the order of the lower court denying motion for a new trial based on newly discovered evidence where the evidence is of an impeaching character only. Waer v. Waer, 189 Cal. 178, 207 P. 891. Besides, in this case, there were counter affidavits contradicting the affidavits upon which the motion was based. Under the well-known principle, the trial court's conclusion on such conflict will not be disturbed. Waer v. Waer, 189 Cal. 178, 207 P. 891.

Judgment and order appealed from are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

89 Cal. App. 197

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 6101.)★

District Court of Appeal, First District, Division 1, California. Feb. 10, 1928.

Hearing Denied by Supreme Court April 9, 1928.

Master and servant ⚷375(2)—Widow of employee injured while returning home after service outside usual duties and hours held entitled to compensation (Workmen's Compensation Act).

Widow of employee fatally injured while returning from performing a special service for his employer outside his usual duties as salesman, in leaving home after usual hours to unlock door of store so that electrician could enter and do some work, *held* entitled to compensation, under Workmen's Compensation Act (St. 1917, p. 831); going and coming rule being inapplicable.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by Annie Casey, claimant, for the death of William D. Casey, her husband, an employee of the L. D. MacLean Company, opposed by the State Compensation Insurance Fund, as insurance carrier. Order of the Industrial Accident Commission granting an award, and the insurer applies for certiorari to review the order. Affirmed.

F. J. Creede and H. G. Sanford, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

KNIGHT, J. William D. Casey, an employee of the L. D. MacLean Company in San Francisco, for more than 20 years, died on May 31, 1927, as a result of injuries sustained by him 6 days prior to his death. His surviving widow, Annie Casey, thereafter applied to the Industrial Accident Commission for compensation and was granted an award, which the petitioner herein as the insurance carrier for said company, seeks by this proceeding in certiorari to have annulled. The sole question presented for determination is whether, contrary to the finding of said commission, the nature of the service the decedent was performing at the time he was injured was such as to bring the case within the operation of the so-called "going and coming" doctrine, which in effect declares that injuries sustained by an employee while going to or returning from his work are not compensable under the provisions of the Workmen's Compensation Act. 27 Cal. Jur. 380.

As stated, the decedent had been working for said company for many years, and for some time immediately preceding his death filled the position of outside salesman, his duties being to call on customers, take orders, and sell goods; and he was required to report each morning for duty at the company's store on Sutter street. On May 25, 1927, before leaving the store at the end of his day's work he was instructed by one of the company's executives to return to the store that night, after he had finished his dinner at home, for the purpose of unlocking the door and admitting an electrician who would be there to repair a broken switch, to remain on the premises until the work was finished, and then to see that the store was locked. In accordance with his usual custom the decedent left the store on the day mentioned about 5 o'clock, went to his home on Eighth avenue, San Francisco, ate his dinner, and, pursuant to the instructions of his employer, returned to the store, unlocked the door, allowed the electrician to enter, and remained there from 7 o'clock until 10, at which time the electrician finished his work and departed. The decedent then locked the store and boarded a street car to go home. On the way home, and while transferring from one car to another, he slipped and fell on the street or curb, cutting his eye and chin. Believing that his injuries were not serious, he went to work the next day, but on the day following grew worse and consulted a doctor. The injuries rapidly developed into a case of erysipelas and on May 31, 1927, he died.

It is well settled, as petitioner contends, that ordinarily employees who suffer injuries while going to or returning from their place of work are excluded from the benefits of said act, for it is held that they are not at that time rendering a service growing out of or incidental to their employment. 27 Cal. Jur. 380. But the foregoing rule is not absolute. It is subject to many exceptions. As said in Makins v. Industrial Accident Commission, 198 Cal. 698, 247 P. 202, 49 A. L. R. 411:

> The rule generally known as the going and coming rule "has been considered and applied by this court in numerous cases where the person injured was employed to perform service at or in a particular plant or upon particular premises and the injury claimed to be compensable was inflicted while he was going to or returning from his place of employment, or where the employee had left the place of employment on an errand personal to himself. The general rule, *subject to many exceptions, however,* is that injuries inflicted under the foregoing circumstances are not compensable. California C. I. Exchange v. Industrial Acc. Com., 190 Cal. 433 [213 P. 257]; London Guar. & Acc. Co. v. Industrial Acc. Com., 190 Cal. 587 [213 P. 977]. Awards have

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★Hearing denied by Supreme Court.

> been affirmed by this court, however, where the facts of the case showed that the injured employee was not at the time he was injured upon his master's premises. Judson Mfg. Co. v. Industrial Acc. Com., 181 Cal. 300 [184 P. 1]. Each case must be adjudged by the facts which are peculiarly its own. Industrial accidents are produced by so many varying circumstances that it is rather unusual to find any two or more cases that may be ruled by the same legal precedent." (Italics ours.)

As the commission held, the evidence here proves that this was not the ordinary case of an employee being injured while following his usual custom of going to or coming from the place where he works. On the contrary, it shows beyond doubt that decedent was injured while returning from a special errand which he was performing under the direction of his employer and which required him to leave his home at night, after regular working hours, and called for a service outside of his regular duties as salesman, the sole purpose of which was to help his employer in the latter's business; and it was because of the relationship of employer and employee that the one requested the service and the other rendered it. Manifestly, under such circumstances, it would be a harsh and indefensible rule which would withhold compensation for an injury received by an employee in the performance of such an errand. As pointed out in Ocean Accident & Guarantee Co. v. Industrial Acc. Com., 173 Cal. 313, 159 P. 1041, L. R. A. 1917B, 336, in discussing the question of the application of the going and coming doctrine:

> "The right to an award [under the Workmen's Compensation Act] is not founded upon the fact that the *injury* grows out of and is incidental to his employment. It is founded upon the fact that the *service* he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks." (Italics ours.)

Obviously, the service decedent was performing on the night he was injured did not have its inception at the store upon his arrival there, nor did it end there immediately upon leaving. It began the instant he left his home on the errand to go to the store for the purpose of allowing the electrical work to be done; and if, as has been held, the "going and coming" rule does not apply to an employee who has sustained an injury in performing a business errand for his employer while *going* home (Sun Indemnity Co. v. Industrial Acc. Com., 76 Cal. App. 165, 243 P. 892), it would not be reasonable to hold that the rule should apply where the employee is injured while *returning* to his home from the performance of a business errand. As indicated, it was in effect held in Sun Indemnity Co. v. Industrial Acc. Com., supra, that the "going and coming" rule should not be held to apply where the employee was injured while primarily engaged in a business errand for his employer, notwithstanding that he was at the time returning home after having finished his day's work; and substantially the same principle was involved in Western Pacific R. Co. v. Industrial Acc. Com., 193 Cal. 413, 224 P. 754, except in the latter case the accident to the employee happened after leaving his home. We are of the opinion that the doctrine stated in the foregoing cases is applicable to the facts here.

In support of its contention for the application of the "going and coming" rule petitioner has cited a number of decisions of the Industrial Accident Commission, which, however, were not reviewed by the courts; also a few cases from foreign jurisdictions. But the facts of the cases cited are materially different from those of the present one, because in those cases it was shown that the employees when injured were not engaged in the performance of any special errand under instructions from their employers, but were injured while on their way to or coming from their places of employment, where they intended to work or had worked overtime, after regular hours, in the performance of their regular duties. On account of these varying circumstances we do not deem those cases in point. Makins v. Industrial Acc. Com., supra.

For the reasons above stated, we are of the opinion that the commission was fully warranted in finding that the present case is not subject to the operation of the "going and coming" rule. The award is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 528

JAMES v. HALL et al. (Civ. 4677.)

District Court of Appeal, Second District, Division 2, California. Jan. 23, 1928.

1. Constitutional law 🔑56—Lis pendens 🔑2—Declaratory Relief Act held not invalid as imposing nonjudicial duties upon court or failing to provide for lis pendens (Code Civ. Proc. § 1060).

Code Civ. Proc. § 1060, providing for declaratory relief, is not unconstitutional as imposing nonjudicial duties upon courts or as failing to give declaration effect of lis pendens.

2. Appearance 🔑20—Defendants appearing by demurrers and answers cannot complain of failure to serve with summons.

Where defendants appeared by demurrers and answers they cannot complain of failure to serve them with summons, since voluntary appearance is equivalent to personal service.

3. Judgment 🔑138(3)—Motion to set aside defaults held properly denied on ground that defendants were not served where they appeared by demurrers and answers (Code Civ. Proc. § 1060).

Court *held* not to have abused its discretion in denying motions to set aside defaults in action under Code Civ. Proc. § 1060, for declaratory relief, on ground that defendants were not served with summons, where defendants appeared by demurrers and answers.

4. Frauds, statute of 🔑139(1)—Statute of frauds is inapplicable to executed oral contract (Civ. Code § 1624, par. 4).

The statute of frauds (Civ. Code, § 1624, par. 4) has no application to an executed oral contract.

5. Judgment 🔑533—Judgment that plaintiff is owner of undivided one-fourth interest in property is not adjudication of partnership (Code Civ. Proc. § 1060).

Judgment in action under Code Civ. Proc. § 1060, for declaratory relief, that "plaintiff is the owner of an undivided one-fourth interest in" property, was not an adjudication of partnership between plaintiff and defendants.

6. Appeal and error 🔑750(1)—Assignment unsupported by argument or authority held insufficient to raise question of power of court to grant injunctive relief in action for declaratory relief (Code Civ. Proc. § 1060).

Mere assignment that trial court, in action under Code Civ. Proc. § 1060, for declaratory relief, erred in decreeing that defendants and their representatives are enjoined from transferring property declared to belong to plaintiff, unsupported by argument or authority, *held* insufficient to raise question of power of court to grant injunctive relief.

7. Injunction 🔑3—Enjoining defendant from disposing of property declared plaintiff's in action for declaratory relief held proper (Code Civ. Proc. § 1060).

In action under Code Civ. Proc. § 1060, for declaratory relief, enjoining defendants and their representatives from disposing of property declared to belong to plaintiff is purely ancillary to relief sought, and is expressly provided for in the statute.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Harry A. James against Charles J. Hall and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Will D. Gould and Norman T. Mason, both of Los Angeles, for appellants.

Alfred W. Hare and Albert E. Dunning, both of Los Angeles, for respondent.

VALENTINE, Justice pro tem. [1] This is an action brought under section 1060 of the Code of Civil Procedure, entitled "Declaratory Relief." The appeal is from the judgment declaring plaintiff's rights in and to certain moving picture films and productions.

The appellants contend that this is not an action for declaratory relief, but is an unclassified proceeding and unknown to law or equity, and that the complaint does not state a cause of action, and cite section 24, art. 4, of the Constitution.

There is no merit in this contention nor in appellants' arguments to sustain it. The Supreme Court of California in Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495, decided that section 1060 of the Code of Civil Procedure was constitutional, and, in an opinion by Justice Waste (now Chief Justice), concurred in by the entire court, gives a comprehensive review of the subject of declaratory relief and of sections 1060, 1061, and 1062 of the Code of Civil Procedure (Stats. 1921, c. 463, p. 689), providing for declaratory relief in the state of California. That was an action brought by the plaintiff for a declaration of his rights under certain contracts of employment entered into with the defendants. A general and special demurrer to the complaint was sustained without leave to amend, and judgment entered dismissing the action and for costs. This judgment was reversed.

That case is so easily accessible and contains such a comprehensive discussion of the subject, and so fully answers appellants' contentions as to section 1060 of the Code of Civil Procedure upon this appeal that we deem it sufficient to adopt it as a part of this opinion by reference and only to consider the slight difference in the points involved, and call attention to the analogies. In that case the record disclosed an "actual controversy relating to the legal rights and duties of the respective parties." So does the record in the instant appeal. In that case it was urged that the sections of the Code (above) imposed nonjudicial duties upon the courts, thereby rendering the act unconstitutional; that in effect is appellants' contention here.

In that case the objection was also made that there is nothing in the act giving the declaration of the court the effect of a lis pendens; in the instant appeal it is urged by appellants that there has been no repeal of any sections of the Code by the enactment of section 1060, and that the statute of limitations and the statute of frauds still remain unchanged and function the same, notwithstanding such enactment, and that the "declaration" or judgment of the trial court is in effect a decree for specific performance. The court says, in Blakeslee v. Wilson, supra: "None of these objections [is] sound." As affecting the instant appeal, the same is true here.

In the instant appeal the findings of the court must be examined as to whether the evidence sustains them and whether they sustain the judgment, but that is another matter. There is no merit in appellants' contention that the complaint fails to state a cause of action and that the demurrers should be sustained, nor in the objection that the motion for nonsuit should have been granted.

[2] Appellants contend that no defaults should have been allowed and that the motion to set aside the defaults should have been granted, because, first, the defendants appeared by demurrers and answers; second, because no service of summons was made on defendants defaulted; and, third, because the complaint does not state a cause of action.

The third point has already been disposed of. If appellants' first contention be true, that the defendants appeared by demurrers and answers, then there is no force in the second contention, that they were not served with the summons. Voluntary appearance is equivalent to personal service. Estate of Piercy, 168 Cal. 755, 759, 145 P. 91.

[3] The record discloses:

That on the 9th day of August, 1922, the plaintiff filed his complaint in the above-entitled action and that the summons, with a copy of the complaint, was delivered to defendants Charles J. Hall, Will D. Gould, and Edward H. Hall, a minor, by the clerk of attorneys for the plaintiff without comment, and within the time allowed by law, said defendants served and filed their demurrers and answers to the complaint, said minor appearing by his guardian ad litem duly appointed. That the demurrers were overruled and the case set for trial, and was tried before Hon. Wm. D. Dehy sitting in department 4 of said superior court, on April 4, 5, and 6, 1923. That at the trial the plaintiff introduced evidence both oral and documentary, and rested the case, and thereupon the defendants, and each and all of them, moved for a nonsuit, which was granted as to defendants Will D. Gould and Edward H. Hall, and thereupon the following statements and proceedings were had in open court, to wit:

"Mr. Dunning: I take it that the Bone-Dry Federation remains?

"The Court: I understood there is a default judgment against that defendant.

"Mr. Gould: We challenge the default judgment. There has never been a service on us, and I don't see how the sheriff could report service. If there is any default judgment, we ask that it be set aside and vacated now, and we include in the motion for nonsuit the Bone-Dry Federation, because we do not want to leave a tangle there.

"The Court: On that last proposition we will open that to-morrow and look over the return of summons.

"Mr. Hare: Before the ruling is made on that, we would want to produce the proof of service. * * *"

The declaration of the attorneys for plaintiff then made in open court was based alone upon the statement in the affidavit of said clerk of the attorneys for the plaintiff, to wit:

"Name of Defendants Served.	Date of Service.
Charles J. Hall	Aug. 10, 1922.
Will D. Gould	Aug. 10, 1922.
Bone-Dry Federation, a voluntary association, by service upon Will D. Gould and Charles J. Hall as president and secretary and treasurer, respectively	Aug. 10, 1922.
Charles J. Hall & Son, a partnership, by service upon Charles J. Hall, one of the partners	Aug. 10, 1922.

"My fees for service are $2.00
"Sept. 11, 1922. Donald M. Redwine."

No other service of summons appears of record in said action.

That in accordance with the suggestion of the court, upon the convening of the court the day following, the attorney for the defendant made a motion to set aside the defaults of the Bone-Dry Federation, a voluntary association, and Charles J. Hall & Son Productions, a copartnership, on the ground of insufficient and inadequate service of said defendants. Upon hearing arguments thereon, the court denied said motion and suggested to counsel for the appearing defendants that the proper way to make a motion for setting aside said defaults is upon affidavits and the five days' notice required by the law. It appears that the entry of said default is in the words and figures as follows:

"In this action the defendants Bone-Dry Federation, a voluntary association, and Charles J. Hall & Son Productions, a copartnership, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint, on file herein and the time allowed by law for answering having expired, the default of said defendants, in the premises is hereby duly entered according to law.

"Attest my hand and seal of said court, this 13th day of October, 1922.

"L. E. Lampton, County Clerk,
"By S. Cole, Deputy."

Notices of motions to set aside the defaults of defendants Bone-Dry Federation and Charles J. Hall & Son Productions were given and made by appearing defendants Will D. Gould, Charles J. Hall, and Edward H. Hall, together with their several affidavits, on April 11, 1923.

Said motions, each and all of them, came on regularly for hearing in department 16 of said court on April 19, 1923, and were heard orally on that day, and the court ruled that defendants would be required, according to section 473 of the Code of Civil Procedure, to accompany their said motions with copies of their proposed amended answers, and thereupon allowed the defendants five days to file amended and supplemental motions without waiving the motions already made and to accompany said motions by copy of said proposed amended answers and to file briefs in said matter within five days, and thereupon case to stand submitted.

Notices of motions to set aside defaults and alleged judgment and to amend answers and for leave to file amended answers of the several defendants were duly served and filed in said matter on the 11th day of April, as aforesaid, and briefs of the respective parties were duly served and filed within said time, and thereupon the matter stood submitted on said 24th day of April, 1923, instead of on April 26, 1923 [sic], and thereafter, on the 2d day of May, 1923, said motions and all of them were denied by the court.

The several notices of motions and affidavits and amendments and supplements and proposed amended answers were similar and alike except as to names and the affidavits of the minor alleging the fact that he had become of the age of 21 years prior to the trial.

The foregoing shows the careful and painstaking attention on the part of the trial court and the judge sitting in the law and motion department. We find no error in the rulings nor abuse of discretion in the decision. Morrissey v. Gray, 162 Cal. 638, 124 P. 246; Colquhoun v. Pack, 28 Cal. App. 319, 152 P. 319.

[4] Appellants contend that the complaint alleges that the action is based upon an oral contract or agreement and claims that it involves more than $200, and is in violation of paragraph 4 of section 1624 of the Civil Code, and is void. A full and sufficient answer to this contention is found in the fact that it was alleged, and determined by the trial court, that the plaintiff had fully performed all of the things to be performed by him, which was sufficient to take it out of the statute. The statute of frauds has no application to an executed oral agreement. Freitas v. Freitas, 31 Cal. App. 16, 19, 159 P. 611, 613; Bates v. Babcock, 95 Cal. 479, 488, 30 P. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133.

[5] As to appellants' assignment of error that the court erred in adjudging a partnership between the defendants or any of them, the court made no such adjudication. The judgment merely declared:

> "That plaintiff is the owner of an undivided one-fourth interest in and to the motion picture film and production, formerly known as 'the Trumpet Call,' later known as 'Loyalty,' and now known as 'When Right Meets Might.' Said interest to be free from all indebtedness and incumbrances."

There is no force in appellants' argument that this is a "judgment that the property is owned by partners, one-fourth by the plaintiff and three-fourths by the defendants." It is true that the court in its findings of fact says "that at all times mentioned in the plaintiff's complaint said defendant Bone-Dry Federation was a copartnership between Will D. Gould and Charles J. Hall, two of the defendants herein who did business under the fictitious firm name of Bone-Dry Federation," but this is far different from a parnership between plaintiff and defendant. As an error in a statement of fact, assuming it to be such, it was not an error prejudicial to appellants from which they suffered any substantial injury, nor any injury; but appellants do not raise this question; they complain that the court erred in adjudging a partnership, and, as stated above, the court made no such adjudication.

[6] Finally, appellants specify as error of law that the trial court erred in giving and making a decree and judgment that "defendants, their attorneys, or other representatives are and each of them is hereby enjoined from transferring or in any manner disposing of the undivided one-fourth interest in and to said motion picture film and production which is hereby declared to be the property of plaintiff herein."

It may be inferred that appellants intended to raise the question of the power of the court in an action under section 1060 of the Code of Civil Procedure to grant injunctive relief. We think this an insufficient presentation of the point, unsupported as it is by argument or authority directed to the question involved. In People v. Chutnacut, 141 Cal. 682, 75 P. 340, cited in People v. Zarate, 54 Cal. App. 372, at p. 375, 201 P. 955, 956, the Supreme Court says: "If counsel will not take the time to point out * * * the law which he invokes, we will not do so." If such an inference as to appellants' intention should be without foundation, then all that we might say on the subject would be mere obiter dictum.

[7] We are also of the opinion that the relief here granted is purely ancillary to the relief sought and decreed and is expressly provided for in the Code section under consideration. The allegations and proof were sufficient to support it.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

89 Cal. App. 290

PEOPLE v. PIERCE. (Cr. 1580.)★

District Court of Appeal, Second District, Division 2, California. Feb. 16, 1928.

Hearing Denied by Supreme Court April 16, 1928.

Criminal law 🔑1071—Failure to present application to trial court stating grounds of appeal required dismissal of appeal (Pen. Code, § 1247).

Defendant's failure to present application to trial court, stating in general terms the grounds of appeal and points on which he relied, as required by Pen. Code, § 1247, required dismissal of the appeal, even if grounds of appeal were fully stated in defendant's motion for new trial.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

W. E. Pierce was convicted of the unlawful possession of stills, coils, and apparatus used in the manufacture of intoxicating liquor, and he appeals. On motion to dismiss appeal. Appeal dismissed.

C. W. Benshoof, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Dep. Atty. Gen., for the People.

THOMPSON, J. This appeal is from a judgment of conviction of the unlawful possession of stills, coils, and apparatus used in the manufacture of intoxicating liquor, and from an order denying a motion for a new trial. The respondent has made a motion to dismiss the appeal upon the ground that appellant failed to "present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies," as required by section 1247 of the Penal Code. It is there also said:

> "If such application is not filed within said time (five days from the time the appeal is taken) the appeal is wholly ineffectual and shall be deemed dismissed."

We recently held that this section is applicable to appeals taken subsequent to the amendment (St. 1927, p. 1047) of section 1246 of the Penal Code and prior to the promulgation of rules by the judicial council governing the time and manner of preparing the record on appeal. People v. McClellan (Cal. App.) 263 P. 841.

The appellant seeks to escape the force of the statutory provision that the appeal is wholly ineffectual and shall be deemed dismissed upon his failure to present the application by urging that the grounds upon which he relies are fully stated in his motion for a new trial to which reference is made in his notice of appeal. It is said in People v. Flaherty, 61 Cal. App. 775, 215 P. 699:

> "Several times it has been held that the provisions of said section 1247 are mandatory."

Very much the same argument was made in that case as is made here, yet the court concluded that the appeal was "wholly ineffectual." We are of like opinion as to the present appeal. For further authorities to the same effect, reference may be had to those cited in People v. McClellan, supra.

Counsel also relies upon a statement found in the case of People v. McDougal, 74 Cal. App. 666, 241 P. 598, as follows:

> "The Attorney General moved to dismiss the appeal upon two grounds, the first of which was that the application required by section 1247 of the Penal Code had not been filed. The record did not at first contain this application, but it appears that it has since been filed, and has been added to the record on appeal, so that no further mention need be made of this point."

This statement does not bear the construction put upon it by appellant, but means that the application has since been made a part of the record on appeal. This construction is borne out by an inspection of the record, which discloses the fact that the application was filed in the trial court on the same day that the appeal was taken, but was not made a part of the record on appeal until some time after the transcripts were filed here, and then by an amended clerk's transcript.

Appeal dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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89 Cal. App. 250

PACIFIC READY-CUT HOMES, Inc., v. BRACHT. (Civ. 5002.)

District Court of Appeal, Second District, Division 1, California. Feb. 14, 1928.

1. Appeal and error 🔑171(1)—Court might consider appeal on theory that pleadings conformed to evidence, and that findings covered issues, in view of theory of trial and silence of briefs on questions.

Court of Appeal might consider appeal on theory that pleadings conformed to evidence that check was given as payment under contract, and that findings covered such issue where case was tried on the theory that pleadings covered issues, and briefs did not make point of absence of allegations or findings on question.

2. Sales 🔑92—Consideration for check given as payment failed with cancellation of contract by mutual agreement.

Consideration for check given as payment under contract to buy ready-cut house wholly failed when contract was canceled by mutual agreement.

3. Bills and notes 🔑26—Where buyer's check, given as payment under purchase contract, is dishonored, seller may sue on check, check being conditional agreement to pay (Civ. Code, § 3311).

Where buyer's check, given to seller as payment under purchase contract, is dishonored,

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★Hearing denied by Supreme Court.

seller may sue on check, and need not sue for breach of contract under Civ. Code, § 3311, since check is agreement of drawer to pay, if bank refuses payment.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action on dishonored bank check by Pacific Ready-Cut Homes, Inc., against E. P. Bracht. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

HAHN, Justice pro tem. The case which gives rise to this appeal is one wherein the appellant as plaintiff filed an action in the superior court in and for the county of Los Angeles, to recover judgment on a check for the sum of $657, which check, it was alleged, was issued and for a valuable consideration delivered to the plaintiff by the defendant and respondent. The complaint sets forth the usual allegations of presentation and dishonor of the check by the bank on which it was drawn, and the subsequent demand upon the maker for payment, and his refusal to make payment.

The answer admits the execution and delivery of the check, as also the demand and refusal of payment, but denies that the check was given for a valuable consideration. The answer contains in addition in paragraph IV the following allegations:

> "And further answering the complaint of plaintiff, defendant alleges that on or about the 10th day of September, 1923, at the city and county of Los Angeles, state of California, the said plaintiff made, executed, and delivered to this defendant its contract in writing, wherein and whereby said plaintiff agreed to sell and deliver to said defendant a ready-cut house according to the plans and specifications set forth in said contract, for the sum of $657; that thereafter, to wit, on or about the 11th day of September, 1923, said contract was by mutual consent canceled, and the said plaintiff agreed with said defendant to make, execute, and deliver to him a contract for the delivery to defendant of another house of the same model, but complete in every detail; that said plaintiff, its agents, servants and employees, was informed by said defendant, at the time of said agreement to purchase said ready-cut house, that he was a postal employee, and that he had made application for his leave of absence, to begin at a certain date, and that the erection of said house was to take place during his leave of absence; that, at the request and under the instructions of said plaintiff, its agents, servants and employees, he went to the office of said plaintiff on several occasions to complete the sale and purchase of this new house, but said plaintiff failed and refused to keep appointments made with said defendant for such a length of time that it was impossible thereafter to procure said ready-cut house in time for its erection during this defendant's leave of absence, and said defendant thereupon informed said plaintiff that, by reason of the fact that he could not get delivery of said house, he could not accept the same."

Findings and judgment went for the defendant, from which the plaintiff prosecutes this appeal.

Appellant, in urging a reversal of the judgment, contends that the following findings are not supported by the evidence in the case:

> (a) "Said contract was, by mutual consent, canceled." (b) "There was no consideration for said check." (c) "That said plaintiff agreed with said defendant to make, execute and deliver to him a contract for delivery of another house of the same model, but complete in every detail. * * * It was impossible to procure said ready-cut house during defendant's leave of absence."

[1] An examination of the record discloses a singular situation with regard to the pleadings, in that there is no allegation in either complaint or answer that the check sued on and set forth in the complaint had any connection with the contract referred to in the answer; nor is there anything in the findings to indicate that the check was given in fulfillment of defendant's obligations under the contract.

However, it clearly appears from the record that the case was tried by the court and litigants upon the theory that the pleadings were sufficient to raise the issues which the findings attempt to cover; nor do counsel in their briefs make a point of these missing allegations from the pleadings, or the lacking connection in the court's findings. We will therefore consider the points raised upon the theory that the pleadings conform to the evidence and the findings cover the material issues.

[2] The evidence without conflict shows that the check sued on was in fact given by defendant to plaintiff in payment of the sum agreed upon in the contract as the price defendant was to pay for the ready-cut house plaintiff contracted to manufacture and deliver to him. Upon the question of the cancellation of the contract by mutual agreement, there is marked conflict in the evidence. However, there is sufficient evidence in the record to support this finding, as well as the finding that the parties agreed to execute a new contract which was never consummated.

Connecting the check with the contract, it would necessarily follow that, with a cancellation of the contract by mutual agreement, the consideration for the check wholly failed. From such facts the conclusion would necessarily follow that there was no consideration for the check.

[3] Respondent occupies his entire brief with citations to support his contention that plaintiff has mistaken his remedy in suing on the check; and urges that the cause of action, if any plaintiff has against the defend-

ant, is a suit for damages for breach of agreement to buy personal property under section 3311, Civil Code.

We cannot agree with respondent in this contention. While the check on its face is an order drawn upon a third party to pay to the payee or indorsee of the check the amount declared on its face, the law makes it an agreement on the part of the maker to pay the amount of the check to the payee or indorsee, if the bank upon which the check is drawn refuses payment. This, of course, presumed a valuable consideration. John M. C. Marble Co. v. Merchants' National Bank, 15 Cal. App. 347, 115 P. 59; Bank of Venice v. Clapp, 17 Cal. App. 657, 121 P. 298; Equitable National Bank v. Griffin & Skelley Co., 113 Cal. 692, 45 P. 985.

If the situation required, we are of the opinion that this court has authority under section 956a, Code of Civil Procedure (Stat. 1927, p. 583), to remand the case to the trial court to cause such amended pleadings to be filed and findings drawn as would correctly support the judgment. This would seem to place undue emphasis on the form rather than the substance.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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88 Cal. App. 784

DELANEY PRODUCING & REFINING CO. v. CRYSTAL PETROLEUM PRODUCTS CORPORATION et al. (Civ. 3391).

District Court of Appeal, Third District, California. Feb. 2, 1928.

1. Corporations 🔑547(1)—Corporation creditor as such has no lien on its property.

Plaintiff as mere creditor of corporation has no lien on corporation property.

2. Sales 🔑353(1)—Complaint alleging corporation's indebtedness to plaintiff for merchandise sold held to state cause of action for merchandise sold and delivered.

Complaint against corporation, alleging defendant was indebted to plaintiff for merchandise sold in certain sum, for amount of which judgment was prayed, *held* to state good cause of action for merchandise sold and delivered.

3. Creditors' suit 🔑11(1), 13—Creditor's suit will not lie until claim is reduced to judgment and legal remedies exhausted.

Creditor's suit in equity will not lie until his claim has been reduced to judgment and his legal remedies have been exhausted.

4. Corporations 🔑557(5)—Equity will not appoint receiver of property of corporation unless clearest evidence shows necessity for such action for protection of all parties concerned.

Equity courts will not appoint receivers of property of corporation without clearest evidence of absolute necessity for such extraordinary action for protection of all parties concerned, since appointment of receiver on application of creditor is tantamount to dissolution of corporation and displaces board of managers.

5. Corporations 🔑609—Without express statutory authority, equity cannot dissolve corporation, wind up its affairs, or sequester its property.

In absence of express statutory authority, court of equity has no power to dissolve corporation, wind up its affairs, or sequester its property.

6. Corporations 🔑554—Equity held unauthorized to appoint receiver for corporation on application of creditor who had not reduced claim to judgment and had not made directors parties (Code Civ. Proc. § 564, subd. 5).

Equity *held* without power under Code Civ. Proc. § 564, subd. 5, to appoint receiver for debtor corporation on application of mere creditor who had not reduced claim to judgment and exhausted legal remedies and had not made directors parties to action, since such appointment would amount to usurpation of powers of directors and virtual dissolution of corporation.

7. Corporations 🔑554—Creditor of corporation before reducing claim to judgment cannot, under "trust fund doctrine," maintain equitable action to appoint receiver for corporation on mere allegation of insolvency (Civ. Code, § 3441).

Mere creditor of corporation who had not reduced claim to judgment *held* not entitled, under Civ. Code, § 3441, to claim lien on assets of corporation under "trust fund doctrine" so as to entitle him to maintain equitable action to appoint receiver for debtor corporation on mere allegation of insolvency.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Suit by the Delaney Producing & Refining Company against the Crystal Petroleum Products Corporation and another. From a judgment dismissing the action as to defendant Thomas C. Job, plaintiff appeals. Affirmed.

Robert M. Pease, of Los Angeles, for appellant.

Romaine L. Hogan and Ovila N. Normandin, both of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment of dismissal as to the codefendant Thomas C. Job, entered upon failure of the plaintiff to amend his complaint after a demurrer had been sustained for failure to state facts sufficient to constitute a cause of action.

[1] An action in assumpsit was brought against the defendant Crystal Petroleum Products Corporation for the value of certain petroleum products alleged to have been sold and delivered. This suit for the value of merchandise sold was combined with an effort

to allege facts constituting an equitable action based upon a demand under the "trust fund doctrine" to reclaim alleged assets belonging to the defendant corporation "for the benefit of plaintiff and all other creditors similarly situated." Plaintiff sought to accomplish this purpose by applying for the appointment of a receiver to take charge of the assets of the corporation, and by an effort to procure a decree of court declaring a certain assignment of lease and option to purchase real property, which were held by the defendant Thomas C. Job, to be a mortgage, and praying that the equity therein be held by said Job as a trustee for the benefit of the creditors and stockholders of said defendant corporation. The directors of the corporation were not parties to the action. The plaintiff's claim had not been reduced to the form of a judgment, nor had any attempt been previously made by the plaintiff to exhaust its legal remedies. As a mere creditor, he had no lien upon the corporation property.

[2] The complaint alleged that the plaintiff and defendant Crystal Petroleum Products Corporation were duly organized corporations, with their principal places of business at Los Angeles; that the defendant corporation was indebted to plaintiff for merchandise sold in the sum of $16,513; that the defendant corporation was organized for the purpose of conducting an oil-refining business, and to manufacture gasoline and petroleum products; that said defendant corporation had sold to several hundred individuals the stock of said corporaton, of the aggregate par value of $878,370, and had borrowed money and incurred indebtedness represented by both secured and unsecured accounts in the sum of $212,000; that the assets of said defendant corporation were of uncertain value, consisting of the manufacturing plant and other property, and upon information and belief it was alleged that the assets did not exceed the sum of $75,000, and that the corporation defendant was therefore insolvent and had ceased active business operations. It was further alleged that practically the only tangible assets of the corporation consisted of a certain lease and option to purchase 20 acres of land upon which the manufacturing plant of the corporation was constructed; that this option provided for the purchase of said land at the agreed sum of $1,000 per acre, while the actual value of said land was alleged to be $2,500 per acre; that said lease and option depended upon the payment of regular monthly rent therefor; that said lease and option had been hypothecated to the defendant Job as security for the payment of an indebtedness of $35,000 owing to him from the defendant corporation, which was due and unpaid; that the defendant Job had notified the defendant corporation that, unless said indebtedness was paid before October 29, 1924, the lien upon said lease would be foreclosed. It was alleged that it was therefore necessary to institute this action to reclaim and preserve the interest of the defendant corporation in said lease and option, and to thus prevent a transfer thereof to some innocent purchaser; that said lease and option is of the value of $65,000, and that after demand the "defendant corporation by its officers and board of directors refused and still fails and refuses to claim or exercise ownership * * * over said option, and thereby is depriving the plaintiff and other creditors * * * of the principal fund or source from which said unsecured liabilities * * * may be paid." It was further alleged that the manufacturing plant of said defendant corporation was operated for only a few months, and then ceased to operate, and that ever since that time it stood and still remains idle and unproductive, and that the defendant corporation was insolvent. The prayer of the complaint demands judgment against the defendant corporation for the sum of $16,513; that a decree be rendered declaring that the defendant Job holds said assigned lease and option as a mortgage, in trust for the defendant corporation and its creditors, and that a receiver be appointed to take charge of the property of said corporation, and preserve and disburse its assets for the benefit of its creditors and stockholders.

Clearly, this complaint states a good cause of action against the defendant corporation for merchandise sold and delivered. But this defendant suffered default, and is not involved in this appeal. By means of this action plaintiff seeks to discover assets belonging to the defendant corporation in the hands of Job, to appoint a receiver and oust the directors, and assume the management of the corporation business and procure a distribution of the assets among its creditors without having first reduced its creditor's claim to a judgment, and without making the legally constituted directors of the corporation parties to the action. Equity has no such jurisdiction. We are therefore of the opinion that the demurrer was properly sustained.

The appellant contends that the trial court erred in dismissing the action against the defendant Job, claiming that, pursuant to the "trust fund doctrine," a creditor holds a lien upon the assets of an insolvent corporation and may maintain an action to reclaim property belonging to a corporation, to which it fails and neglects to assert title.

It will be observed that, while it is alleged that the defendant corporation is insolvent, it appears from the complaint that stock has been sold of the value of $878,370, and that the total indebtedness was but $210,000. The value of the manufacturing plant and other assets are not given. The assignment of the lease and option was made to the defendant

Job for a valid existing debt of the corporation. No actual fraud is alleged. While it is stated that the manufacturing plant had ceased operations and was inactive and unproductive, it appears that there was a legally constituted board of directors in existence, whose lawful duty it was to assume charge of the affairs of the corporation and liquidate its obligations. No inability of or dissensions among the members of the board were alleged. A mere failure was charged on the part of the board to assert a claim to a questionable asset of the corporation.

[3-6] A creditor's suit in equity will not lie until his claim has been reduced to a judgment and his legal remedies have been exhausted. Roberts v. Buckingham, 172 Cal. 458, 156 P. 1018; 7 Cal. Jur. 793, § 6; 8 R. C. L. 19, §§ 23, 24; 4 Pomeroy's Eq. Jur. (4th Ed.) 3355, § 1415, page 3602, § 1533. In 4 Pomeroy's Equity Jurisprudence, 3602, § 1533, it is said:

> "It is almost the universal rule that a creditor's bill, whether to set aside a fraudulent transfer or to reach equitable assets, will not lie in behalf of mere general creditors who have not prosecuted their claims to judgment, nor in any other manner acquired a lien upon the debtor's property."

At page 3611 of the same volume it is said:

> "As a rule of equity practice, the courts are very reluctant to appoint receivers of the property of corporations, upon the idea that it is a practical displacement of the board of directors. It is an assumption of the function of the directors. It displaces the board of managers placed there by the stockholders, * * * and before the court will take charge of the corporation and thus displace its chosen directors and managers, it ought to have the clearest evidence of the absolute necessity for such extraordinary action for the protection of the creditors, stockholders, and all parties concerned. It is no slight matter for a court of chancery to lay its hand upon large business enterprises, take them out of the control of capacity and experience, and charge them with expenses and commissions" incident to the appointment of a receiver.

In effect, the appointment of a receiver, upon the application of a creditor, is tantamount to the dissolution of a corporation. Fischer v. Superior Court, 110 Cal. 129, 42 P. 561. "It is well settled, with scarcely a dissenting voice, that, in the absence of express statutory authority, a court of equity has no power to dissolve a corporaton, or wind up its affairs or sequester its property." 4 Pomeroy's Eq. Jur. 3615, § 1540; Boyle v. Sup. Court, 176 Cal. 671, 170 P. 1140, L. R. A. 1918D, 226; Lieberman v. Superior Court, 72 Cal. App. 18, 36, 236 P. 570. It is the settled law of California that a court of equity has no power to appoint a receiver for a corporation, upon the application of a mere creditor, until after he has first reduced his claim to a judgment and exhausted his legal remedies, for the reason that this would amount to an usurpation of the powers of the directors, and a virtual dissolution of the corporation. La Société Francaise, etc., v. District Court, 53 Cal. 495; Smith v. Superior Court, 97 Cal. 348, 32 P. 322; Fischer v. Superior Court, 110 Cal. 129, 141, 42 P. 561; Murray v. Superior Court, 129 Cal. 628, 62 P. 191; Elliott v. Superior Court, 168 Cal. 727, 145 P. 101.

In the French Bank Case above cited, a receiver was appointed upon the complaint of a creditor for money expended in behalf of the corporation. Similar to the instant case, it was further alleged that the corporation was insolvent; that the bank commissioners had examined the bank and so reported; that its liabilities exceeded its assets to the amount of $800,000; that, through improper conduct of the manager of the corporation, $700,000 of its assets had been improperly expended, and that there was grave danger of its control falling into the hands of designing and irresponsible persons who would dissipate the funds and bankrupt the corporation. On appeal the order appointing the receiver was vacated as an unwarranted exercise of equitable jurisdiction. Chief Justice Wallace, writing the opinion, said:

> "There is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management and substitutes its own, and assumes, * * * 'to do all and everything necessary * * * to protect the rights of the creditors and depositors.' * * * 'It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations, or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction.' Of course, it is not to be doubted that the trustees of a corporation, * * * are subject to the control of courts of equity. * * * But even in such a proceeding as that, *the trustees must of course be made parties defendant.* * * * There is no inherent power in * * * courts of equity, to appoint a receiver in such a case as that presented by [this] complaint."

Further commenting upon the statutory authority for the appointment of a receiver, under certain circumstances, as provided by section 564 of the Code of Civil Procedure, Justice Wallace says:

> "The case * * * is not included in the sixth subdivision of this statute, * * * the appointment here not having been made '*after judgment.*' * * * The particular subdivision, however, which is supposed to confer the power

* * * is the fifth—being the only portion of the statute in which corporations are named. * * * There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver—such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute of this state, * * * which undertakes to confer upon a private person, either as stockholder or creditor the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver."

The effect of the foregoing language construing section 564, subd. 5, Code of Civil Procedure, which reads, "A receiver may be appointed * * * (5) in the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights," is to assert that, even if the corporation is insolvent, a mere creditor may not maintain an action in equity and procure the appointment of a receiver to take the custody of property and the management of a corporation away from its legally constituted directors, amounting to a virtual dissolution of the corporation, without having first reduced his claim to a judgment and exhausting his legal remedies, and particularly without making the alleged malefactors parties to the action. This would have been the exact result in the instant case if plaintiff's equitable action were permitted to stand.

[7] Nor does the "trust fund doctrine" aid respondent in the instant case. If we correctly understand its claim to mean that this fiction has bestowed upon it a sort of creditor's lien upon the assets of the corporation defendant, which entitles him to maintain an equitable action upon a mere allegation of insolvency, without first reducing his claim to a judgment, it certainly has mistaken his remedy. According to this trust fund doctrine, some authorities in America have held that the capital stock of a corporation, or the assets of an insolvent corporation representing its capital stock, constitutes a trust fund for the benefit of creditors, upon which they have an equitable lien for the payment of their claim. 8 Fletcher's Enc. of Corpo. 8635, §§ 5027–5030. But this theory of attaching a lien to the assets of a corporation for the payment of creditor's claims has been greatly modified, if indeed it has not been totally repudiated in America. And it never was the law in England. In the last text cited, at page 8643, it is said, "The doctrine in general has been very much criticized." Prof. Pomeroy refers to the theory as one based on analogy and metaphor. He says, in 3 Pomeroy's Equity Jurisprudence, § 1046, "They are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor." The extent to which the so-called "trust fund" applies to corporations, is explicitly asserted in a series of United States Supreme Court decisions, and may be epitomized in the statement of Justice Field in the case of Fogg v. Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. Ed. 721, wherein he concludes by saying, "Such a doctrine has no existence." And in the leading case of Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. Ed. 1113, it was held that a contract creditor could not maintain an action in equity to compel a corporation to respond to his claim, until it had first been reduced to a judgment. Mr. Justice Brewer there says, with respect to the trust fund doctrine:

> "We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law, it is as distinct a being as an individual is, and is entitled to hold property * * * as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them. * * * The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

The extreme limit to which this doctrine may be said to extend is that—

> "The capital stock or assets of a corporation are a trust fund for the benefit of the corporate creditors when the corporation has either suspended its business, or has become insolvent, and its assets have been placed in the possession of a court of equity and are in the course of administration for final settlement and distribution." 4 Thompson on Corporations (2d Ed.) 39, § 3421.

In support of its claim of right to maintain a creditor's bill in this action, the appellant relies upon the cases of Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 P. 765, 29 Am. St. Rep. 149; Miller v. Kehoe, 107 Cal. 340, 40 P. 485; First National Bank v. Eastman, 144 Cal. 487, 493, 77 P. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; and Aigeltinger v. Einstein, 143 Cal. 609, 77 P. 669, 101 Am. St. Rep. 131. There appears to be nothing in these cases in conflict with the general rule heretofore announced with respect to the "trust fund doctrine." In Blanc v. Paymaster Mining Co., supra, it appears that the Esperanza Mining Company was a foreign corporation, which was indebted to plaintiff in the sum of $6,000 represented by two promissory notes. It was alleged that suit had been brought against this company, the claim reduced to judgment, and an attachment issued therein. Subsequently all the property of this company was transferred to one Blaisdell as trustee for the benefit of the creditors. Blaisdell purported to convey this property for a nominal consideration to the principal officers and stockholders of the Esperanza Company, who proceeded to organize the defendant corporation for the alleged purpose of defrauding creditors and defeating the plaintiff's judgment. In the opinion it was said: "The court below was justified in finding that plaintiff recovered * * * the judgment *alleged in the complaint*." Apparently the facts of that case brought it directly within the rule announced which requires a corporation creditor to pursue his legal remedies before he may resort to the aid of a court of equity. This was the view which the Supreme Court evidently took of the facts of that case, for it was cited with approval in support of a declaration of the general rule, in its order denying a rehearing of the case of Benson v. Harriman, 55 Cal. App. 483, 491, 204 P. 255. So, also, the case of First National Bank v. Eastman, supra, was against an individual and not a corporation. It is true that the opinion, in commenting upon the general rule, referred to an exception to that rule, as follows (page 493 [77 P. 1046]):

> "Where the defendant is a nonresident, a personal judgment cannot be obtained against him, and therefore the fact of his being a nonresident creates an exception to the rule, and such action can be maintained without the creditor having [first] obtained a judgment."

But that case has no application to the facts of the instant case, for the defendant corporation in this case was alleged to be a resident of the county of Los Angeles, where its principal place of business and its property was located. It was therefore not a nonresident of California, and there was no reason why a creditor could not serve it with process and prosecute his claim to judgment in a court of law, so as to procure a lien upon the corporation property.

Likewise, in the case of Miller v. Kehoe, supra, the defendant was an individual and not a corporation. It was there alleged that the defendant "had commenced proceedings in insolvency, which prevented plaintiffs from obtaining judgments against him," and asked to vacate a fraudulent conveyance and assign the property to the estate of the insolvent for the benefit of creditors. This prayer was denied. The court held that "the assignee in insolvency was not entitled to recover the property as assets of the insolvent estate." The question as to the right of a creditor to maintain an action in equity without first reducing his claim to judgment was not discussed or considered. And in the case of Aigeltinger v. Einstein, 143 Cal. 609, 77 P. 669, 101 Am. St. Rep. 131, cited by appellant, the court quotes with entire approval from Mr. Pomeroy, as follows:

> "'It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law. The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he had obtained his judgment.' * * * The courts, however, all agree and have held that there are exceptions to the general rule stated above. Whether the case of an attaching creditor who has by his writ secured a lien on the property, but as yet has no judgment, comes within the exception is a question about which the decisions are not harmonious."

Section 3441 of the Civil Code specifically provides:

> "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation."

For the foregoing reasons the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

89 Cal. App. 267

WEBB et ux. v. TISCHAUSER et al.

(Civ. 3401.)

District Court of Appeal, Third District, California. Feb. 15, 1928.

1. Appeal and error ⚷987(4)—On appeal by automobilist, appellate court has duty to determine sufficiency of evidence to support jury's finding of lack of pedestrian's contributory negligence.

In action by pedestrian against automobilist for personal injuries, in which jury found against defense of contributory negligence, on appeal by defendant automobilist, appellate court has duty to examine evidence and find whether it was insufficient to sustain such conclusion.

2. Municipal corporations ⚷706(7)—Evidence held not to show contributory negligence as matter of law by pedestrian injured by automobilist.

In action by pedestrian for injuries by automobilist, evidence *held* not to show contributory negligence as matter of law.

3. Municipal corporations ⚷706(7)—That pedestrian allowed only 5 feet of clearance between himself and passing automobile held not to show contributory negligence as matter of law.

In action by pedestrian against automobilist for injury, where automobilist drove to left of middle of street at street intersection to avoid collision with another automobile, fact that pedestrian, who originally was standing 10 feet from curb, jumped back, and allowed only 5 feet of clearance between himself and passing automobile, *held* not to constitute contributory negligence as matter of law.

4. Appeal and error ⚷187(2)—Wife's joining plaintiff in action for injuries by automobile, where objection was first raised on appeal, held not reversible error (Code Civ. Proc. § 430).

Under Code Civ. Proc. § 430, fact that pedestrian's wife joined him in action against automobilist for injuries and alleged loss of comfort, assistance, support, and aid of her husband, where objection was first raised on appeal, did not constitute reversible error, especially in view of fact that his wife did not testify, and that no evidence was introduced by plaintiffs that did not properly support cause of action in favor of husband alone.

5. Trial ⚷295(11)—In action by pedestrian, joined by wife, against automobilist, use of word "plaintiffs" in instructions held not reversible error, in view of instructions as whole.

In pedestrian's action against automobilist for personal injuries, in which objection to fact that pedestrian's wife, joined as plaintiff, was first raised on appeal, use of word "plaintiffs" in forms of verdict and in court's instruction that, if jury found for plaintiffs, in estimating actual compensatory damages, to consider certain elements, in view of fact that all elements of damage set out related only to damage to husband, and another instruction clearly basing right to recover on husband's injury alone, was not error requiring reversal.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. R. Webb and wife against H. V. Tischauser and Fred W. Myers. Judgment by default against the second-named defendant. From a judgment for plaintiffs, the first-named defendant appeals. Affirmed.

Howard Prowse and Burton Briggs Crane, both of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondents.

PULLEN, Justice pro tem. This is an action for personal injuries growing out of an automobile accident at the intersection of Avenue 18, North Broadway and North Spring streets in the city of Los Angeles. Defendant Myers did not appear at the trial, and judgment by default was taken against him, but from the verdict of the jury in favor of the plaintiffs and against defendant Tischauser, he (Tischauser) appeals.

Avenue 18 runs in an easterly and westerly direction; North Spring street runs in a northerly and southerly direction, terminating at the intersection of Avenue 18. North Broadway enters the intersection of Avenue 18 and North Spring street from a westerly direction, bisecting the angle of intersection of Avenue 18 and North Spring street, and, continuing across said intersection, proceeds in an easterly direction at right angles. Avenue 18 forms the continuation of what would be North Spring street. A double street car track runs along North Broadway, making a wide curve swerving across the intersection formed by Avenue 18, North Broadway, and North Spring streets. A traffic button is located in the intersection, which lies somewhat to the west of the center line of North Spring street and its northern extension, called North Broadway.

On the morning in question appellant Tischauser was driving southerly along North Broadway, intending to cross Avenue 18 in a direct line down North Spring street. He stopped at the intersection of North Broadway and Avenue 18 for a north-bound street car to pass. He then proceeded on, and, in passing a south-bound street car and another automobile, passed to their left and to the left of the button, thereby causing him to drive slightly to the left of the center of the street. At that point he observed a large automobile approaching along North Broadway at a high rate of speed. He proceeded further toward the left of the street to avoid a collision. It was at that time that he first observed plaintiff, who was standing about 10 feet from the east curb of North Spring street. Immediately upon plaintiff seeing the approaching car of appellant, he jumped back about 3 feet. Appellant, observing the approaching automobile, again swerved to the left to avoid the collision, and he again turned his automobile toward plaintiff, who again jumped back about 3 feet, and almost simultaneously the collision between the two automobiles occurred. The plaintiff was struck by one of the speeding cars, and sustained the injuries complained of.

Appellant contends that respondent was guilty of contributory negligence, and that certain remarks by the court prejudiced the appellant before the jury.

[1] The question of negligence was presented by the plaintiff, and appellant submitted proof as to the question of contributory negligence to the jury, which found against him upon his contention, and it is the duty of the court, in view of appellant's appeal, to examine the evidence and find if it was insufficient to sustain such a conclusion.

In the case of Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649, the court makes the following comment:

> "The question of whether or not the pedestrian is negligent in crossing a street is one which, in the absence of express statutes regulating his conduct, must ordinarily be left to the jury, for the conduct of an ordinarily prudent person under such circumstances must be largely determined by the condition of the traffic at the particular time and place in question."

[2] The testimony in the record does not support appellant's claim that the respondent was negligent as a matter of law. The plaintiff testified, in part, as follows:

> "When I first saw the Ford coupé coming around the street car, I was about 10 feet out on Spring street going across to this corner, and I saw him come right in my direction—I don't know the speed, but it would be 20 or 25 miles an hour or more; and I saw I was in danger, so I jumped back maybe 3 feet, and he came the second time in my direction again, headed to me again. I jumped back again, and when I jumped the second time he was right on top of me, and I didn't know anything else."

Mr. William Giovanetti, a disinterested witness, testified as to what occurred in the following manner:

> "Well, I seen this Ford car coming down Broadway there, and then I seen this other Willys-Knight coming down, and so I seen this man here, Webb, I think his name is, and I seen this Ford kind of cutting the button there, coming over toward this man here, and I kind of didn't look for the cars any more, if they hit or not, but I watched Mr. Webb here when he tried to jump back, and this fellow kind of pulled out a little bit, and Mr. Webb jumped back in, and he hit him."

Appellant testified:

> "As I was passing him (respondent), the center of my car was about even with his body when this machine which was coming down the hill struck the rear end of my car with a terrific crash and threw the car completely around, turned the car around so I was facing in the opposite direction, and knocked it over on its side, on its left side." And: "Q. And how many feet from the curb line at that particular point, approximately? A. My left front wheels were probably 15 feet from the curb line, as the pedestrian had stepped back twice 2 or 3 feet. He probably stepped back about 5 feet, and was then standing about 10 feet from the curb. I was clearing him about 5 feet, running parallel with the curb."

[3] Surely, if appellant, who was in a superior position to observe what was transpiring and to judge the respective speed and distance of the approaching automobile, thought that he would clear respondent by 5 feet, if he had not been struck by the car of his codefendant Myers, the respondent would have the equal right to believe the same and act accordingly. Owing to the difference in the speed and congestion on our highways, as compared with the traffic conditions of a few years ago, what might have been considered willful negligence and careless exposure to injury at that time may now, perhaps, be considered necessary agility to keep up with the moving throng, and it cannot be declared to be contributory negligence on the part of respondent that he allowed only 5 feet of clearance between himself and the passing car.

The remarks of the trial court, to which appellant excepts, arose during the examination of medical experts on the witness stand, and had to do with the testimony of a preceding witness, both of whom were testifying as to the subject of syphilis. We have carefully read the entire record, and can find nothing to bear out the construction placed upon the remarks of the court by appellant.

[4] In a supplemental brief the question is raised for the first time that the wife of respondent, Angelica Webb, was not a proper party plaintiff, and that the complaint did not state a cause of action in her favor, and for that reason that she could not, under the circumstances, sustain any damages, and was not authorized to sue. Angelica Webb, wife and coplaintiff of respondent, J. R. Webb, alleges her sole ground of recovery as follows: "That as a consequence of the injuries of said plaintiff, J. R. Webb, plaintiff Angelica Webb, has lost the comfort, assistance, support, and aid of her husband."

This allegation was denied by appellant in his answer in the following language:

> "Denies that as a consequence of said injuries, or any injuries, the said plaintiff Angelica Webb lost the comfort or assistance or support or aid of the said plaintiff J. R. Webb."

The objection was not raised either by demurrer or motion at any stage of the proceedings, and is for the first time suggested to the court in this supplemental brief.

Section 430, Code of Civil Procedure, provides that a defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either: "4. That there is a defect or misjoinder of parties plaintiff or defendant," and section 434 of the same Code provides:

> "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

In the case of Meier v. Wagner, 27 Cal. App. 579, 150 P. 797, the plaintiffs, husband and wife, were improperly joined as parties plaintiff. The point was raised by defendants on demurrer, and, although the reviewing courts held that the demurrer should have been sustained, yet, where it was shown that the defendants and appellants had not suffered by such error, the judgment would not be reversed. The court in that case said:

> "Such misjoinder, however, in no wise prevented a full, fair, and complete trial of the issues presented, which, in the absence of the rule stated, might, without prejudice to defendant, have been included in one action prosecuted by the husband and wife as plaintiffs. The fact that the judgment and proceeds thereof are, as community property, subject to the exclusive control of the husband, constitutes a bar to a further action by him to recover the consequential damages alleged in the complaint herein. The error, since it is purely technical and did not deprive defendant of any substantial right, or affect the merits of the case, falls within the provision of section 4½ of article VI of the Constitution, which provides that 'no judgment shall be set aside, or new trial granted * * * for error as to any matter of pleading, * * * unless * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'"

In the case at bar, no claim is made by appellant that the elements of damage were not suffered by plaintiff J. R. Webb. There is no denial that plaintiff was confined to the hospital, that he was compelled to employ a physician, and that he suffered the injuries complained of, and no contention is made that the award by the jury is excessive or unreasonable.

In the case of Asevado v. Orr, 100 Cal. 293, 300, 34 P. 777, 779, the court, considering this point, says:

> "The second count in the complaint sufficiently states a cause of action against these appellants upon their undertaking, and a demurrer to the entire complaint cannot be sustained if either of the counts is good. So, also, a joint demurrer by all of the defendants must be overruled if the complaint is good against either of them. A complaint is not necessarily defective in which there is united with some defendants another against whom no liability * * * or recovery sought, and an order overruling a demurrer for misjoinder of parties defendant does not constitute a reversible error, if it can be seen that the rights of the parties have not been prejudiced. The complaint in the present case seeks no recovery against these appellants except upon their undertaking, and it is evident that their rights could not be prejudicially affected by the fact that their principal, who did not unite with them in the undertaking, has been made a codefendant."

To the same effect, the Supreme Court holds in the case of Daly v. Ruddell, 137 Cal. 674, 70 P. 785:

> "And, moreover, no substantial rights of the defendant have been invaded by this joinder. When no impairment of substantial rights is shown even a judgment rendered after a trial upon the merits should not be reversed because the court overruled a demurrer for such misjoinder."

The plaintiff Angelica Webb did not herself testify, and no evidence was introduced by plaintiffs that was not properly in support of the cause of action in favor of J. R. Webb alone.

[5] Appellant claims that the use of the word "plaintiffs" in the court's instructions and the use of the plural in the forms of verdict would require a reversal in this case. Upon the question of damages the court instructed the jury as follows:

> "You are instructed that, in the event you find in favor of plaintiffs, in estimating the actual compensatory damages, if any, to which he is entitled, you may take into consideration the value of the time lost, if any, by the plaintiff J. R. Webb while disabled from his injuries, if any, to work and labor, taking into consideration the nature of his business and whether or not he will be able to further pursue said labor or business in the future. Also a fair compensation for his suffering, if any, and the probable effect of the injury, if any, in his health or strength or future suffering, if any, awarding him as a whole such sum of money which will actually compensate him for the injuries sustained."

It will be noted that, although the court in the second line used the word "plaintiffs," throughout the balance of the instruction the masculine singular was employed. Also, the following instruction was given:

> "You are instructed that if the plaintiff in this action has shown himself entitled to recover, he is entitled to recover for all damages which he has suffered up to the time of the trial, if any, and for all damage that it is reasonably probable that he will sustain in the future, if any, not exceeding the sum claimed in the complaint. In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily and physical pain and suffering which is shown by the proof to be reasonably certain to have naturally resulted from the injury. The plaintiff, if you find him entitled

to recover, should be awarded compensation for all expenses actually paid or incurred for doctor's bills. If you find that plaintiff is entitled to recover, and believe from the evidence that the injuries sustained are permanent in their character, this must also be taken into consideration in your estimate of damages, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for any injuries received by reason of the alleged negligence and carelessness of the defendants or either of them, not exceeding in amount the sum claimed in the complaint."

These two instructions were the only instructions given by the court on the question of damages, and they are so plain as to what elements the jury could take into consideration on that subject as to preclude any doubt thereon.

For the foregoing reasons, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

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89 Cal. App. 47

NOBLE v. CITY OF PALO ALTO.
(Civ. 6218.)

District Court of Appeal, First District, Division 1, California. Feb. 7, 1928.

1. Officers 🔑110—Public officer is impliedly bound to exercise powers conferred on him with disinterested skill and diligence primarily for public's benefit.

A public officer is impliedly bound to exercise powers conferred on him with disinterested skill, zeal, and diligence, and primarily for benefit of public.

2. Officers 🔑103—Dealings between public officer and himself as private citizen, bringing him into collision with other citizens equally interested with himself in his integrity, are against "public policy."

Dealings between public officer and himself as private citizen, which bring him into collision with other citizens equally interested with himself in integrity and impartiality of public officer, are against "public policy," which is that principle of law which holds that no citizen can lawfully do that which has tendency to be injurious to public or against public good, and which may be termed policy of the law, and means the public good.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Policy.]

3. Officers 🔑98—Public policy forbids that public officer receive for services performed by him in discharge of official duty any other remuneration than that prescribed.

Public policy and sound morals alike forbid that public officer should demand or receive for services performed by him in discharge of official duty any other or further remuneration than that prescribed and allowed by law.

4. Officers 🔑103—Public officers should not be allowed to place themselves in position in which personal interest may conflict with duty to public.

Public officers ought not to be allowed to place themselves in position in which personal interest may come into conflict with duty which they owe to public.

5. Municipal corporations 🔑180(1)—Policeman in discharge of duties stands in relationship to governing authority which may be classified as that of "public officer"; "peace officer" (Pen. Code, § 817).

Policeman is "peace officer," under Pen. Code, § 817, and in discharge of his duties he stands in relationship to governing authority differing greatly from that of mere employee or agent, and that relationship for many purposes is indistinguishable from and may be classified as that of a "public officer."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officers; Peace Officer.]

6. Municipal corporations 🔑189(1)—When police from time immemorial have exercised rights under circumstances causing people to suppose they possess power claimed, exercise of rights becomes part of duties.

When police from time immemorial have exercised rights under circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to, or invoke, their action, supposing them to possess power and right claimed, exercise of those rights will become an integral part of duties incident to office.

7. Municipal corporations 🔑189(1)—It is within police officer's duty to inquire whether property found in streets is lost, or stolen, and assure protection in meantime.

It is within the duty of a police officer to make inquiry as to whether property found in streets has been stolen, or lost, and, pending result of that inquiry, to assure safety and protection of property which is otherwise liable to destruction or deterioration.

8. Finding lost goods 🔑10—Chief of police selling bicycles found in streets not claimed by owners must turn moneys into city treasury.

Chief of police *held* required to turn over money derived from sale of bicycles found on streets and highways of city, and in some instances outside city limits, into city treasury, though there was no ordinance or general law making it his duty to gather lost property, since his relationship to city may be classified as that of a public officer and to permit him to claim rights of finder of lost property would be against public policy; it being no concern of his what city does with funds.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action to determine ownership of certain personal property by C. F. Noble against the

City of Palo Alto. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Norman E. Malcolm, City Atty., of Palo Alto, for appellant.

Louis Oneal and Maurice J. Rankin, both of San José, for respondent.

PARKER, Justice pro tem. This is an action brought to determine the ownership of certain personal property, to wit, cash in the sum of $308. Plaintiff and defendant, city of Palo Alto, by appropriate pleading set up their respective claims to the said amount, and after trial before the court judgment was rendered in favor of plaintiff. From this judgment defendant appeals.

The record discloses that at all times involved herein plaintiff was chief of police of the city of Palo Alto, and the money in dispute here is money derived from the sale of certain bicycles admitted to have been found on the streets and highways of Palo Alto, and in some few instances outside of the limits of said city. Many of these bicycles were found by plaintiff, and the others were found by other police officers and by them brought to the city hall of Palo Alto and there stored. It appears from the record here that there was a standing order in the police department of the city of Palo Alto directed to the members thereof that each officer should in his territory take up abandoned personal property of value and deliver the same to the city hall. In the period covered by this controversy a large number of bicycles were accumulated, and from time to time private sales were made, the amount of money realized being as heretofore stated. No accounting was made of these sales nor was notice thereof given. The custom was that as a purchaser appeared the sale was consummated and the transaction closed. All of these sales were made by the plaintiff chief of police and the moneys derived therefrom retained by him.

There was no ordinance or regulation of the city of Palo Alto or any board or commission of said city making it the duty of the plaintiff or any member of the police department to gather lost property, nor is there any such express direction in the general law of the state. Nor is there any ordinance or general law in terms directing the turning over of the funds in question to the public treasury.

The plaintiff chief of police contends here, as he did in the court below, that the money thus received belongs to him without the duty of accounting to the city, and urges that whatever may be the right or claim of the original owners of the lost property the city of Palo Alto is not concerned therewith, and the claim of the city to the funds in dispute is without right. In this the plaintiff was sustained by the court below. There are many principles discussed in the briefs on file. At the outset defendant attacks the form of action and the right of an individual to prosecute an action against the city. This we pass for the present. The ground upon which the claim of plaintiff was upheld seems to be that the property named, the bicycles, being lost property, belonged to the finder, subject to the provisions of the general law; that the finding and retention of the property was not within the actual or implied duties of the police department or the members thereof; and that the fact that in this case the finder happened to be a police officer does not in any manner abridge his right or claim to the property found, or place upon his possession any different status from that of any individual finder.

As an additional fact it may be here stated that the testimony discloses that the officers on patrol were ordered to bring all property found to the city hall, and make a record of the delivery, together with an identifying description. The chief of police testified further that one of the purposes in collecting the bicycles was to recover any that might have been stolen and concerning which the usual police bulletin had been circulated. It further appears that in some cases, after sale of a bicycle, the original owner would appear and make claim, and in this event settlement would be made with him personally and a refund allowed the buyer; all of these negotiations being conducted through the chief of police personally and in his individual capacity.

From the foregoing sufficient appears to fully present the case-made. We do not feel that it requires any minute analysis of all of the points urged. It is our conclusion that the claim of plaintiff cannot be upheld, and that to establish the doctrine contended for by him would lead to a result in contravention of a sound public policy, and on this ground alone we deem it necessary to reverse the judgment of the court below.

Public policy is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts (section 546), says:

> "It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud."

By "public policy" is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law. Likewise, it has been defined as:

> "The principles under which freedom of contract or private dealing are restricted by law for the good of the community"

—the foregoing definitions being supported by respectable authority. 32 Cyc. 1251. Public policy means the public good. Anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against public policy. It is the evil tendency and not the actual result which is the test of illegality. Maryland Trust Co. v. National Bank, 102 Md. 608, 63 A. 79.

[1, 2] A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence, and primarily for the benefit of the public. Harnung v. State, 116 Ind. 458, 19 N. E. 151, 2 L. R. A. 510. Dealings between a public officer and himself as a private citizen which bring him into collision with other citizens equally interested with himself in the integrity and impartiality of the officer are against public policy. Goodyear v. Brown, 155 Pa. 514, 26 A. 665, 20 L. R. A. 838, 35 Am. St. Rep. 903.

[3] Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty any other or further remuneration than that prescribed and allowed by law. Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726.

Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason. Cheney v. Unroe, 166 Ind. 550, 77 N. E. 1041, 117 Am. St. Rep. 391.

[4] There is neither a more wholesome nor a sounder rule of law than that which requires public officers to keep themselves in such a position as that nothing shall tempt them to swerve from the straight line of official duty. Officers ought not to be allowed to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. The rule which has so long prevailed is eminently just. Stropes v. Greene Co., 72 Ind. 42.

[5] There is no doubt but that a policeman is an officer. He is made a peace officer by section 817, Penal Code, and a large part of his duties are such that he must have authority to act, not as the agent for the state or city, but by virtue of the office. See Ann. Cas. 1912D, note, at page 897; Cal. Jur. vol. 21, p. 389.

In Olmstead v. New York, 42 N. Y. Super. Ct. 481, it is said that the term "officer" implies "an authority to exercise some portion of the sovereign power of the state, either in making, executing, or administering the laws." In Eliason v. Coleman, 86 N. C. 235, it is said: "The true test of a public office seems to be that it is parcel of the administration of government, civil or military." In People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, we find that "an officer is a part of the personal force by which the state acts, thinks, determines, administers, and makes its Constitution and laws operative and effective." That a policeman is an officer of a city or state and not merely an employee or agent is approved in Dillon on Municipal Corporations (5th Ed.) § 1655.

Without pursuing this branch of the inquiry it might be conceded that a policeman is not an officer in every sense of the term. In other words, it is not within the scope of this opinion to announce the law that for all purposes and in all respects the position of a policeman fully meets all the standards and requirements essential to or usually inherent in the legal definition of an office. We do not attempt to determine the question. We do conclude, however, that a policeman in the discharge of his duties does stand in a relationship to the governing authority differing greatly from that of a mere employee or agent, and that relationship for many purposes is indistinguishable from and may be classified as that of a public officer. Being, as it is, so closely allied we hold that the principles herein announced have equal application to the position of policeman.

Further illustrating the attitude of our own courts on the policy of maintaining the integrity of public officials and removing all sources of temptation, see Moody v. Shuffleton (Cal. Sup.) 262 P. 1095, decided January 10, 1928.

It is true that nowhere in the general law or in local ordinances can we find all the duties of a police officer set forth in detail. Indeed, these duties are so varied and indefinable that we could not expect an exact and detailed outline thereof.

In the case of Norton v. Shelby County, reported in 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178, the court in speaking of a de facto officer says:

> "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised—without a known appointment or election but under * * * circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to" possess the power and right claimed.

[6, 7] While we are not dealing here with any question of an officer de facto, yet the language used has a striking application to the question of the powers of a police officer. When the police from time immemorial have exercised rights under circumstances of reputation or acquiescence as are calculated to

induce people, without inquiry, to submit to or invoke their action, supposing them to possess the power and right claimed, the exercise of those rights will become an integral part of the duties incident to the office. When a police officer discovers personal property of value abandoned upon the streets of a city, it is but natural and reasonable to assume that either of two things has occurred, namely, that the property has been stolen or has been lost. Indeed, in the instant case the purpose of the police, or at least one purpose as admitted, was to discover whether or not the property had been stolen. In either case, however, it is well within the duty of a police officer to make inquiry, and, pending the result of that inquiry, to assure the safety and protection of the property, which is otherwise liable to destruction or deterioration. This duty and right of the police is universally conceded to the extent that the average citizen accepts it as a matter of course, and upon the discovery of property apparently lost the first thing that suggests itself is to notify the police, and, on the other hand, with reference to the owner of lost property, his first impulse is to advise the police of his loss and solicit their aid, and this impulse has been fostered and encouraged by the police themselves from time immemorial and in California the police departments throughout the state have justified to the fullest extent their confidence. By way of illustration, let us assume that in the streets of Palo Alto there was discovered a bicycle lying on the sidewalk with no apparent owner, and a number of citizens came upon it, and each claimed the right of a finder and the resulting right to take the bicycle into his exclusive possession—the police officer on the detail comes along and observes the situation, and thereupon declares that he will take the property and deliver the same to the city hall that the owner may recover the same. What ordinarily results? Each individual forthwith concedes and recognizes the law and the right of the officer; and this right and power inures to the policeman solely and entirely by virtue of his office and not otherwise. To uphold the contention of the plaintiff herein would be to say to a police officer, in effect:

> "It is your sworn duty to preserve peace and order and to protect life and property. You shall, among other duties, diligently make investigation where you have reason to believe crime has been committed, and the most common crimes are those of larceny and theft. When you find property abandoned and without an owner, you shall take all necessary means to preserve and protect the same, while endeavoring to ascertain whether a public offense has been committed. If you can conclude that no crime has been done, then you may retain the property, and, if the true owner is not located, then the property or the proceeds thereof shall belong to you personally."

In view of what we have heretofore said on the question of public policy, we consider this a dangerous doctrine to announce, inimical to and contrary to a sound public policy.

[8] It was the duty of the plaintiff herein to turn into the city treasury of Palo Alto the moneys in dispute here, and, failing to do so, the moneys turned into court should be ordered so disposed of. Whatever right the city may have to the fund as against the original owners of the bicycles is not of concern to us here, and surely of much less concern to the plaintiff individually. The fear that the officials of a city may not make legal or proper disposition of these funds establishes no basis for the claim of plaintiff.

Judgment reversed, with directions to enter judgment for defendant.

We concur: TYLER, P. J.; KNIGHT, J.

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89 Cal. App. 81

SMITH v. SOUTHERN COUNTIES GAS CO.★

(Civ. 6174.)

District Court of Appeal, First District, Division 1, California. Feb. 8, 1928.

Hearing Denied by Supreme Court April 5, 1928.

1. Gas 🔑20(2)—Doctrine of res ipsa loquitur held applicable to action for injuries to water company employee lighting match in pit maintained by gas company, causing explosion.

In action for injuries to employee of water company sustained when employee struck match causing explosion in pit constructed by gas company containing water company's shut-off valve, doctrine of res ipsa loquitur was applicable where pit containing gas pipes had been used for more than year before accident happened, was under management of defendant gas company, and accident was such as in ordinary course of things did not happen if those who had management used proper care.

2. Appeal and error 🔑1011(1)—Judgment based on conflicting evidence in personal injury action will not be disturbed on appeal.

In action for personal injuries, where evidence meeting burden imposed on defendant by application of doctrine of res ipsa loquitur merely created conflict, judgment will not be disturbed on appeal.

3. Gas 🔑20(4)—Whether gas company exercised due care in maintaining pit where explosion occurred injuring waterworks employee held for jury.

In action for injuries to employee of water company sustained when employee struck match causing explosion in pit constructed by gas company containing water company's shut-off valve, testimony by gas company that gas pipes in pit had been tested and were constructed with latest improvements, offered to rebut presumption of negligence arising from explosion, made question of fact for jury whether gas company met burden imposed on it of showing exercise of due care.

★Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action by Harvey H. Smith against the Southern Counties Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George L. Greer and LeRoy M. Edwards, both of Los Angeles, for appellant.

Nichols, Cooper & Hickson, of Pomona, for respondent.

CAMPBELL, Justice pro tem. This is an action for damages for personal injuries arising by reason of an explosion in a manhole or pit in one of the public streets of Pomona.

Appellant, Southern Counties Gas Company, was a public utility corporation, supplying the residents of Pomona with gas at the time of the injury complained of and for some time prior thereto. The company about December 14, 1922, constructed a pit 4 feet by 6 feet and 5 feet deep at the intersection of Ninth and Reservoir streets, and was using the public street by virtue of a franchise. The pit was built of concrete, and the pipes of the gas company had been laid and the valves placed before the cement was poured; the pit being constructed for the purpose of making accessible three shut-off valves and a regulating valve in the gas line. When the excavation was made, it was found that a shut-off valve of the water company would be located in the pit.

From December, 1922, to January, 1924, the pit was inspected monthly by the gas company; that is, some one visited the pit, opened it, and oiled the regulating valve. Covering the pit there was an 18 by 25 inch cast-iron cover.

On January 10, 1924, respondent, Harvey H. Smith, being then an employee of the water company, went to the intersection of Ninth and Reservoir streets for the purpose of shutting off the water. He went into the pit, not knowing that it belonged to the gas company or that the gas company's pipes were located therein. Being unable to see, he struck a match, and the explosion occurred, causing the injuries complained of.

The court gave judgment for the plaintiff in the sum of $2,500, together with costs, and from this judgment defendant, Southern Counties Gas Company, has appealed. It is appellant's contention, first, that the doctrine of res ipsa loquitur does not apply; and, second, that, if it does apply, the defendant has met the burden imposed.

In Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, one of the early leading cases in California involving this question, the court says:

> "This proposition [referring to the doctrine of res ipsa loquitur in common carrier cases] is elementary and uncontradicted; therefore, the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations and inapplicable to cases where no contractual relations exist."

In Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164, in a case where goods were injured by the overflow of water from the boiler of defendant's engine room located on an upper floor, the court answering defendant's contention that the court erred in instructing the jury that the mere fact of the overflow of the water from the boiler under the circumstances of the case was prima facie evidence of negligence, says:

> "The rule applicable to this question is thus stated in Judson v. Giant Powder Co., 107 Cal. 549 [40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146], * * * 'when a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' It appeared from the evidence that this engine had been operated without injury, under the same circumstances, for three or four years before the accident happened. This sufficiently demonstrated that in the ordinary course of things such accidents did not happen, and was a justification of the instruction complained of. A large number of cases are cited from other states, apparently holding the contrary to this doctrine. It is sufficient to say that the rule is settled the other way in this state. Butcher v. Vaca Valley, etc., R. L. R. Co., 67 Cal. 518 [8 P. 174]."

See, also, Harlow v. Standard Improvement Co., 145 Cal. 477, 480, 78 P. 1045; Bowley v. Mangrun et al., 3 Cal. App. 229, 234, 84 P. 996; Bauhofer v. Crawford, 16 Cal. App. 676, 678, 117 P. 931; Lippert v. Pacific Sugar Corp., 33 Cal. App. 198, 208, 164 P. 810.

In Lippert v. Pacific Sugar Corp., supra, which was a case where death resulted from the explosion of a boiler, the court says:

> "The cases are industriously cited and considered in Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. Referring to the case of Young v. Bransford, 12 Lea (Tenn.) 232, which supports a contrary doctrine, attention is called to the following language in the reported opinion of that case: 'At the same time the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: "That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition."' We are satisfied that this is a case where the doctrine of res ipsa loquitur is applicable, and plaintiffs

> are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence."

This doctrine is followed in a number of other states. In Chiles v. Ft. Smith Com. Co., 139 Ark. 489, 216 S. W. 11, 8 A. L. R. 493, the court adopts the same rule followed in this state and cites with approval Judson v. Giant Powder Co., supra. See, also, Manning v. St. Paul Gaslight Co., 129 Minn. 55, 151 N. W. 423, L. R. A. 1915E, 1022, Ann. Cas. 1916E, 276; Gould v. Winona Gas Co., 100 Minn. 258, 111 N. W. 254, 10 L. R. A. (N. S.) 889; Kearner v. Tanner Co., 31 R. I. 203, 76 A. 833, 29 L. R. A. (N. S.) 537; Warn v. Davis Oil Co. (D. C.) 61 F. 631.

Appellant in support of its contention has cited us to several cases. All but one, however, are from other jurisdictions; the one California case being Union Investment Co. v. San Francisco Gas & Electric Co., 168 Cal. 58, 141 P. 807. That case is reviewed in the later case of Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 13, 151 P. 286, 288, in which the court, in commenting on the Union Investment Co. Case, says:

> "The citation is not apt because in that case we were considering a record which did not disclose the origin of the fire as being an explosion of gas."

As to the other cases cited as holding that the mere fact of an explosion in a building furnished with gas does not establish a prima facie case or raise a presumption of negligence, nor does the fact that gas was found accumulated in a pit, though unusual and not according to the ordinary occurrence of events, give rise to a prima facie presumption of negligence, it may be said that the cases cited do not parallel the present case, but, if they did, they are not authority, for, as is said in Kahn v. Triest-Rosenberg Cap Co., supra, "the rule is settled the other way in this state."

[1] In the present case the pit containing the gas pipes had been used for more than a year before the accident happened, was under the management of appellant gas company, and the accident was "such as in the ordinary course of things does not happen if those who have the management use proper care," and therefore the doctrine of res ipsa loquitur applies. Judson v. Giant Powder Co., supra.

[2, 3] As to appellant's second contention that if the doctrine of res ipsa loquitur does apply, it has met the burden imposed, it may be said that the evidence offered by appellant merely creates a conflict, and upon such conflict the judgment will not be disturbed on appeal. Appellant offered testimony to show the exercise of due care and to rebut the presumption of negligence. Witnesses connected with the appellant company testified that following the accident they tested the gas pipes in the pit with soapsuds and found no leak; that there was a 4-inch vent pipe running from the pit to the corner of the street and coming up between the curb and the sidewalk, and also, as to the character of the pit, that it was constructed modernly, with the latest improved devices or structures to prevent accumulation of gas. With the presumption of negligence, however, arising from the explosion, the question was one of fact as to whether the gas company had met the burden imposed upon it of showing the exercise of due care.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 243

FIRST NAT. BANK OF LONG BEACH v. CROWN TRANSFER & STORAGE CO.

MERCHANTS' NAT. BANK OF LOS ANGELES v. SAME.

(Civ. 6133, 6134.)

District Court of Appeal, First District, Division 2, California. Feb. 14, 1928.

1. Warehousemen 🔑34(5)—Burden was on warehouseman to show what became of missing goods.

In action for damages by failure to deliver all of goods for which defendant issued warehouse receipts, burden was on defendant to excuse its apparent default by showing what became of missing goods.

2. Warehousemen 🔑34(2)—Pledgees held not estopped to sue warehouseman for nondelivery of goods on assumption that pledgor's manager had misappropriated them, in absence of showing of what became of them.

Pledgees of goods stored *held* not estopped to sue warehouseman for damages by failure to deliver all of them at wharf for shipment to purchaser, as directed by pledgor's manager on assumption that latter misappropriated missing goods, in absence of evidence of who got them or what became of them.

3. Warehousemen 🔑34(5) — Court cannot presume in favor of or against warehouseman in determining value of spoiled goods.

In action for damages by failure to deliver all of goods for which defendant issued warehouse receipts, court cannot presume either in favor of or against defendant in arriving at value of spoiled goods.

4. Warehousemen 🔑34(9)—Any inference in favor of or against warehouseman in fixing value of spoiled goods was for jury.

In fixing value of spoiled goods in action against warehouseman for damages, any inference in favor of or against defendant was for jury.

5. Warehousemen 🔑34(8) — Warehouseman held liable for average sale price of spoiled goods.

Warehouseman, sued for damages by failure to deliver all of goods stored, *held* liable to pledgees for average price received for spoiled goods sold.

6. Warehousemen 🔑34(4)—Complaint showing special title to, and immediate right to possession of, goods, and alleging demand therefor and defendant warehouseman's refusal, stated cause of action for conversion.

Complaint stating facts showing that plaintiff held special title to, and immediate right of possession of, goods described, and alleging that plaintiff made demand for return thereof, and that defendant warehouseman refused to comply, stated a cause of action for conversion.

7. Warehousemen 🔑34(8) — Warehouseman is liable for interest from date of conversion by refusal to return goods on demand (Civ. Code, §§ 3287, 3336).

Under Civ. Code, § 3336, warehouseman is liable for interest on damages recovered from date of conversion by refusal to comply with demand for return of goods stored, not from date of judgment under section 3287.

8. Warehousemen 🔑25(6) — Warehouseman was not bound to make deliveries outside city wherein warehouse was located.

Warehouseman was under no duty under its contract to make deliveries elsewhere than at city where its warehouse was located.

9. Interest 🔑47(1)—Allowance of interest from date before filing of complaint, not alleging date of demand on warehouseman for return of goods, was excessive.

Where complaint, in action against warehouseman for conversion, did not allege date of plaintiff's demand for return of goods, allowance of interest from date prior to that on which complaint was filed was excessive.

Appeals from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by the First National Bank of Long Beach and the Merchants' National Bank of Los Angeles, respectively, against the Crown Transfer & Storage Company. Judgments for plaintiffs, and defendant appeals. Modified, and affirmed as modified.

A. Lincoln Rowland and Carter & Webster, all of Pasadena, for appellant.

Page, Nolan, Rohe & Hurt, of Los Angeles, for respondents.

STURTEVANT, J. Each of these actions was commenced by the plaintiff to recover a judgment for damages. The actions were tried in the lower court, sitting without a jury. The actions were tried together, and the trial court made findings in favor of each plaintiff, and from judgments entered thereon the defendant has appealed in each action under section 953a of the Code of Civil Procedure. The record consists of two transcripts by the clerk, one by the reporter and one set of briefs.

The Braden Preserving Company, hereinafter called the Braden Company, operated a factory at Pasadena, and stored its manufactured products in a warehouse operated by defendant at the same place. The Braden Company from time to time borrowed moneys from the plaintiffs and issued to each its promissory note. To secure the repayment of said moneys, it pledged to the plaintiffs the goods so stored in defendant's warehouse. The amount of the plaintiffs' claim against the Braden Company at all times greatly exceeded the value of the goods in the warehouse. As there was considerable detail in the transactions, C. W. Clark, an employee of one of the banks, was engaged as the agent of both banks to attend to the business representing the interests of both banks. From time to time merchandise was stored, some was sold and taken out, and more was received. June 1, 1922, the entire merchandise on hand was contracted to be sold at certain ports, and was to be shipped on board one of the vessels anchored at the wharf of the Luckenbach Steamship Company at San Pedro. The manufacturers negotiated the sale, and engaged defendant to transport the merchandise at $4 per ton to San Pedro. The plaintiffs adopted the transaction. The manager of the Braden Company at that time was Mr. Baer. On that date Mr. Clark wrote a letter to the defendant informing it of the sale, and, among other things, said:

> "The writer will call upon you Saturday morning and surrender the warehouse receipt held by us and the First National Bank of Long Beach, and in the meantime, kindly assist Mr. Baer in getting these goods ready for shipment."

The goods consisted of preserves, jams, jellies, etc. The goods were in cases. Some needed repacking. In some instances cases needed repairing. Some of the goods were in such condition that it was necessary to reboil them, etc. The available space to do this reconditioning, and machinery therefor, could not be had at the defendant's warehouse. Neverthless, much of the work was done there. However, some of the goods were taken to the factory of the Braden Company for reconditioning. As the reconditioning proceeded, it was learned that some of the goods were spoiled so badly that they could not be reconditioned.

Different goods were packed in different sized containers. In some instances one and the same kind of goods was packed in different sized packages or containers.

When the deliveries at the wharf of the Luckenbach Company had come to an end, a reckoning was had. From that reckoning it appeared that the defendant had not made delivery of all of the goods which it had received and for which it had issued warehouse receipts. Thereupon these actions were commenced.

[1] Finding No. 7 in each action finds: (1) That the defendant did not deliver the goods in accordance with the plaintiff's written instructions; and (2) that plaintiff did not, in writing or otherwise, direct the defendant to deliver any of the goods to the Braden Company. The defendant asserts that the finding is not sustained by the evidence, and it quotes Mr. Clark's letter. The plaintiff replies that a proper construction of the language used by Mr. Clark will not support the contention of the defendant. The plaintiff then states that, even if the contention in this behalf is not sound, nevertheless the finding was correct, because the burden rested on the defendant to excuse its apparent default, and it failed to support its allegations with sufficient proof. 2 Deering's General Laws, 1923, p. 3721, § 8. We will concede for the purposes of this decision that Mr. Clark's letter was, among other things, an authorization for the workmen to take some of the goods to the factory of the Braden Company for the purposes of reconditioning them. However, for the protection of the good names of each party, and in the exercise of ordinary care, it would appear that a record would have been made of the goods so taken and of what became of them. But this record is wholly silent on that subject, and, as stated above, the burden was on the defendant.

If defendant would go so far as to claim that Mr. Clark's letter was an authorization for an absolute and permanent delivery to the Braden Company, we have no hesitancy in saying the terms used in the letter do not admit of that construction. Furthermore, there were orders, in the usual form as used by the parties, issued on June 3, 1922, which covered these particular goods, and which directed delivery to the Luckenbach Company. Mr. Baer was not called by either party. Mr. Braden was called. But no one was called who stated what in very short was done with the absent or missing packages.

[2] In presenting the point just discussed, the defendant asserts that the plaintiff is estopped. In making that assertion, it assumes that the record discloses that Mr. Baer misappropriated the missing goods. It does not. It falls far short of showing who got them or what became of them.

[3, 4] The defendant claims that finding No. 9, which fixes the damages, is not sustained by the evidence. It argues that only those damages may be allowed which are clearly ascertainable both in their nature and origin. Civ. Code, § 3301. The wrong complained of, under the undisputed findings, arose through the acts of omission and commission of the defendant. We come next to value. In fixing that value, we are confronted with a question regarding what rule of law to follow. There are three possible rules. The defendant asserts that, in arriving at the value of the 1,000 cases of spoiled goods, as the character thereof was not shown, "the trial court should have eliminated the cases having the greatest value, and then those having the next greatest value, and so on down until the 1,000 cases were exhausted." The plaintiff says:

> "No. There is no authority for doing so. To do so is to presume in favor of the defendant, whereas we should presume against it. The latter rule is stated in Armory v. Delamirie, 1 Strange, 506, and has been followed in many cases. 2 Sutherland on Damages, p. 1415, volume 4, p. 4225."

[5] We may not, in this state, adopt either presumption as there is no statute to that effect. If it is claimed that an inference exists instead of a presumption, then the inference was for the jury. Davis v. Hearst, 160 Cal. 143, 116 P. 530. The trial court followed neither method. It followed the rule delineated in Hobbs v. Monarch Refrigerating Co., 277 Ill. 326, 115 N. E. 534, L. R. A. 1917D, 847, Ann. Cas. 1918B, 743. At page 536 (277 Ill. 332), the court said:

> "Counsel for plaintiff in error also argue that the court erred in reckoning the amount which it was decreed should be paid per pound for the damaged poultry sold. In an action to recover the proportionate share of the property or goods confused by another, it is not necessary to identify the exact article or the exact property formerly owned. The proof tends to show that plaintiff in error could have separated the damaged goods of defendant in error from the other goods injured and thereafter sold as salvage. Not having done so, it is clear that under the authorities it was properly held liable by the decree for the average price received in the sale of such goods. 8 Cyc. 576; First Nat. Bank of Elgin v. Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; 5 R. C. L. 1052. The burden of establishing the number of pounds of salvage sold by plaintiff in error belonging to defendant in error, and the prices received therefor, was upon plaintiff in error. Having failed to make this proof, it cannot now be heard to complain because it is required to pay the average price for which such damaged goods sold."

If it be conceded that the rule as stated is sound, we do not understand the defendant contends that the trial court erred in applying it; but its contention is that the trial court should have applied a different rule. We think the trial court did not err.

[6, 7] The defendant contends that the trial court should not have allowed interest on the plaintiffs' demand before the date of the judgment, and it cites Civil Code, § 3287; Williams v. Flinn & Treacy, 61 Cal. App. 352, 214 P. 1024; American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 768, 121 P. 709; Cox v. McLaughlin, 76 Cal. 60, 71, 18 P. 100, 9

Am. St. Rep. 164. The plaintiff contends that it sued in conversion, and that the interest was properly allowed from the date of the demand made on the defendant. Civ. Code, § 3336. The complaint was quite multifarious, but no demurrer was interposed. After a careful examination, we think it must be conceded that, among other things, it stated a cause of action as for conversion. It stated facts showing that the plaintiff held a special title to, and an immediate right to the possession of, the goods described in the complaint, and thereupon it followed with an allegation that the plaintiff made a demand for the return to it of the goods and that the defendant had refused to comply with the demand. These facts constituted a conversion of the plaintiff's property. The law fixing the measure of damages in an action for conversion is section 3336 of the Civil Code. By the terms of that section the defendant was liable for interest from the date of conversion. Under the facts pleaded, the conversion took place when the defendant refused to comply with plaintiff's demand.

[8, 9] In its complaint the plaintiff alleged that on the 3d day of June, 1922, it directed the defendant to deliver the goods to the Luckenbach Steamship Company at San Pedro. As is stated above, the defendant's warehouse was at Pasadena. Under its contract as warehouseman the defendant was under no duty to make deliveries at San Pedro. However, the plaintiff also pleaded that it demanded the return of the goods to the plaintiff, and that the defendant failed and refused to comply with that demand. The demand last mentioned is not denied by the answer. That demand and the defendant's refusal constituted the default of the defendant. But the date of that demand is not alleged. The complaint was filed April 30, 1923. The demand was at least as early as April 30, 1923. The judgment awarded interest from June 3, 1922. That was an excessive allowance.

The judgment in each case is modified by deducting therefrom interest from June 3, 1922, to April 30, 1923, and, as so modified, it is affirmed, and the respondents will recover their costs on appeal.

We concur: KOFORD, P. J.; NOURSE, J.

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89 Cal. App. 382

HEAP et al. v. RODGERS et al. (Civ. 5019.)

District Court of Appeal, Second District, Division 1, California. Feb. 21, 1928.

1. Appeal and error ⇨193(2), 719(4)—Misjoinder of plaintiffs or causes of action, not raised below or on appeal, need not be considered.

Misjoinder of parties plaintiff or causes of action need not be considered, where defendants made no point thereof in court below and did not raise question on appeal.

2. Appeal and error ⇨1011(1)—Where evidence of who constituted partnership was conflicting and there was sufficient evidence to sustain finding that appellant was partner, judgment must be affirmed.

Where evidence as to who constituted partnership was in marked conflict and there was sufficient evidence to sustain court's finding that appellant was copartner with his codefendants, appellate court must affirm judgment.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

Action by James L. Heap and others against E. R. Rodgers, E. L. Askin, and another, individually and as partners doing business under the name of E. R. Rodgers & Co. Judgment for plaintiffs, and defendant Askin appeals. Affirmed.

Lester G. King, of San Bernardino, and D. M. Edwards, of Visalia, for appellant.

A. S. Maloney and John L. Campbell, both of San Bernardino, for respondents.

HAHN, Justice pro tem. The action which gives rise to this appeal is one wherein the plaintiffs sued to recover judgment against the defendants for a balance alleged remaining unpaid on account of several crops of apples, each owned by a separate plaintiff and sold separately to the defendants. The court found in favor of plaintiffs, and from the judgment rendered defendant E. L. Askin appeals.

[1] A unique situation is presented by this action, in that four plaintiffs have joined in an action to recover a joint judgment based upon four separate contracts. Each contract was made separately and at different times and represented a separate and distinct purchase by Rodgers & Co., the defendant, and the joint judgment prayed for is the total of the four separate balances owing on the four contracts.

Inasmuch as the defendants made no point of the misjoinder of parties plaintiff or causes of action in the court below, nor have they raised any such question on appeal, we pass to a discussion of the one point urged by appellant for a reversal of the judgment. Appellant states this point in his brief in the following language: "Evidence not sufficient and against the facts."

Under this heading appellant in his brief discusses the evidence for the apparent purpose of pointing out that it is insufficient to support the findings and judgment, and in our consideration of the case we will put this interpretation upon the appellant's above-worded contention.

[2] Each of the four plaintiffs being owners of separate apple orchards in San Ber-

nardino county contracted to sell his crop of apples to a concern designated in the written contract executed in each sale as "E. R. Rodgers & Co." Respondents' contention was and is that E. R. Rodgers & Co. was a copartnership consisting of defendants E. R. Rodgers, Willard Morton, and E. L. Askin. Askin alone answered the complaint and the principal issue tendered by him was the question of who constituted the firm of E. R. Rodgers & Company. Askin there urged and in his appeal contends that he was not a partner, but that the firm of E. R. Rodgers & Co., was a partnership consisting alone of E. R. Rodgers and Willard Morton.

The evidence upon the question of who constituted the partnership is markedly in conflict. To point out the details of this conflict would serve no useful purpose. We are satisfied that there was sufficient evidence to sustain the court in finding that appellant was a copartner with Rodgers and Morton, doing business under the firm name of E. R. Rodgers & Co. Under these circumstances this court must hold that there is sufficient evidence to sustain the findings complained of and affirm the judgment.

The judgment is accordingly affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

89 Cal. App. 122

PHILLIPS v. PACIFIC ELECTRIC RY. CO.

(Civ. 3394.)

District Court of Appeal, Third District, California. Feb. 8, 1928.

1. Negligence 🔑136(9)—Question of contributory negligence is for jury, where reasonable minds may differ thereon (Civ. Code, § 1714).

Wherever facts present a problem on the question of contributory negligence, on the solution of which reasonable minds may differ, question is one of fact for jury; contributory negligence being bar to recovery of damages for personal injuries under Civ. Code, § 1714.

2. Trial 🔑165—On motion for nonsuit, all of evidence must be accepted as true, disregarding contradictions, and indulging every reasonable inference in plaintiff's favor.

On motion for nonsuit, evidence must be viewed most strongly against defendant, and all of evidence disclosed by record must be accepted as true, disregarding conflicts and contradictions, and giving plaintiff's evidence its full probative strength, regardless of improper admission of evidence, together with every reasonable inference and presumption in plaintiff's favor.

3. Street railroads 🔑98(8)—Pedestrian, attempting to cross street railway tracks on unpaved way, where rails projected, was required to look and listen and to stop, if view was obstructed.

Where way occupied by street car tracks was unpaved, and consisted of ties resting upon loose sand, with rails projecting above level of street, pedestrian, attempting to cross tracks, was required to first look and listen before crossing and was obliged to stop where view was obstructed; same rule being applicable in such case as that applying to steam railways.

4. Street railroads 🔑98(6)—Pedestrian, attempting to cross street railroad tracks, had right to assume car would not proceed at night without headlight, whistle, or bell.

Pedestrian, attempting to cross street railroad tracks, had right to assume that car would not be run at night across an open way leading to residence street without a headlight and without adequate warning by whistle or bell, where the public were accustomed to cross the tracks at that place.

5. Street railroads 🔑117(21)—Contributory negligence of pedestrian attempting to cross street car tracks on unpaved way within view of apparently stationary unlighted car on side track held for jury.

Contributory negligence of pedestrian attempting to cross street railway tracks on unpaved way to street opening on other side, within view of apparently stationary car located on side track without lights, *held* question for jury, in action for injuries caused when car moved forward, without lights and without any warning signal and struck him.

6. Street railroads 🔑113(7)—Testimony that public ordinarily crossed street car tracks at place where accident occurred held competent in action for injuries to pedestrian.

In action for injuries to pedestrian attempting to cross street car tracks along unpaved way, testimony that place of accident was place where public commonly crossed tracks in course leading to street on opposite side *held* competent to show custom, knowledge of which would throw light on question of plaintiff's contributory negligence.

7. Appeal and error 🔑1058(1)—Court's admission of similar evidence renders harmless former error in sustaining objection to testimony.

Party is not harmed by trial court's ruling which excludes competent evidence, where similar evidence on point is subsequently admitted.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by R. Floyd Phillips against the Pacific Electric Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Ford, Bodkin, Watt & Herlihy, of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment of nonsuit granted solely upon the ground of alleged contributory negligence on the part of appellant, in an action for damages for personal injuries sustained in being run over by an electric car while attempting to cross respondent's tracks at the city of Venice.

The respondent railroad corporation owns and operates double tracks of electric trolley car lines adjacent to, and parallel with, the ocean shore from Santa Monica southerly through and beyond Venice. In the vicinity of Venice, where the accident occurred, the trolley right of way is about 60 feet in width, and at this point contains three lines of tracks, the rails of which are spiked to ties which rest upon loose ocean shore sand which is common to this vicinity. The rails extend above the ties a distance of about 3 inches. The main north and south bound tracks are some 16 feet apart at this point. Along the extreme easterly portion of this right of way a third track has been maintained for more than 10 years as a side track, upon which it was the custom of respondent railroad company to station cars during the night, and at times when the traffic did not demand their immediate use. Appellant was aware of this custom. Parallel with this line of side tracks, and 3 feet easterly thereof, was a sidewalk which was commonly used by pedestrians. This district was somewhat thickly settled, and was laid out in streets and blocks, with business buildings and dwelling houses adjacent to the car line on either side. Clubhouse avenue extended from the ocean on the westerly side of the tracks, at right angles to the trolley way, opposite which there was no regular paved or planked crossing of the tracks. Here there was a break in the continuation of this avenue, which resumed its course beyond the tracks about 100 feet northerly. Between the main tracks, at a point about 100 feet southerly from the westerly extension of Clubhouse avenue, was a railway station, where the electric trains customarily stopped for the accommodation of passengers. The railway right of way was not paved or planked for pedestrians at this crossing.

Appellant was 30 years of age, active, alert, and possessing good faculties. For 15 years he had resided on Clubhouse avenue west of the railroad tracks. In returning home from Venice, it was his custom to follow the sidewalk along the easterly side of respondent's right of way to a point opposite the westerly entrance to Clubhouse avenue, and then cross the tracks at right angles to his residence. At night the right of way was poorly lighted in this vicinity. There were no lights nearer than 10 feet south of the waiting station. These lights consisted of three or four 40-watt electric lamps. No fence or obstructions existed to prevent pedestrians from crossing the tracks opposite Clubhouse avenue. It was a common occurrence for people to cross the tracks at this point, although it was not a regular railroad crossing. The witness Mr. Heffron testified: "The public came to that station from Westminster avenue and also from Clubhouse avenue, and they crossed the tracks (there)." Mr. Wilson also testified: "There is a little crossing unkept that leads across Horizon and Clubhouse, right across the tracks. * * *"

It appears from the evidence that on the night of the accident the appellant had spent the evening with some friends south of Venice. About 11 o'clock p. m. he left for home, stopping for lunch at Venice. In company with a friend he then pursued his course along the sidewalk easterly of respondent's trolley way to a point immediately opposite Clubhouse avenue, where he resided. Here they stopped to chat for a moment. As they stood talking, appellant saw a car apparently stationed on the side track about 90 feet northerly from the place where they stood talking. The car had neither headlight nor side lights exhibited, although there was a dim light shining inside the car. No motorman was seen. There was nothing in the appearance of the car to indicate that it was in motion or approaching. Knowing of the custom to side-track cars at this point, seeing no lights and hearing no sounds to indicate that the car was in motion, the appellant was deceived into believing that it was in fact parked there for the night. Just before stepping upon the side track to cross to his own side of the trolley way, he again looked to the north, seeing the car in the same position which he supposed it formerly occupied. He then looked down toward the rails, and stepped upon the track in an effort to cross the right of way. Suddenly, as he reached a point within a foot of the farthest rail of the side track, he heard the rumbling of the wheels of the approaching car. It carried no headlight, nor side lights, the fender was elevated, and not down in its proper position for safety; no whistle was blown, and no gong was sounded. Startled, the appellant hesitated for a moment, then he lurched forward to save himself, but was struck, and dragged some 40 feet. One ankle was run over and crushed, necessitating the amputation of his foot. Four witnesses, besides the appellant, agree that neither headlight nor side lights were lighted upon the car; that the fender was elevated and that there was no one in or about the cars except a motorman who had charge of the car. Several witnesses testified they heard no whistle or bell. Evidently the car was without passengers, and was being run down to the main track by a single motorman, without lights or any of the usual evidences that it was in transit.

The appellant testified:

> "On the night of February 8th, * * * I was with some friends about eight blocks south of Venice. * * * I left there about 11:15 (p. m). * * * I went up to Venice, and, after getting something to eat, I started home on the sidewalk. * * * I proceeded along this walk until I came to Clubhouse avenue. * * * I am familiar with the place marked 'waiting room.' I have been catching trains

* * * for 15 years at that station. * * * The trains stopped at that point. The waiting room is opposite the alley marked on the map, and south of Clubhouse avenue (about 100 feet) between the two main tracks. * * * The public crossed the south-bound track going to the waiting room at Clubhouse avenue. That is the only way you can get to the station. The public also crossed from the east side of the main track going to the waiting room. * * * For about ten years * * * the side track has been used for parking electric trains—usually in the evening. I had observed cars there hundreds of time, for the night. They were parked on the side track. * * * I arrived near Clubhouse avenue on the cement sidewalk about 5 or 10 minutes after 12. The chap with me and I were walking down the sidewalk toward Clubhouse avenue, and we stood there a minute, and I happened to see this car parked there. * * * It was north of me. There was no headlight on it. There was a dim light inside. I couldn't say whether it was a single car or not. * * * There were no red lights nor green lights attached to it—no lights whatever. * * * I couldn't tell whether there was any man at the motor, or not. * * * No gong or whistle was sounded immediately prior to the time I was struck by the car. * * * I did not become aware that the car was moving toward me until, I should judge, it was about 8 feet from me, and at that time (when) I heard (it)—I gave a lurch, and that is the last I remember—I was struck. I was about half way between the two rails on this switchback when I was struck. * * * I was proceeding toward the ocean * * * directly opposite the east side of Clubhouse avenue. * * * The only way people could get there (to the station) was walking on that sidewalk. They proceeded west to Clubhouse avenue and across. * * * When this car was right on top of me, I naturally tried to get out of the way of it. I jumped westerly—that was the direction I was going; then it hit me. * * * My foot was crushed at the ankle but not cut off completely, but I had to have it amputated. * * * No warning was given from the time I first saw the car until I was struck. There were no * * * lights there at the scene of the accident. * * *"

Upon cross-examination appellant further testified:

"I was directly opposite Clubhouse avenue on the sidewalk when I saw the car that I thought was standing still. * * * I should judge the car was (then) about half a block away, in the neighborhood of 90 or 100 feet. * * * I was standing on the sidewalk at the time talking with this chap. I stood there, I imagine about a minute or so talking, after I saw the car. As I stood upon the sidewalk, I looked again. When I stepped off the sidewalk, the car was in the same position I noticed it at first—somewhere 90 or 100 feet away. I looked, and the car was standing there. * * * I had to look down to step over the tracks. * * * As I got to the second rail, I heard the car coming. I looked up, and then it was right on top of me. Then it kind of startled me, and I paused a moment, and then gave a lurch. The car was still up there when I stepped off the sidewalk to the rail. * * * It was very dark that night—no lights, and I could not say exactly (where the car was located. * * *) Just as I was about to step over the second rail, I heard the rumble of the train, and it looked like it was almost on top of me. * * * I stood there (on the sidewalk) about a minute talking to this friend. I looked before I stepped. I looked as I was stepping, and then (stepped) in the middle of the rails."

The record discloses an abundance of evidence requiring the submission of the case to the jury for its consideration upon the issue of contributory negligence. The motion for nonsuit was therefore erroneously granted.

[1, 2] Contributory negligence will bar one from recovering damages for personal injuries. Civ. Code, § 1714. But the question as to whether one has brought the injury upon himself by a lack of ordinary care is usually not a question of law for the court, but is one of fact for the jury. It is the province of the jury to determine the question of contributory negligence whenever the facts present a problem upon the solution of which reasonable minds may differ. 1 Thompson on Negligence, 408, § 425; 29 Cyc. 631; Kelly v. Santa Barbara R. R. Co., 171 Cal. 423, 153 P. 903; Hoffman v. So. Pac. Co. (Cal. App.) 258 P. 397. For the purpose of a nonsuit, the evidence must be viewed most strongly against the defendant. Every reasonable inference and presumption which may be deduced from the evidence must be resolved in favor of the plaintiff. All of the evidence disclosed by the record must be accepted as true. Conflicts and contradictions in the evidence must be disregarded. A lack of credibility of witnesses may not be considered, and the plaintiff's evidence is entitled to its full probative strength regardless of whether it may have been properly or improperly admitted. 9 Cal. Jur. 551, § 35.

[3] Since Trolley way, at the point where the accident occurred, is unpaved, and occupied by double interurban tracks, consisting of ties which rest upon loose sand, and T-rails projecting their full height above the level of the street, it must be conceded that the rule of caution required of a pedestrian attempting to cross tracks under such circumstances is the one applicable to steam railways, rather than the rule governing street car tracks within the boundaries of a city congested with traffic. Riney v. Pacific Electric Ry. Co., 45 Cal. App. 145, 187 P. 50. Clearly, this rule requires one to reasonably exercise his faculties of sight and hearing before attempting to cross an interurban electric system of tracks. One is bound to look and listen before crossing a railroad track, and, if the view is obscured for any reason so as to impair his sight or hearing, the exercise of reasonable caution will require him to stop so that he may more carefully look for approaching cars. 22 Cal. Jur. 318, § 68, p. 335; section 80; Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68.

[4, 5] Testing the conduct of appellant in the instant case by the foregoing rule, can it be said that he omitted any act for his safety which would be required of a reasonable person under like circumstances? His familiarity with the custom of the respondent railroad company to station cars for the night on this side track would induce him to reasonably conclude that here was a car switched out and stationed until the increased traffic in the morning would require its use. His very knowledge of this custom beguiled him into the natural mistake of assuming that it was side-tracked for the night. This inference may reasonably be supported by the fact that it appeared to be stationary, and had neither headlight nor side lights which were customarily used upon these electric cars when they were being operated. He saw no motorman in the car, despite the dim light which appeared within. He heard no sound to warn him of a moving car, although his hearing was good. He stopped; he looked and observed the car; and he listened. It was dark at this point, for there were no lights nearer than the farthest end of the station, and these consisted of merely a group of three or four small incandescent globes. After stopping and observing the car some 90 feet away he chatted for a moment or more with his friend, and, before venturing upon the side track, he again looked, and saw the car in the same position where he supposed he had formerly seen it. Everything in the appearance of the car confirmed his belief that it was stationary. As a reasonable person, he had a right to assume that it would not be run down across an open way leading to a residence street where the public were accustomed to cross the tracks, without a headlight, and without adequate warning of whistle or bell. This is not a case of a pedestrian thoughtlessly stepping in front of a rapidly approaching car on a main line, where one should expect trains to be running, and where a glaring headlight, or a warning whistle or bell, admonished him of the danger.

It was a mistaken estimate regarding an unlighted and unheralded car silently sliding down upon him on a side track in the darkness. His attention was diverted from the car as he looked downward in the darkness to pick his way across the track. Without warning, the car suddenly came upon him. Unquestionably he was deceived regarding the real distance of the car when he saw it. The darkness and the lack of lights on the car may reasonably have accounted for this mistake. Since his hearing was good, we may reasonably assume that the car was silently rolling down upon him in the darkness without lights and without warning.

Under such circumstances, viewing the evidence most strongly against the respondent with every reasonable inference and presumption in favor of the appellant, accepting the entire evidence as true, rejecting all conflicts and contradictions, if any exist, and giving full weight, credit, and probative force to the testimony, we are bound to conclude that the record does not warrant the court in finding, as a matter of law, that appellant was guilty of contributory negligence.

As precedents in support of the judgment of nonsuit in the present case, respondent relies on the cases of Brown v. Pacific Electric Co., 167 Cal. 199, 138 P. 1005; Ross v. Pacific Electric Co., 39 Cal. App. 658, 179 P. 538; and Riney v. Pacific Electric Co., 45 Cal. App. 145, 187 P. 50. These cases, however, were based upon facts radically different from those found in the case at bar, and are therefore of little aid. Reference to the essential facts of these cases will readily distinguish them from the instant case without comment. In the Brown Case, supra, the syllabus concisely states the facts upon which a nonsuit was sustained, as follows:

> "The deceased, after approaching the car track and seeing the rapidly approaching car with its brilliant headlight, and after turning back to a place of safety, and hearing the warning whistle sounded by the motorman, suddenly, without looking, or taking any of the commonest precautions, rushed in front of the car."

In the Ross Case, supra, a nonsuit was affirmed on the following facts: Plaintiff was well acquainted with the locality where the accident occurred. It was broad daylight. She alighted from a car adjacent to a parallel track upon which another car was approaching from the opposite direction. The court said:

> "She had alighted * * * [in a] zone of safety from which, * * * she had an unobstructed view for * * * several hundred feet easterly, and from which point the slightest look or glance by her would have disclosed the proximity of the moving car which was such that rendered it impossible to step forward without colliding therewith; and yet she, with full knowledge that the cars were accustomed to pass each other in the manner shown, * * * left the zone of safety, * * * and stepped so near the car then passing immediately in front of her that she was struck by the projecting step."

And in the Riney Case, supra, a nonsuit was affirmed in a case where plaintiff was injured at nearly the same place where the accident in the instant case occurred. In that case, however, the plaintiff crossed the railroad right of way from east to west, a distance of about 40 feet, and, without looking, stepped directly in front of a rapidly approaching car on the main track, which was plainly visible at a great distance. The court said:

> "It was upon the second track that plaintiff was injured. * * * The only time he looked or listened for an approaching car was when he left the sidewalk to cross the street. Although

there was an open view for five hundred feet, and his hearing was good, he says he neither saw nor heard any indication of an approaching car. From that point, until he was struck * * * he paid absolutely no further heed to his surroundings, but proceeded leisurely across the street, apparently engrossed in introspective reflections. The distance he traveled was over forty feet, and he then entered upon the second track without looking up or even listening. At this time there was a car speeding down toward him * * * at a rate of thirty or forty miles per hour, upon an open, unpaved track, with a noise * * * heard half a block away. * * * Considering the distance plaintiff had to travel from the curb, where he took his only observation of the street, to the second track, where he was struck, the most obvious dictates of common prudence required him to look and listen again before entering on this second track."

[6, 7] Appellant complains of error in the sustaining of objections to testimony to the effect that the public commonly crossed respondent's tracks, at the place where the accident occurred, in their course directly to Clubhouse avenue on the westerly side of Trolley way. "Q. Is it (the right of way across the tracks to Clubhouse avenue) ordinarily used by the public?" Objections to similar questions were sustained. Unquestionably this evidence was competent to show a custom of pedestrians, the knowledge of which would throw some light upon the question as to whether appellant exercised reasonable caution in attempting to cross the tracks at that point. Still appellant is not harmed by this ruling, as similar evidence upon this point was subsequently admitted, as hereinbefore mentioned.

For the foregoing reasons, the judgment is reversed.

We concur: FINCH, P. J.; HART, J.

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89 Cal. App. 238

In re MAJOR'S ESTATE.★

MAJOR v. ROBERTSON.

(Civ. 6212.)

District Court of Appeal, First District, Division 1, California. Feb. 14, 1928.

Hearing Denied by Supreme Court April 12, 1928.

1. Wills 🔑439—In construing will, testator's intention must prevail, where ascertainable, and not contrary to some positive rule of law.

In construction of wills, the cardinal rule to be observed is to ascertain the testator's intent, and if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail.

2. Wills 🔑440—Testator's intent must be ascertained from words employed in will, together with such intrinsic evidence as may be admissible.

Testator's intent must in all cases be ascertained from the words which he employs in will, together with such intrinsic evidence as may be admissible; it not being permissible for courts to attempt to improve on will which testator has actually made.

3. Wills 🔑440—To ascertain testator's intent court must not consider words testator may have meant to use but did not.

In construing a will, the question always before the court is not what the testator should have meant to do or what words he may have meant to use, but what did he mean by the words which he actually used.

4. Wills 🔑72—Where there is doubt as to whether instrument is a will, test is whether maker executed document animo testandi.

In cases where doubt arises as to whether an instrument is a will or of some other character, the true test is whether maker executed the document animo testandi.

5. Wills 🔑72—Instrument cannot be will, in absence of testamentary intent.

Without testamentary intent, an instrument cannot be a will.

6. Wills 🔑72—Where maker did not intend by particular instrument in question to dispose of his property in manner in which it could have been disposed of by will, instrument must be denied probate, regardless of general intention as to disposition of property.

If the maker of an instrument did not intend by that particular instrument to dispose of his property in the manner in which it could have been disposed of by will, such instrument must be denied probate, no matter how correct it may be as to form and execution, and no matter how clearly it may conform to intentions of maker which he had otherwise expressed.

7. Wills 🔑452—Heirs at law are not to be disinherited, unless will clearly and with legal certainty expresses such intention.

Heirs at law are not to be disinherited, unless such intention is clearly manifested and expressed in the will with legal certainty.

8. Wills 🔑72—No particular words are necessary to show testamentary intent.

No particular words are necessary to show testamentary intent.

9. Wills 🔑130—Letter by uncle to nephew relative to property disposition held not olographic will, since no testamentary intent was expressed therein.

Letter written by uncle of one petitioning for probate of letter as uncle's olographic will, in which letter the uncle stated that he had not changed his idea, and that nephew was to be "the owner of the hold thing," and stating extent of uncle's wealth, *held* not an olographic will, since it contained no words which could be construed as words of testamentary intent.

10. Wills 🔑441—In construing wills, each case must stand on its own peculiar facts.

In the construction of wills, each case must stand on its own peculiar facts.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

★Hearing denied by Supreme Court.

Application by Oscar Major for probate of the will of Arthur Major, deceased, opposed by Katherine Robertson. From a decree in favor of the proponent, contestant appeals. Reversed.

Treat & Ogden, of San Francisco, for appellant.

Joseph A. Garry, of San Francisco, for respondent.

TYLER, P. J. Appeal from an order admitting a will to probate. The sole question here presented is whether or not the instrument so admitted constitutes on olographic will. It reads as follows:

> "San Francisco, California, Dec. 12, 1924.
> "Mr. Oscar Major
> "Dear Nephew,
> "in reply to your letter i received last week i must tell you that i am very well and hope your the same i must tell you that i will go to St. Andre before long and i take up with me the copy of my testament you ask me for but be sure i have not change my idea your are to be the owner of the hold thing i am worting about $15,000 to $16,000 dollar
> "your uncle Arthur Major."

The evidence introduced in support of the petition established that Arthur Major was a resident of and died in the city and county of San Francisco, Cal., on the 15th day of February, 1926, leaving an estate of the approximate value of $12,000, and leaving surviving him as his next of kin and heirs at law a brother, Joseph Edward Major, and a sister, Katherine Robertson; that the above-recited instrument submitted for probate was sent to Oscar Major through the mail by his uncle, Arthur Major, the decedent, in the month of December, 1924, and that such instrument was entirely written, dated, and signed in the handwriting of the deceased. No evidence was introduced as to testamentary capacity of the deceased. The court found, among other facts, that deceased was, at the date of the execution of the instrument in question, of sound and disposing mind and that the letter was testamentary in character. As conclusions of law it was determined that it constituted an olographic will and it was accordingly admitted to probate. Appellant contends that the findings are not supported by the evidence; that the conclusions of law are erroneous, as is also the order admitting the instrument to probate. We are of a like opinion.

[1-10] Primarily it may be said that in the construction of wills, the cardinal rule to be observed is to ascertain the intent of the testator, and if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail. In the ascertainment of this intent, however, courts cannot make a will for a testator or attempt to improve upon the will which the testator actually made. It follows that a testator's intention must in all cases be ascertained from the words which he employs in his will, together with such extrinsic evidence as may be admissible. The question always before the mind of a court is not what the testator should have meant to do, or what words did he mean to use, but what did he mean by the words which he actually used. In cases where doubt arises as to whether the instrument is a will or of some other character, the true test is whether the maker executed the document animo testandi. Without this it cannot be a will. Proof that a party intended to make a disposition of his property similar to or identical with that contained in a certain paper which he has executed does not make such paper his will. No matter what his intentions may have been with respect to the disposition ,of his estate, if the maker of an instrument did not intend *by that particular paper* to dispose of his property in the manner in which it could have been disposed by a will, such instrument must be denied probate, no matter how correct it may be as to form and execution, and no matter how clearly it may conform to the intentions of the maker which he had otherwise expressed. 1 Alexander on Wills, §§ 46, 47. In other words, when it is claimed that the intention of a deceased was that a paper should stand for a last will and testament, it must be plainly and satisfactorily apparent that the testator intended *the very paper* to be his will. Unless it so appears, the paper must be rejected. Heirs at law are not to be disinherited unless such intention is clearly manifested and expressed with legal certainty. Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244. And courts cannot supply an intention which cannot be found in it. Estate of Branick, 172 Cal. 482, 157 P. 238. No particular words are necessary to show a testamentary intent, but, as was said by Mr. Justice Seawell in Estate of Spitzer, 196 Cal. 301, 237 P. 739, it must appear that the maker intended *by it* to dispose of property after his death. Here the instrument in question reveals that the deceased had been asked by his nephew for his will, and that the letter in reply, and which it is sought to have established as a will, is a mere acknowledgment to such request containing an assurance that he had not changed his mind with reference to the disposition of property in his testament. That deceased had made a will under which his nephew was the sole legatee, but which will had been rejected for the reason it was not properly executed is conceded by both parties. This beyond question was the testament referred to in the letter. The letter, however, cannot be construed as a will, for it contains absolutely no words that can possibly be construed as a testamentary intent. Nor is there any evidence in the record that deceased ever intended that the instrument in question

should constitute his will. It was a mere response to a request containing an assurance of the existence of a will under the terms of which the nephew had not been forgotten. The document was clearly informative and not testamentary. We conclude, therefore, that the record contains no evidence to show that *the particular instrument* offered and received as a will was ever intended by the deceased to be his will. Whatever his intention may have been to make his nephew his sole legatee, no words have been employed by him in the instrument in question to effectuate that purpose and it is clearly manifest that deceased did not intend the letter to constitute his will, but, as stated, it was clearly informative and containing the assurance that the nephew was remembered in a will. We are cited by respondent to cases which he claims uphold his contention that the instrument is a will. We do not so understand them, but, on the contrary, the facts upon which they are based showed in each case a testamentary intent from the instrument itself. As was said in Estate of Spitzer, supra, no good purpose would be accomplished by citing them, as each case must stand upon its own peculiar facts.

The order admitting the instrument to probate is reversed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

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89 Cal. App. 37

GUNST v. ZIMDARS et al. (Civ. 5395.)

District Court of Appeal, First District, Division 2, California. Feb. 6, 1928.

1. Vendor and purchaser 🔑348—Demurrer to complaint for damages for breach of contract by one not party or privy to contract held well taken.

Where plaintiff sued vendor and successor in interest for damages for breach of land contract, and it appeared from complaint that C., who bought land at mortgage foreclosure sale, was not party to contract, nor in privity therewith, but complaint prayed for judgment against him requiring him to execute deed to lot plaintiff had purchased from vendors, his demurrer to complaint should have been sustained.

2. Pleading 🔑418(2)—In action for breach of land contract, one not party to contract having, after demurrer overruled, tendered issue of title, court could determine question of title (Code Civ. Proc. § 738).

In action by purchaser against vendor and successor in interest for damages for breach of land contract, and for judgment against purchaser at mortgage foreclosure sale, requiring him to execute and deliver deed to lot, in which the latter's demurrer was overruled, and he thereupon answered and by appropriate allegations in cross-complaint tendered issue of title to land described in complaint, under Code Civ. Proc. § 738, and issue was traversed by plaintiff, court was authorized to determine question of title, and cross-complainant cannot complain that court determined issue presented by him.

3. Mortgages 🔑551—Action to compel mortgage foreclosure purchaser to execute deed, commenced within 18 months after latter obtained deed, was not barred by laches.

Where purchaser's action against vendor and successor in interest for damages for breach of land contract, and against C., purchaser at mortgage foreclosure sale, to compel him to execute deed to lot on ground that foreclosure action was intended to be dismissed as to lot purchased by him from mortgagor, was commenced within period of 18 months after C. obtained deed to land, plaintiff's action was not barred by laches.

4. Mortgages 🔑551—Evidence supported finding that it was intended to dismiss mortgage foreclosure action as to lot purchased by plaintiff.

Evidence *held* sufficient to support finding that parties to foreclosure action foreclosing mortgage on tract of land including lot purchased by plaintiff from mortgagor intended to dismiss foreclosure action both as to plaintiff and as to plaintiff's lot, though action was dismissed only as to plaintiff.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action to quiet title by Joseph Gunst against J. B. Zimdars and others, in which B. B. Cory filed a cross-complaint. From the judgment, the cross-complainant appeals. Upon the death of plaintiff, Vera B. Gunst, the administratrix of his estate, was substituted as plaintiff and respondent. Affirmed.

True Van Sickle, of Oakland, and Thomas W. Firby, of San Francisco, for appellant.

Arthur H. Barendt, of San Francisco, for respondent.

BURROUGHS, Presiding Justice pro tem. This is an appeal by the defendant B. B. Cory from a judgment quieting plaintiff's title to lot 6 in block 8 of Sunnyside in the city and county of San Francisco. March 11, 1912, the Homeland Company, then a corporation, was the owner of a tract of land of which said lot 6 was a part. On that day the said company made, executed, and delivered to one T. C. Judkins a mortgage covering all of said land, including said lot 6. The said mortgage was recorded in the office of the county recorder of said city and county on March 13, 1912. The real owner of said mortgage and the debt secured thereby was this appellant, B. B. Cory. On February 26, 1918, the said mortgage was formally assigned to him by the said Judkins. On March 31, 1913, the Homeland Company entered into a contract of sale with the respondent herein, whereby it agreed to sell to respondent said lot 6, and upon the performance by the latter of certain conditions named therein to convey to him a good and sufficient title thereto, free and clear of all incumbrances. Said contract of sale was duly recorded in the office of the recorder of said city and county on July 16, 1913. The Homeland Company, on October 1, 1915, conveyed its title to all of said property to the defendant Thomas A. Fisher. January 31, 1917, T. C. Judkins commenced an action to foreclose the mortgage against the said Homeland Company, Thomas A. Fisher, and this respondent. February 4, 1918, the respondent herein having completed his payments in accordance with the terms of said contract of sale, said Thomas A. Fisher, as the successor in interest of the Homeland Company, on March 23, 1918, made, executed, and delivered to respondent a deed to said lot 6, and said deed was duly recorded April 2, 1918. On January 20, 1920, on motion of counsel for the plaintiff in the said foreclosure suit herein mentioned, the said action was dismissed as against this respondent who, as heretofore said, was a defendant in said action. On January 12, 1920, the said foreclosure proceedings were carried to judgment as against the Homeland Company and Thomas A. Fisher, and on February 17, 1920, the defendant B. B. Cory purchased all of said property under the foreclosure proceedings and on June 11, 1921, received a deed therefor. This action was commenced on January 15, 1923, and the complaint prays a judgment against the Homeland Company and Thomas A. Fisher in the sum of $700, being the amount which it is alleged that he paid for said land, and also a judgment against the defendant Cory, requiring him to make, execute, and deliver to the plaintiff a deed to said lot of land upon such terms as the court may deem just. The appealing defendant filed his answer to the complaint, and by a cross-complaint sought to quiet his title to the said lot 6 hereinbefore referred to. The said cross-complaint contains the usual allegations in an ordinary action to quiet title under the provisions of section 738, Code of Civil Procedure, and the plaintiff by his answer to said cross-complaint raises the issue of title to said described tract of land.

[1, 2] The trial court rendered its judgment quieting plaintiff's title to said land. It is contended by the appellant that the court should have sustained his demurrer to the complaint; that plaintiff's action is one against the Homeland Company and Thomas A. Fisher for damages for breach of contract and it appears from said complaint that this appellant was neither a party to the contract nor in privity therewith. We are of the opinion that this point was well taken and the demurrer should have been sustained, but it was overruled by the court. Appellant thereupon answered, and by appropriate allegations in his cross-complaint tendered the issue of title to the tract of land described in the complaint, and said issue, having been traversed by the plaintiff, the court was authorized to determine the question of title. Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209, we believe is in point. That action was brought under what is commonly called the McEnerney Act (St. 1906 [Ex. Sess.] p. 78) to determine adverse claims to real property. One of the defendants appeared therein and by answer put in issue the title to the property in dispute. Judgment going against him, he thereupon appealed and made the objection that, as the plaintiff had failed to bring himself within the provisions of the McEnerney Act, the court was without authority to treat the case as an ordinary action to quiet title. The Supreme Court held that, having appeared in the action and by appropriate allegations submitted his claim to the court, he could not complain. In the case at bar the appealing defendant, having tendered the issue of title, he cannot now complain that the court determined the issue thus presented by him.

[3] It is further contended that the plaintiff's cause of action was barred by laches, but it appears from the uncontradicted record that plaintiff's action was commenced within a period of eighteen months after the appellant obtained his deed to said tract of land. We are therefore of the opinion that the action was not barred by laches.

[4] It is further claimed that material findings are not supported by the evidence. Finding 5, which is one of the findings under attack, reads as follows:

> "That on or about the 20th day of January, 1920, the attorneys for the plaintiff in said action to foreclose moved to dismiss said action as to the defendant Joseph Gunst, and said motion was granted, but said action was not dismissed as to the said lot No. 6 in block No. 8, though it was the intent of the parties to the foreclosure that said action should be dismissed both as to said Joseph Gunst and as to said lot 6 in block 8."

It is contended that there is no evidence that the parties to the foreclosure intended to dismiss said action both as to said Gunst *and as to said lot*. The only evidence in support of this finding is the testimony of Mr. Zimdars, a former director of the Homeland Company and now one of its trustees, as follows:

> "The Homeland Company is the owner of the property. At the time it made this contract with Mr. Gunst the property was mortgaged, the pro rata thereof on this lot was about $140. Then, about a year after this mortgage went on record, a contract was entered into with Mr. Gunst for the sale of this lot on installment payments. Long after that the Homeland Company made a conveyance of this lot to Thomas Fisher, including many other lots, and Mr. Gunst

was thereafter directed to make payments to the bank, which he did. * * * Mr. Fisher collected the amounts that were payable on this contract from Mr. Gunst, and he made him a deed, but he did not release this mortgage, and a suit for foreclosure was brought, and in that Mr. Gunst was made a defendant, Mr. Fisher was made a defendant, and the Homeland Company was made a defendant, and I was one of the officers of the Homeland Company, and when I discovered that situation I went to the attorney who had charge of that matter and requested that this action be dismissed against Mr. Gunst, and that he be not included in the judgment, and my understanding was that there was enough property left to satisfy that mortgage. * * * The action was dismissed as to Mr. Gunst, but when it came to entering the decree of foreclosure the lot appeared in that decree, and it was sold in accordance with that decree. Now there has been no foreclosure of mortgage against Mr. Gunst, and the time for any action of that kind has long since passed by."

We are of the opinion that this uncontroverted evidence that the attorneys for plaintiff dismissed the action as to this plaintiff upon the request of a director of the Homeland Company was sufficient to support an inference that it was intended to dismiss the action not only as to this plaintiff, but also to dismiss as to the tract of land claimed by the plaintiff. The only possible reason that this plaintiff was a proper party to said action was for the purpose of foreclosing whatever interest he might have had in the lot claimed by him, as no personal judgment could have been rendered against him on the debt secured by the mortgage.

It is also claimed that the following findings are not sustained by the evidence: Finding 8 to the effect that respondent did not know at the time of the execution and delivery of the so-called Fisher deed that Fisher was not able to convey plaintiff a clear title to the land. Finding 9, to the effect that on or about March 1, 1922, the plaintiff herein learned that the recorded title to said lot of land stood in the name of appellant. Finding 13, to the effect that it was not true that plaintiff had knowledge of any of the matters clouding his title to said lot of land prior to March 1, 1922. We deem it unnecessary to consider the evidence bearing upon these findings, because, in view of finding 5 above set forth, these findings become immaterial, in that by said finding 5 the court found that it was intended to dismiss the foreclosure action as to said lot 6, and the further reason that we do not consider the doctrine of laches as applying to plaintiff's cause of action. Nor do we believe that the case of Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am. St. Rep. 157, cited by appellant, applies to the case at bar. In the cited case it was held that, in an action to quiet title against a defendant who held a mortgage on the premises described in plaintiff's complaint, but which mortgage had been foreclosed without making the plaintiff in that action a party, the plaintiff was not entitled to a decree unless plaintiff paid the defendant's mortgage, but in the case at bar such a condition does not arise, as it was intended by all the parties to the foreclosure proceedings to dismiss that action as to this plaintiff.

It is further claimed by appellant that there is no finding of the trial court that respondent had any title or interest in the lot at the time this action was commenced, also that there is no finding as to whether respondent's answer to the cross-complaint was true or untrue. This contention is based upon the finding that none of the allegations of the answer or cross-complaint of appellant, "wherein they controvert any of the findings of fact in favor of plaintiff hereinbefore set forth, are true," but an examination of the findings made by the trial court shows that they are full and complete and respond to all of the material issues. This disposes of all the points presented by appellant for a reversal of the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

89 Cal. App. 258

BANK OF ST. HELENA v. LILIENTHAL-BRAYTON CO. et al. (Civ. 6226.)★

District Court of Appeal, First District, Division 1, California. Feb. 15, 1928.

Rehearing Denied March 16, 1928. Hearing Denied by Supreme Court April 12, 1928.

1. Fraud ⟹50—Bank purchasing notes from brokers whose circular describing notes was fraudulent must prove knowledge of circulars.

Bank purchasing notes could not recover from defendant brokers for false and fraudulent statement in its circulars regarding the notes, where bank did not prove that it was influenced by the circulars or representations therein, or that the circular had even been read by it or its officers.

2. Fraud ⟹50—One ignorant of facts and without means of information of which material representations had been made is presumed to rely thereon.

Where one, ignorant of real facts and having no ready means of information, enters into transaction as to subject-matter of which representations have been made which are material, the law presumes as matter of fact that he relied on them.

3. Fraud ⟹50—Proof that one has been defrauded does not support presumption he was misled by representations never made to him.

Proof that one has been defrauded does not support the presumption that he was misled by representations never made to him.

★Rehearing denied. Hearing denied by Supreme Court.

4. Fraud ⚿20—Party complaining must be deceived by untrue statement, and cannot rely on statements not coming to his knowledge until transaction is consummated.

Party complaining of fraud must be deceived by the untrue statement, and there can be no reliance on statements which do not come to his knowledge until after he has consummated the transaction.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Bank of St. Helena against the Lilienthal-Brayton Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Clarence N. Riggins, of Napa, for appellant.

Thomas, Beedy, Presley & Paramore, of San Francisco, for respondents.

PARKER, Justice pro tem. Appeal from judgment in favor of defendants entered pursuant to a verdict of a jury, which verdict was directed by the court upon the theory that plaintiff had failed to present facts sufficient to sustain its cause of action. The action was one to recover damages resulting to plaintiff from and through the fraud of defendants, and a narrative of the facts may be here given.

The plaintiff is a banking corporation with its place of business at St. Helena, in Napa county, Cal. The defendants as partners are engaged in a general brokerage business, consisting in part in the underwriting and sale of bonds, notes, and other investment securities. During the month of January, 1921, the defendants offered for sale to the general public certain mortgage serial notes described as T. A. Tomasini notes. A circular descriptive of said notes was prepared and circulated throughout the state. The circular described the notes and the security behind them. Without detailing the representations of the circular it will suffice to say that the notes were represented as being abundantly secured, and held out as an unusually sound investment, approved and certified by the superintendent of banks as a legal investment for savings banks in California. For the purposes hereof it may be admitted that the contents of the circular were false and fraudulent, and designed to induce prospective investors to part with their funds in the purchase of the securities. The record herein discloses that on the 21st day of January, 1921, plaintiff banking corporation came into possession of one of the circulars through a firm of bond and security salesmen other than defendants. On the same day plaintiff bank, through its president and cashier, purchased Tomasini notes to the amount of $10,000. Thereafter the security failing to a great extent, the notes became correspondingly diminished in value, and the present action results, plaintiff claiming that it was induced to buy said securities by and through the willfully false representations of defendants.

[1] The answer of defendants put in issue all of the material allegations of plaintiff's complaint and a trial was had. The trial court directed a verdict for defendants on the ground the plaintiff had failed to prove that it had been at all influenced by the circular or any representation made by defendants, or that said circular had ever been read by plaintiff or any of its officers before the purchase of the securities. This is the one point involved here. The trial court held that there was no direct evidence showing that plaintiff or any of its officers had ever seen and read the circular before the purchase of the bonds in question.

Appellant here concedes, as indeed it must, that in the absence of knowledge of the contents of the circular on the part of plaintiff through acting officers no recovery can be had. We therefore examine the record for any evidence on this point which will indicate the fact of knowledge or any fact or facts from which a fair inference thereof may be drawn.

At the time of trial the president of the bank had died. However, there are no facts that would indicate that he had any knowledge of the transaction or the circular. The cashier of the bank had died before trial, but plaintiff had secured his deposition, and the same was used at the hearing below. It appears that the negotiations leading up to the purchase of the Tomasini notes by plaintiff were carried on by one Frank Pellet on behalf of the bank. All of the facts connected therewith were within his knowledge, and the fraud operating upon the corporation became effectual, if at all, through its influence upon Pellet the individual. On January 21 the bank received a letter from a firm of brokers, other than defendants, calling the attention of the bank to the Tomasini notes as a good investment, and stating in the letter that the circular was inclosed. No one seems to remember whether the circular was or was not in fact inclosed. As far as the direct testimony goes the cashier Pellet testified that he had no recollection of the circular accompanying the letter. The letter itself was commendatory of the Tomasini notes, and called attention to the fact that the issue had the approval of the state superintendent of banks as a legal investment for savings banks. In fact, this letter itself was stronger than the circular prepared by defendants. Upon receipt of this letter Pellet telephoned the brokers at San Francisco and, following the telephone communication, plaintiff bank placed its order for the purchase of the bonds. There is not a single word of evidence that Pellet or any one else connected with plaintiff bank ever read the circular. The testimony of Pellet is to this effect: "I do not recall the circumstances at all, only as the letters show." The whole claim of appellant is based upon the fact that the order for the notes was placed on January 21, 1921, and that the circular was received in the bank on that date. There is nothing to show whether the circular and the letter referred to came together, or whether the circular came first or the letter. Further, there is not one word of evidence to indicate that the purchase of the bonds was made after the receipt of the circular. Appellant rests on the bare record, and then builds up its case by inference. It is contended that we must presume from the fact that the circular bears a receipt stamp indicating its receipt by the bank on January 21, 1921, that receipt by the bank was as of that date. We accept that. Then appellant argues that we must infer that the circular came at a time prior to the purchase, and that the circular was read by some officer of the bank, who acted thereafter on the information in the circular contained. The strain of inference exhausts itself in the face of the testimony of the cashier, the one human agency involved in the purchase, to the effect that he does not recall anything about the circular. It is passing strange that one can be induced to part with his money by fraudulent representations of another without knowing that it was these representations that induced him. Pellet, the cashier, was a man who had been in the banking business for many years, and a man familiar with investments and banking. If he had read the circular he certainly would have known it; and the fact that he would not testify that he had showed clearly that he was not of the impression that his act of purchase was in anywise affected by the circular statements. As hereinbefore set forth, the only direct fact we have in the record is that a copy of this circular was in possession of the bank on the same date that it purchased the notes. From that fact we are called upon to presume or infer the remaining facts necessary to plaintiff's recovery. If we could infer that the circular was received before the purchase, and then infer further that the circular was read before the purchase, we would be beyond the main difficulties, and the foundation would be sufficient to conclude a reliance upon the statements in the circular contained. The stress of appellant's argument is that proof of the representations permits the inference that reliance was placed thereon. We can agree with appellant to this extent.

[2] Where a person ignorant of the real facts and having no ready means of information enters into a transaction as to the subject matter *of which representations have been made* which are material, the law will presume as a matter of fact that he relied upon them. 27 C. J. p. 49, § 179. Section 206, same volume, Corpus Juris, says:

> "While plaintiff must show that the false representations set out induced him to act to his prejudice, the fact of reliance may be inferred from other facts proved. It does not require strong proof to establish that a person complaining of fraud was influenced by the false representations."

[3] This general doctrine is upheld by our Supreme Court in the case of Hunter v. McKenzie, 197 Cal. 185, 239 P. 1090. But by no stretch of the authorities or the language employed can it be said that the presumption works backwards. It cannot be held, or even seriously argued, that proof that one has been defrauded supports the presumption that he was misled by representations never made to him. In Nash v. Rosesteel, 7 Cal. App. 504, 94 P. 850, it is said:

> "Plaintiff * * * had never seen the inventory, nor was he informed of what it purported to contain. Hence, admitting the truth of his contention [that a false inventory was prepared], he could not have been misled or deceived by such document."

[4] The party complaining must be deceived by the untrue statement; otherwise, there can be no reliance. And there can be no reliance on statements which do not come to the knowledge of a contracting party until after he has consummated the transaction. 12 Cal. Jur. 751.

In the case of Ward v. Richmond, 193 App. Div. 727, 184 N. Y. S. 508, the court says:

> "Plaintiff testified that he saw these prospectuses, and that some were laid upon his desk, but he never discussed them with" defendants. "He further testified that he relied upon the representations contained therein. * * * But he nowhere testifies that he saw, read, or received the prospectus before he bought the stock from defendants. * * * As the representations claimed to have been relied on, and proven to be false, were contained in the printed prospectus, it would be well upon a new trial to establish the fact as to when plaintiff actually read the prospectus, whether before or after he parted with his money for the stock."

In 26 Corpus Juris, at page 1140, it is said:

> "Obviously there can be no recovery where it was impossible for complainant to have relied on the representations, because they had not been made or communicated to him at the time of the transaction."

The entire case presented here may be thus illustrated: A purchases stock or bonds in a corporation. After purchase he discovers that he has been defrauded. He then goes to B and says:

"I purchased stock in the Hope More Company. On the day I purchased the stock I received a circular issued by you with the idea of inducing people to buy the stock. This circular of yours contained statements knowingly and willfully false and intended to mislead people to their disadvantage and to your gain. I do not know if I ever read the circular before I bought the stock and cannot say that I did. Nevertheless, I have a cause of action against you for the loss to me by reason of my purchase of the stock, based on these representations."

From the authorities hereinbefore cited and as a matter of law too plain for further discussion it is apparent that A could not recover. Plaintiff here is similarly situated.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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88 Cal. App. 706

STEVENS v. PRIVETT et al. (Civ. 5980.)

District Court of Appeal, First District, Division 2, California. Jan. 30, 1928.

1. Appeal and error 🔑1010(1)—Trial court's findings may not be disturbed where sustained by abundance of evidence.

Findings of trial court may not be disturbed by Court of Appeal where they are sustained by abundance of evidence.

2. Patents 🔑215—Whether contract involved patent rights held immaterial in action to rescind contract where court had jurisdiction.

Whether contract involved rights under patents *held* immaterial in action to rescind such contract, where trial court had jurisdiction of issues presented by pleadings.

3. Patents 🔑213—That licensee under patent obtains only immunity from suit held immaterial in action to rescind contract purchasing license on ground of fraudulent representations.

Fact that licensee under patent obtains only immunity from suit *held* immaterial, in action to rescind contract purchasing license rights under patents on ground that sellers made fraudulent representation that they could sell such rights, whereas in fact they could not, action thus being based on theory that buyer never became licensee or other party to patent.

4. Patents 🔑213—Buyer of license rights under patents seeking to rescind on ground that sellers fraudulently represented that they could sell such rights can dispute sellers' title.

Buyer of exclusive sales rights under patents seeking to rescind purchase contract on ground that sellers made fraudulent representation that they could sell such rights, whereas in fact they could not, can dispute sellers' title.

5. Patents 🔑213—Buyer of license rights under patents might rescind for fraudulent representation of sellers that they could sell such rights, regardless of recognition of buyer as licensee by owner of patent.

Buyer of exclusive sales rights under patents had right to rescind purchase contract on ground that sellers made fraudulent representation that they could sell such rights, whereas in fact they could not regardless of fact that buyer was recognized as licensee by owner of patent.

6. Patents 🔑213—Buyer of license under patents might rescind because of sellers' fraudulent representation, regardless of financial difficulties and treatment of buyer by owner of patent.

Buyer of exclusive sales rights under patents had right to rescind purchase contract because of fraudulent representation of sellers that they could sell such rights, whereas in fact they could not, regardless of financial difficulties and treatment of buyer by owner of patent.

7. Patents 🔑213—Motive of buyer of license under patents in rescinding may not be inquired into where he relies on legal reason.

Motive of buyer of exclusive sales rights under patents in seeking to rescind purchase contract may not be inquired into when he has legal reason for rescinding and relies thereon.

8. Patents 🔑213—Buyer of license under patents, showing that because of false representations of sellers he made certain payments to them for which he got nothing, showed injury sufficiently for rescission.

Buyer of exclusive sales rights under patents, showing that because of false representations of sellers that they could sell such rights he made certain payments to them for which he got nothing, showed injury to amount of these payments sufficiently to warrant rescission.

9. Appeal and error 🔑1056(3)—Excluding writings of slight significance, if any, held not reversible.

Excluding written instruments having slight significance, if any, *held* not ground for reversal.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for rescission of contract on ground of fraud, brought by D. A. Stevens against C. R. Privett and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Meserve & Meserve, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, for respondent.

STURTEVANT, J. This is an appeal from a judgment of rescission of a contract on the ground of fraud. By the terms of the agreement respondent was granted exclusive sales rights of a certain patented automobile inner tube called the "Boggs compression inner tube," within the entire territory of Idaho, as will more specifically appear.

The U. S. Compression Inner Tube Company, a corporation, of Tulsa, Okl., was the owner and manufacturer of the "Boggs compression inner tubes" which were protected by two patents issued by the government in 1917. The right to sell said tubes within certain states was conditionally granted by said owner to appellants October 9, 1919. In consideration of the sum of $13,845, the appellants granted to respondent, by a written agreement dated February 16, 1921, the absolute exclusive right to sell said tubes within the county of San Diego, state of California. The purchase price consisted of respondent's promissory note in the sum of $8,845 and a cash payment in the sum of $5,000. Of the cash payment $500 was subsequently refunded upon a modification of the contract. On July 20, 1921, the contract was so changed that instead of the county of San Diego the state of Idaho was designated as the territory. A new written instrument was executed as to the new territory and the written instrument as to San Diego was canceled. The contract was for the unexpired term of said patents which continued for some thirteen years from that date. After February 16, 1921, respondent entered the state of Idaho and commenced to make sales and for a period of about one year proceeded to sell tubes in the state of Idaho, purchasing them at the contract price from the U. S. Compression Inner Tube Company at Tulsa, Okl.

The complaint alleged, and the trial court found, that respondent contracted for the exclusive right to sell said tubes in the territory of Idaho for the unexpired term of said patent, in consideration of the sum of $13,845, which was paid to appellants as above stated, relying solely upon the representations by appellants that they were the owners and possessed of an absolute right to sell said Boggs compression inner tubes within the territory of Idaho and elsewhere; that appellants falsely represented to respondent that they had secured such exclusive right by contract from the owner of said patents, and that said agreement was in full force and validity, while in truth and in fact appellants held no such property right, and had no authority to sell such territorial privilege for the reason that appellants' contract with the owner of said patents, so far as it related to the territory of Idaho, was specifically conditioned upon the construction and operation of an inner tube factory which was to be built at Burbank, Cal., at an estimated cost of $100,000, which factory was in fact never completed nor operated, and that appellants' right to sell said tubes in, or dispose of territory in, the state of Idaho was inoperative and had never vested.

The eighth paragraph of the agreement between the appellants and the owner of the patents, and which is dated October 9, 1919, provided as follows:

"Eighth. It is agreed and understood that this contract does not take effect until said factory in California or some of the other states mentioned herein shall have been erected, and party of the first part has commenced manufacturing tubes and is able and ready to supply party of the second part with all the tubes required by him to supply said territory, and until said time, a contract heretofore entered into by the U. S. Compression Inner Tube Company and C. R. Privett, covering the state of California and dated March 27, 1919, remains in full force and effect, but after such factory is completed and party of the first part is able and ready to supply party of the second part with a sufficient number of tubes to supply said territory, then this contract shall become operative and binding and shall in all particulars supersede the said contract dated March 27, 1919, and party of the first part agrees to furnish party of the second part a sufficient number of tubes to supply the demands of the trade in all of the above-named number of states. Second party has first call on all tubes made by the factory to be established under this contract to supply his territory."

The contract mentioned in paragraph 8 and dated March 27, 1919, was not offered in evidence, is not in the record, and we are wholly uniformed as to the provisions thereof.

It was further found that at the time of the execution of said agreement between the appellants and respondent, the latter was unaware of the existence of the conditional provision contained in the eighth paragraph of the contract between the appellants and the owner, or that the appellants then had no power or authority to enter into a contract granting to respondent the exclusive right to make sales in the state of Idaho; that respondent was persuaded to part with the purchase price for said territory by said false representations; that on July 25, 1922, for the first time respondent learned that the appellants had no authority to grant him the said right, and thereafter he served a written notice of rescission upon appellants offering to restore to them everything of value received by him pursuant to contract and that the offer was rejected. The trial court also found that the owner of said patents never ratified appellants' contract with respondent and never waived the conditional terms contained in the above-quoted paragraph 8 of the contract between the owner and the appellants. The trial court entered judgment against the appellants for $4,500, rescinded the contract between respondent and appellants, and canceled respondent's promissory note for the sum of $8,845.

Appellants contend that: (1) The contract involves rights under United States letters patent; (2) licensee under patent obtains only immunity from suit; (3) respondent received all that his contract called for; (4) respondent cannot dispute appellants' title; (5) respondent made no offer to compensate appellants for use of right in Idaho; (6) no offer to restore San Diego contract; (7) respondent did not offer to, nor did he return all or any of the benefits which he received under the contract sought to be rescinded, nor did he offer to restore appellants to the position in which they were prior to July 20, 1921; (8) respondent was recognized by the owners of the patent as the licensee in the state of Idaho; (9) financial difficulties and treatment of respondent by owner of patent no justification for rescission; (10) no misrepresentations of act made by appellants to respondent; (11) respondent was not injured; (12) errors in not admitting evidence.

[1] Of the attacks above mentioned those numbered 3, 5, 6, 7, and 10 are each and all attacks on the findings. Appellants do not complain that the findings are outside of the issues, nor that any issues are not found upon. The burden of their complaint is that the findings attacked should have been made in their favor. In this behalf it is sufficient to state that there was an abundance of evidence to sustain each finding and that this court, under these circumstances, is not at liberty to disturb the findings as made.

[2] Assuming that the contract involves rights under United States letters patent, we do not understand appellants to claim that the issues presented by the pleadings in the case before us were issues of which the trial court did not have jurisdiction. Therefore we need not further discuss the point.

[3] That a licensee under a patent obtains only immunity from suit is not involved in the case before us because we are here concerned solely with the rights of one who claims that, by reason of fraud, he never became a licensee or other party to the patent.

[4] The contention that the respondent cannot dispute appellants' title is based on what is said in Garvey v. Lashells, 151 Cal. 526, 531, 91 P. 498; Bell & Howell Co. v. Bliss (C. C. A.) 262 F. 131, 133; In re Michigan Motor Specialties Co. (D. C.) 288 F. 377, 379. The authorities are not applicable to the facts of this case. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, and Kahn v. Revett, 39 Cal. App. 312, 178 P. 733, are applicable to the facts of this case. They rule the point against the appellants.

[5] The fact that the respondent was recognized by the owners of the patent as the licensee in the state of Idaho did not constitute a defense. Under his contract the respondent attempted to purchase from appellants (1) the exclusive right to sell tubes in the state of Idaho through his own efforts or through his salesmen or both, and (2) the right to sell subportions or divided portions of said territory within the bounds of the state of Idaho. Conceding that the U. S. Compression Inner Tube Company took cognizance of the sales of tubes in the state of Idaho, that fact is of little importance in determining whether the appellants did or did not attempt to perpetrate a fraudulent act. The importance of the fact arose on a consideration of the defense of ratification and the defense of waiver and no doubt the trial court at that time gave the evidence introduced by appellants due consideration. Nevertheless, the trial court found the ultimate fact against the appellants.

[6, 7] The appellants contend that the financial difficulties and treatment of respondent by the owner of the patent was no justification for a rescission. We do not understand that the respondent claims to the contrary. All of those facts were brought into the record by the appellants. Conceding that they did not constitute, either in whole or in part, a justification for respondent's rescission, it must at the same time be granted that the same facts do not constitute a defense in behalf of appellants. As a part of this point the appellants claim that the reason the respondent attempted to rescind was because of the fact that it had transpired that the respondent had made a bad bargain, and not because of the alleged fraud of the appellants. The motive of the respondent in rescinding may not be inquired into when he has a legal reason for rescinding and relies thereon. De Bairos v. Barlin, 46 Cal. App. 665, 672, 190 P. 188.

[8] The contention that the respondent was not injured may not be sustained. Under that point the appellants state that after the purported contract had been signed the respondent went into the state of Idaho and attempted to build up a business; that he made sales; and that the U. S. Compression Inner Tube Company filled all of his orders. They then argue respondent was not injured. This argument amounts to this:

> The seller says to the buyer: "Yes, I took your $13,345 as the purchase price of the right to sell the tire in Idaho for thirteen years expiring in 1930; I have no such right to sell, but up to the present time you have been permitted to sell without such right because the real owner of that right has thus far found it to his interest not to interfere with your selling. What I sold you is therefore useless and worthless. You don't need it, and anyway I haven't got it to sell, so I will keep your $13,345, but you are not damaged."

When plaintiff pleaded and proved and the trial court found that because of the false representations of the appellants he had made certain payments to them and for which he got nothing, he showed injury to the amount of those payments. Wainscott v. Occidental, etc., Ass'n, 98 Cal. 253, 257, 33

P. 88; Spreckels v. Gorrill, 152 Cal. 383, 389, 92 P. 1011; Orton v. Privett (Cal. Sup.) 262 P. 713. In an action as for rescission the law did not require that he should go further. In Munson v. Fishburn, 183 Cal. 206, at p. 219, 190 P. 808, 813, the court said:

> "First, as to rescission: It is clear from the authorities we have cited that the exact amount of damage need not be shown, provided it be in an 'appreciable' sum. Where the action is for damages, however, the plaintiff must allege and prove that by reason of the fraud he has suffered damage in a definite amount."

[9] Finally, the appellants claim that the trail court erred in not admitting certain evidence. The evidence not admitted consisted of written instruments. Those instruments were identified and are contained in the bill of exceptions. A reading of them discloses that they are of slight, if any, significance. They do not even purport to throw any light whatever on the proposition that the appellants had no authority to sell to respondent territorial rights in the state of Idaho, or to authorize respondent, in turn, to sell subdivisions of such territorial rights.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; THOMPSON, Justice pro tem.

89 Cal. App. 295

ESSIG v. SEAMAN. (Civ. 4994.)

District Court of Appeal, Second District, Division 1, California. Feb. 17, 1928.

1. Judgment ⚷139—Court cannot ignore statutory law in exercising discretion in permitting default judgment to be vacated.

In the exercise of its discretion in permitting a default judgment to be vacated, court cannot ignore a statutory law or hold any of its provisions meaningless.

2. Judgment ⚷139—Court's discretion to set aside default is not to be exercised ex gratia.

Trial court's discretion to set aside default judgment is not to be exercised ex gratia.

3. Judgment ⚷143(3)—Defendant held guilty of inexcusable neglect in permitting default judgment, where he knew suit was pending, time in which plea was required, and his attorney appeared to dissolve attachment on last day of filing period.

Defendant *held* not entitled to have default judgment set aside, where his inexcusable neglect was shown from the fact that he knew suit was pending, that he was required to plead within 10 days of service, that he would be in default if he did not plead within time, and where his attorney was in court presenting a motion to dissolve an attachment in the suit on the last day of the period in which he was permitted to plead.

4. Appeal and error ⚷957(1)—Appellate court should not interfere with superior court's order setting aside default judgment, except where abuse of discretion appears.

The rule is well established that the appellate court should not interfere with the order of the superior court in cases relative to setting aside default judgments, except where it appears that there has been an abuse of discretion.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Guy R. Crump, Judge.

Action by Fred G. Essig against Percy Seaman. Judgment for plaintiff by default. On defendant's motion, default was vacated, and judgment set aside. From such order, plaintiff appeals. Reversed.

Tobias R. Archer, of Los Angeles, for appellant.

R. A. Ramey, of Glendale, for respondent.

YORK, J. This is an appeal by plaintiff from an order of the superior court granting a motion made by defendant and respondent to vacate a default entered against him and setting aside a judgment rendered on such default.

The action was commenced September 11, 1924. Summons was issued thereon and served on defendant on September 25, 1924. On October 7, 1924, the defendant not having answered or appeared except to move to dissolve the attachment, defendant's default was duly entered, and, as the action was for liquidated damages, judgment was duly entered in favor of plaintiff and appellant for the amount prayed for in his complaint. Defendant, on October 14, 1924, served and filed a notice of motion to vacate such default and set aside said judgment and filed therewith affidavits and a verified answer which he asked permission to file. Plaintiff filed affidavits in reply, and defendant filed another affidavit in reply to plaintiff's affidavits. After hearing on said motion the court granted the same and vacated said default and set aside said judgment and recalled an execution which had theretofore been issued thereon.

The showing upon which the court granted said motion was that the defendant, after service of the summons and complaint, "at once" mailed the same to his attorney by special delivery, and his attorney had been instructed "to do whatever might be necessary to protect his interests," and did not further communicate with his attorney until after default had been entered; that the attorney received the summons and complaint from defendant by mail on the 27th of September, 1924; that about the 30th of September, 1924, said attorney called at the defendant's "former employers," and made inquiries as to the whereabouts of the defendant in an effort to have defendant verify the answer which he had prepared; that he again called at the same place and made inquiries of "former fellow employees of the former employer, but was unable to get any information"; that he had instructed defendant to be present in court on October 6, 1924, when a motion was to be heard to dissolve the attachment that had been issued and levied in said action, "but the said defendant was not present"; that he located him at a hotel in October 7th.

Defendant had verified an affidavit which was used on the hearing of the last-mentioned motion on October 6th, which motion was argued in his absence one day before the default was entered. His affidavit showed that he had knowledge of the filing of the complaint and its contents before the service of the summons and complaint. He was evidently intending to avoid making a general appearance in the case, yet he asked the court to find that the indebtedness was secured by a mechanic's lien. With his motion to set aside the default and judgment, defendant filed two affidavits of merits, one by himself and the other by his attorney. The affidavit made by defendant is deficient, in that it does not show that the opinion of his attorney was founded on a statement to him of the facts of the case, and the affidavit of the attorney is deficient, in that his belief that defendant has a good and meritorious defense to plaintiff's complaint does not appear to be founded upon a knowledge of the facts of the case. As to the answer filed with the motion, it is defective, in that the plaintiff alleges in his verified complaint specific facts which are first met with a denial of the indebtedness which was a legal conclusion only, and then follows a statement of facts that prior to said ——— day of August, 1924, defendant was indebted to plaintiff, "the exact amount he is unable to state," and that on that day he was the owner of an automobile incumbered for "about $800," and plaintiff accepted the automobile subject to the incumbrance in full payment, settlement, and satisfaction of the whole of the indebtedness of the defendant to plaintiff.

Counter affidavits were filed by plaintiff, denying specifically the allegations of said answer, but it was for the trial court to find what the facts were. In a statement of plaintiff in his affidavit, not denied, he said:

> "On October 2, 1924, said truck was taken from the possession of affiant in the claim and delivery action No. 153741 in this court."

[1, 2] In his motion to release the attachment, which is a part of the transcript on appeal, defendant filed an affidavit in which he stated that he was the owner of the truck on August 12, 1924, and that it was worth $2,000, and that it had not diminished in value, and that it was in plaintiff's possession and held by him on his claim of lien. This affidavit was verified by defendant on the 23d day of September, 1924, and filed on the 2d day of October, 1924. No mention was made in this affidavit about his having sold the truck to the plaintiff. An affidavit made by George E. Bittinger, not denied, states that the automobile was the property of the Mortgage Discount Company, which company had entered into a contract with defendant to sell it to him, and that there was due on this contract of sale about $851, exclusive of interest. In defendant's affidavit in reply to plaintiff's affidavit, he says plaintiff knew that the Mortgage Discount Company was the legal owner of the automobile. Without reviewing all the affidavits, it appears that the defendant does not claim that there was any mistake either of fact or law, or inadvertence or surprise. The question, therefore, for the superior court to decide, was whether the default was taken against the defendant through his excusable neglect, and whether, if there was excusable neglect, there was such a showing of merits as justified the court in exercising its discretion in granting defendant's motion. Although appellate courts have been loath to reverse the action of the trial courts in their exercise of discretion in such matters, there must be some restraint upon a too liberal exercise of that jurisdiction. In the exercise of its discretion a court cannot ignore a statutory law or hold any of its provisions meaningless. Unbridled discretion is dangerous. The exercise of discretion by optimists is very likely to be different from the exercise of discretion by pessimists. "It is different in different men, and in the same man it is not always the same." It is not to be exercised ex gratia. Bailey v. Taaffe, 29 Cal. 423.

[3] The showing in this case establishes inexcusable neglect. The defendant knew the suit was pending and what allegations of the complaint he would have to meet even before the summons and complaint were served on him. He knew that he was required to plead within ten days of the time of service. His attorney knew that the 6th of October was at least his last day to answer the complaint, and that he would be in default if he did not plead by that time, and on that day he was in court presenting a motion to dissolve an attachment therein. He knew, or should have known, that, if he did not want to verify the complaint as defendant's attorney, he could have obtained an extension of time to plead, and, knowing these facts, he did not ask for an extension of time to plead, and permitted the defendant to default.

[4] We are aware that the Supreme Court has held to a liberal policy in sustaining the granting or refusing to grant an order relieving a party from default. The rule is well established that the appellate court should not interfere with the order of the superior court in such cases, except where it appears that there has been an abuse of discretion. Ingrim v. Epperson, 137 Cal. 370, 70 P. 165; Alferitz v. Cahen, 145 Cal. 397, 78 P.

878; Melde v. Reynolds, 129 Cal. 309, 61 P. 932; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204. In the last-cited case it was held that the defendant's counsel was acting under a mistake of law and for that reason the default should have been set aside; in other words, that there was an abuse of discretion by the trial court in refusing to set aside the default. The case most nearly in point in consideration of this appeal is that of Bailey v. Taaffe, 29 Cal. 423. In that case an order setting aside a default was reversed, and the counter affidavits, undisputed, were considered. In that case the Supreme Court, speaking through Justice Sanderson, said:

> "The relief sought is asked solely on the score of excusable neglect; and upon that subject all that is said is in substance that on account of the complicated condition of the defendant's title, and from the fact that the complaint was verified, more time was required to prepare the answer than is required in ordinary cases, and that during a portion of the time allowed for answering, the attorney employed to conduct the defense was compelled to be absent from town. But so far as all this tends to establish a legal excuse, it is completely and conclusively answered by the fact that no reason is given why, if more time was required, either on account of the complications suggested, or on account of the necessary absence of counsel, an application to opposite counsel, or if denied by him, to the court, for an extension of time was not made."

And in the case at bar it could have been said as the court said in that case:

> "There is no pretense that an opportunity to make the application was, from any cause, not afforded."

The contradictory position taken by the defendant in his affidavit to release the attachment and in his answer which he asked permission to file on his motion to vacate the default and in his affidavit made on October 18, 1924, made in reply to plaintiff's affidavit, should not have appealed to the trial court in its exercise of its discretion. In his affidavit which defendant verified on September 23, 1924, he alleged that he was the owner of the automobile in question, and that plaintiff's claim against him was secured by a lien thereon. In the answer he alleged that he had sold and transferred the automobile to plaintiff and plaintiff had taken it in full satisfaction of his indebtedness to plaintiff in August, 1924, and in his last affidavit he alleged that he was led to believe and did believe that plaintiff was holding the same for the full sum of his indebtedness to plaintiff. Those statements cannot all be true. If his statement in his first affidavit that he was the owner of the automobile on September 23, 1924, when the affidavit was made and when he presented it to the court on the 6th day of October, 1924, and that his indebtedness to plaintiff was secured by a lien thereon, was true, it cannot be true, as stated in his answer, that his indebtedness to plaintiff had been settled and discharged prior to the commencement of the action. How can allegations in his answer be reconciled with his statement in his last affidavit that he believed the plaintiff was holding the automobile for the full amount of his indebtedness to plaintiff?

Defendant's inexcusable neglect in failing to plead to plaintiff's complaint under the circumstances did not entitle him to the exercise of the court's discretion in his behalf, and the order of the court vacating the default and setting aside the judgment was an abuse of the court's discretion.

It is therefore ordered that the order vacating the default and setting aside the judgment be and the same is hereby reversed.

I concur: CONREY, P. J.

HOUSER, J. I dissent. I cannot agree to what is inferentially expressed in the prevailing opinion regarding either the necessity for an affidavit of merits, as such, or the effect of the answer of defendant in that connection. Although attention is not directed to any statute which by its terms requires that on a motion to vacate a judgment taken by default an affidavit of merits is necessary, the practice seems to be well settled that either an affidavit of merits or its equivalent be on file at the time the hearing on the motion is had.

In the case of Sampanes v. Chazes, 54 Cal. App. 612, 202 P. 462, it is held that, on a motion for an order setting aside a default judgment, a sworn answer positively denying the material allegations of the complaint is a sufficient affidavit of merits. To the same effect is Fulweiler v. Hog's Back Consolidated Mining Co., 83 Cal. 126, 23 P. 65. Montijo v. Sherer & Co., 5 Cal. App. 736, 739, 91 P. 261, 262, was similar to the instant case in its facts with reference to defects appearing in the affidavit of merits, as well as in the circumstance that an answer was filed with a motion to vacate the judgment. The court said:

> "Neither of the affidavits filed contains a showing that alone would be sufficient as an affidavit of merits, but the verified answer denies every material allegation of the complaint. This has been held sufficient too often by the Supreme Court to be considered an open question—citing authorities."

In Savage v. Smith, 170 Cal. 472, 474, 150 P. 353, 354, it is said:

> "The further objection that there was no affidavit of merits is met by the consideration that a verified answer setting forth a defense to the cause of action alleged in the complaint was actually on file at the time the notice was served. That such verified answer meets all the requirements of an affidavit of merits is, of course, well settled—citing authorities."

See, also, Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737; Melde v. Reynolds, 129 Cal. 308, 61 P. 932; Merchants' Ad-Sign

Co. v. Los Angeles, etc., Co., 128 Cal. 619, 61 P. 277; Brasher v. White, 53 Cal. App. 545, 200 P. 657; Reidy v. Scott, 53 Cal. 69—the last-cited case in effect holding that an answer may be used *in aid of defective averments* contained in an affidavit of merits.

In the prevailing opinion herein that part of the answer of defendant wherein he denies the indebtedness on which the action was brought is criticized for the reason that such denial "was a legal conclusion only." If it be conceded that the denial of defendant in his answer that "he is indebted to the plaintiff" constitutes but a conclusion of law, nevertheless the language used in such denial substantially follows in part the allegation found in the complaint, to wit: That "defendant became and is indebted to said plaintiff * * * for goods * * * sold and delivered." It has been held that an allegation that a specified sum "is now due and owing," although constituting a conclusion of law, is sufficient to support a judgment. Penrose v. Winter, 135 Cal. 289, 67 P. 772, overruling Ryan v. Holliday, 110 Cal. 337, 42 P. 891. See, also, Frisch v. Caler, 21 Cal. 71.

However, the rule as announced in 31 Cyc. p. 52, is that, while in some cases a pleading which is made up partly of conclusions of law, instead of averments of facts, is not fatally defective, the more general rule is to the contrary, citing authorities. But in that regard, whatever may be the correct principle of pleading, it is clear that, when the language contained in the answer follows that of the complaint, the plaintiff cannot be heard to complain that his allegation (whatever its effect) remains unanswered. As is stated in volume 1, p. 257, of Sutherland on Code Pleading:

> "Where the allegation of the complaint is couched in the form of a conclusion of law a denial in the same form will be permissible and is efficient for all purposes."

It will further be noted that in the prevailing opinion herein the invalidity of the answer is also suggested because allegations in parts of the answer were inconsistent with certain statements appearing in affidavits theretofore filed by defendant. An examination of the clerk's transcript on the appeal discloses the fact that the inconsistencies to which attention is directed occur in an affidavit or affidavits made by defendant, not in his motion for an order to vacate the judgment, but in an entirely separate and independent proceeding in the action, to wit, a motion to dissolve an attachment therein. It would therefore seem that, conceding the fact that such inconsistencies existed, they had no place, as such, in a proper determination of the sufficiency of an affidavit of merits. But even had the inconsistencies to which reference is had appeared in the answer itself, it is well settled that inconsistent defenses may be pleaded, and that when that course is pursued, neither of such defenses may be used as an admission to destroy the other. 21 Cal. Jur. p. 134; 31 Cyc. pp. 147, 211. It has been ruled in several cases that the fact that a pleading contains inconsistent counts or defenses, as, for example, where an answer in one part admits that which is denied in another, furnishes no ground for a judgment on the pleadings.

The syllabus in Botto v. Vandament, 67 Cal. 332, 7 P. 753, is as follows:

> "A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted."

To the same effect are Amador County v. Butterfield, 51 Cal. 526; Cass v. Rochester, 174 Cal. 358, 163 P. 212; Nudd v. Thompson, 34 Cal. 39. See, also, Martin v. Porter, 84 Cal. 476, 24 P. 109; Banta v. Siller, 121 Cal. 414, 53 P. 935; Snipsic v. Smith, 7 Cal. App. 150, 93 P. 1035.

It therefore becomes apparent that to all intents and purposes the answer of defendant herein was a sufficient compliance not only with the express requirements of the provisions of section 473 of the Code of Civil Procedure requiring the filing of an answer with the motion to vacate a judgment, but that as well, according to the established practice, the answer met the judicial requirement that an affidavit of merits or its equivalent be filed either at the time the motion was noticed for hearing, or at least be on file at the time when the motion was actually made.

The remainder of the instant appeal depends upon what force is to be accorded the decision of the trial judge in his ruling on the motion to vacate the judgment. It is universally conceded that the determination of a matter of the character of that before the trial court rests within the sound discretion of the trial judge. It is likewise clear that only where such discretion has been *grossly abused* will the conclusion reached by the trial court be disturbed by an appellate court—from which it follows that merely because from the facts in the case the justices of the appellate court would have reached a conclusion different from that reached by the trial court affords no reason for reversing the judgment.

In order that the appellate court be justified in directing a reversal of the order made by the trial court, it is necessary that no substantial foundation exist either in fact or in law for the conclusion and consequent judgment which is under attack. The facts upon which the trial court herein apparently acted were that, in the steps preliminary to a consideration by the court of the motion to vacate the judgment, as a matter of law the requirements of the statute and the accepted practice were fully met by the defendant; that the defendant personally had no actual knowledge of the necessary procedure, but had intrusted the entire matter of his defense to an attorney at law; that as shown by the affidavit of such attorney, several days preceding the last day on which the answer of defendant could be filed within the time allowed by statute, the answer of defendant had been prepared; that within such time and on two separate occasions for the purpose of having defendant verify the answer, the attorney had personally called at the place of defendant's former employers and there made inquiry of such employers, as well as of former fellow employees of defendant, as to the whereabouts of defendant, but was unable to obtain any information with reference thereto; that within such time the attorney had instructed defendant to be present in court at the hearing on the motion to dissolve the attachment levied in the action, but that defendant was not present; that on the day following the attorney located defendant in a hotel where he was rooming, but at that time the default of defendant for failure to answer the complaint had been taken.

The following language occurs in the course of the opinion in Downing v. Klondike M. & M. Co., 165 Cal. 786, 788, 134 P. 970, 971:

> "* * * Where the court has opened a default and placed the cause in a condition for trial on the merits, an appellate tribunal is slow to interfere with the discretion therein exercised, even when the showing made in support of the motion is not of the strongest character [citing authorities]. * * *"

The record herein shows that the default of defendant for failure to answer the complaint was taken on the very first available day, and that the motion to vacate the judgment was filed within one week following the date when the judgment was rendered.

Having application to a situation such as is here presented, it is said in Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95, 97:

> "* * * The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default. * * *"

And the same thought is repeated in part in the case of County of Los Angeles v. Lewis, 179 Cal. 398, 401, 177 P. 154, 155, as follows:

> "* * * It is only in a very plain case of abuse of discretion that this court will disturb the action of the trial court in a matter of this character, especially where the relief is granted and the application therefor is made as promptly as it was in this case."

In such a state of facts, and considering the law applicable thereto, I am unable to concur with my associates in their conclusion that the defendant was guilty of "inexcusable neglect," and that "the order of the court vacating the default and setting aside the judgment was an abuse of the court's discretion."

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89 Cal. App. 314

HILLWIG v. BOYER et al. (Civ. 3399.)

District Court of Appeal, Third District, California. Feb. 17, 1928.

1. Appeal and error 🔑1071(6)—Trial court's failure to find upon material issue is reversible error.

Failure on part of trial court to find upon material issue is reversible error.

2. Appeal and error 🔑1071(6)—Judgment should not be disturbed for failure of trial court to find upon particular issue, if not affected thereby.

Where no substantial right of appellant is prejudiced by failure of trial court to find upon some particular issue or when judgment would not be affected thereby, its omission is harmless, and under such circumstances judgment will not be disturbed.

3. Trusts 🔑372(3)—Evidence held insufficient to upset finding of trial court that trustee's grantee was unaware of trust, in action to recover proceeds from sale of realty.

In action against trustee and his grantee to recover proceeds of sale of real property, where property had been deeded as security for indebtedness, evidence *held* insufficient to upset findings of court that trustee's grantee was unaware of trust relationship.

4. Trusts 🔑372(3)—Evidence held to sustain judgment in favor of trustee's grantees claimed to have conspired with trustee in action for proceeds from sale of land held in trust.

In action to recover proceeds from sale of real property which trustee had sold, evidence *held* sufficient to sustain judgment in favor of trustee's grantees on ground that they were in no way implicated in fraud or conspiracy with relation to property.

5. Trusts 🔑357(2)—Bona fide purchaser from trustee without notice is not liable to owner for breach of trust.

Bona fide purchaser of property from trustee without notice is not liable to owner for breach of trust.

6. Trusts 🔑189—Trustee selling property in exercise of best judgment, after reasonable effort to procure purchaser, held not liable for more than price for which property sold.

In action to recover proceeds from sale of real property, where trustee in exercise of best judgment and with reasonable effort to procure purchaser succeeded in obtaining slight excess over amount of mortgage lien, *held* he was not liable for more than price for which property was sold.

7. Appeal and error 🔑1043(7)—Refusal to continue until appeal from other judgment was determined was harmless, in action for proceeds from sale of realty, where defendant held no property for plaintiff in excess of such other judgment.

Where defendant sold land held to secure indebtedness, and owner brought action to recover proceeds of sale, and another action was pending to determine whether property was held in trust or not, and motion for continuance until the other judgment became final by determination on appeal was refused, *held* refusal was harmless, since defendant trustee received only money with which he was charged in such other judgment and held no other money or property belonging to plaintiff.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by George N. Hillwig against J. F. Boyer and others to recover balance of proceeds of sale of real property. From a judgment for defendants, plaintiff appeals. Affirmed.

Samuel W. Newman, of Los Angeles, for appellant.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of respondents in a suit to recover an alleged balance of proceeds of a sale of real property belonging to appellant, but which land was conveyed to respondent Boyer, and held by him as security for the payment of a debt. The action is based upon a charge of fraud and conspiracy on the part of respondents.

December 1, 1920, appellant was the owner of lot 15, block B of Walsh estate tract, and lot 5, block 2, of Rowen's tract in the city of Los Angeles, known as the San Julian property. The respondents George C. and Rosa Fetterman were husband and wife. Appellant was indebted to the respondent Boyer, and as security for the payment of this debt, on December 6, 1918, he executed and delivered to Boyer a deed of conveyance to the San Julian lots, together with other Los Angeles property. The lots involved in this appeal were then subject to a mortgage of $8,500 held by one Taylor. December 1, 1920, these lots were sold by respondent Boyer and conveyed to respondents Fetterman, in consideration of the sum of $2,000, the grantees assuming the payment of the mortgage together with accumulated interest. Without knowledge on the part of respondent Boyer, these lots were subsequently resold to one Van Geisling at a profit of some $3,000. Boyer was not a party to this sale, and received none of the proceeds therefrom. In a suit for money had and received, previously filed against Boyer by this appellant in April, 1921, affecting the same property involved in the present case, this appellant recovered a judgment for $3,864.92. The amount of this judgment was ascertained by deducting $18,530.14, which was found to be the total amount of indebtedness due to Boyer, from $22,378.06, being the total receipts from the income, interest, and proceeds of sales of appellant's said properties. This judgment included the item of $2,000 received by Boyer upon the sale of the San Julian lots involved in this appeal. In the former appeal it was determined that the deeds to respondent Boyer were mere mortgages for the security of the debt due to him from Hillwig. This judgment was affirmed, since the trial of the present case. Hillwig v. Boyer (Cal. App.) 254 P. 662.

When the present case was called for hearing the appellant moved for a delay of the trial until the former case had been determined on appeal, asserting that it was material to the issues of this case that the former judgment should first become final as to the character of the deeds to the property here involved, which were held by the respondent Boyer. The subsequent affirmation of the judgment in the former action has conclusively established the fact that these deeds were mere mortgages held by Boyer for the security of the debt due to him, and that the property was therefore held by him in trust. The motion for a continuance was denied.

Upon the trial, in addition to other testimony, the judgment roll and all the evidence adduced at the former trial was received by consent and considered in the determination of this cause. Appellant's theory of this case is that Boyer is liable for the full market value of the San Julian lots sold by him in violation of his trust, and that the respondents Fetterman are also liable for the full market value of the land, regardless of the price actually received by Boyer, because, it is asserted, they had knowledge of the trust relationship in which Boyer held the land.

Appellant contends that (1) the trial court erred in refusing to grant his motion for a continuance; (2) that the court failed to find upon the material issue as to whether Boyer held said property in trust, or, upon the contrary, was the legal owner thereof; and (3) that the findings and judgment are not supported by the evidence.

The trial court found that no conspiracy with relation to the sale of the real property existed between any of the respondents; that the respondent Boyer in good faith sold and conveyed the San Julian lots to the respondents Fetterman for the sum of $2,000, and no more; that thereafter the respondents Fetterman resold the property to one Van Geisling, but that this sale was negotiated without the knowledge of Boyer, who obtained no part of the consideration for the last-mentioned sale, and that none of the respondents received or held any money or property belonging to the appellant, except the $2,000 which was merged in the judgment in the former action, and which sum is thereby secured to appellant.

[1, 2] It is true that the court failed to specifically find that Boyer held the property as a mere trustee, and not as the legal owner thereof. But under the evidence adduced this failure could in no way alter the judgment which was actually entered. Treating the respondent Boyer as a mere trustee of the property involved in this action, the judgment in favor of respondents is nevertheless supported by the evidence. A failure on the part of the trial court to find upon a material issue is reversible error. But, when no substantial rights of the appellant are prejudiced by a failure to find upon some particular issue, or when the judgment would not be affected thereby, its omission will be harmless, and under such circumstances the judgment will not be disturbed. 2 Cal. Jur. 1032, § 614.

In the present case, unless the evidence shows either that a conspiracy existed between the respondents by means of which the appellant was defrauded of a part of the purchase price of his land, or that respondents Fetterman knew of the fact that Boyer merely held the San Julian lots in trust without the power to sell them, and profited by the purchase of the property, it would not matter whether the trial court found that these lots were held in trust, or not, and the omission to find on that particular subject would therefore be harmless.

In spite of the fact that the entire evidence adduced at the former trial was admitted on the trial of the present case, appellant quotes at length from the trial judge's remarks in support of his assertion that the evidence of the former trial was not considered in determining the instant case. Appellant intimates that if the trial judge had considered the evidence offered at the former trial, his judgment in this case must of necessity have been favorable to him. In this belief the appellant is mistaken, for at the conclusion of the arguments, the trial judge said:

> "I will reserve my decision. I will mark the matter submitted, and will read that (the testimony taken at the former trial) if you will permit me to have one of your copies, and I will read that before giving final judgment."

The evidence amply supports the court's conclusions to the effect that no conspiracy existed between the respondents with relation to the sale of the real property; that the respondents Fetterman bought the property without knowledge of the trust relation in which Boyer held the property; that the respondent Boyer sold the property in good faith for the best market price which he was able to obtain; and that he received from the proceeds of said sale no more than $2,000 above the mortgage lien, which was fully accounted for and charged to him in the judgment procured in the former action.

To charge the respondents Fetterman with knowledge of the trust relationship in which the property was held by Boyer, the appellant relies on the following testimony of George C. Fetterman:

> "I think he (Boyer) told me that Mr. Hillwig owed him a lot of money, and that if he would pay him back * * * he could have his property. * * * In that deal I was regarding Mr. Boyer as the owner of the property. He said that Mr. Hillwig owed him a lot of money *and he was holding his property as security*, or something like that. I never paid no attention to it.
>
> "Q. Well, at this very time you considered Mr. Boyer the owner of the property? A. Mr. Boyer told me he owned it, and I knew he owned it."

[3] A fair construction of the foregoing testimony will sufficiently support the assumption that Fetterman believed that Boyer owned the property and had a right to dispose of it, in spite of the fact that he said Boyer told him Hillwig owed him a lot of money and that he was "holding his property as security, or something like that." Evidently this statement did not greatly impress him, for he adds, "I never paid no attention to it." Moreover, Mr. Boyer was afterwards called and testified, "I never told Mr. Fetterman that Mr. Hillwig owed me a lot of money, and never discussed with him my relations with Mr. Hillwig in any way." The foregoing record is therefore not sufficient upon which to upset findings of the court to the effect that Fetterman was unaware of the trust relationship in which the property was actually held by Boyer.

With relation to respondents' negotiations for the sale of the property in question, Mr. Boyer testified:

> "I first met Mr. Fetterman in October, 1920. * * * Q. What did you get for the San Julian property? A. $2,000. Q. Did you get anything else? A. No. * * * Q. Did you have anything to do with Mr. Van Geisling? A. No. Q. Did you have any interest of any kind, or anything, or any consideration moving from Mr. Van Geisling to Mr. Fetterman? A. None whatever. Q. Did you and Mr. Fetterman have any understanding, or agreement of any kind that you were to get * * * more than $2,000 for that property? A. No, sir. * * * What I meant to make clear (was that) * * * this deal was made for $2,000, no security—but just $2,000, which is all that was paid. * * * Q. What in your opinion was the value of the property at the time it was sold to Mr. Fetterman? A. What I sold it for.

* * * ($2,000; that was) the best offer I ever had. * * * Q. State it (the value) in dollars and cents. A. At the time I gave him an option (it was) $11,000. Q. What were the incumbrances? A. I think it was $8,500 mortgage, and possibly some taxes and interest. Q. Bringing it up to how much? A. I would say between $9,000 and $9,500, I can't remember exactly. Q. How long a period had you been trying to sell the property? A. About two years."

Upon the same subject-matter, Mr. Fetterman testified:

"Did you have a conversation with him (Mr. Hillwig) at the time of going into the escrow (for the purchase of the San Julian property)? A. Yes, sir. * * * That was in August, 1920. * * * I never met him after that. * * * Mr. Boyer came to my office * * * and wanted to sell that piece of land. * * * Q. Now you finally went into the escrow. * * * with Mr. Boyer? A. Yes. Q. How many parties were there in that escrow? A. Nobody but me and Mr. Boyer. Q. Now wasn't there anybody else, another party? A. Later on, we made it to—some one; that is later. Q. Who was the third party? A. Van Geisling. Q. Did Mr. Boyer have anything to do with any deal between you and Mr. Van Geisling? A. No, sir; none whatever. Q. Did Mr. Boyer know Van Geisling, or have anything to do with him in that connection? A. No, sir; I don't believe that Boyer knew anything about the contract between me and Mr. Van Geisling, for I didn't tell him. * * * Q. How much did Mr. Boyer get out of that deal? A. Well, I paid him $2,000, and had to put up all the back interest, taxes, etc. * * * Q. Did you pay Mr. Boyer more than $2,000? A. I did not. * * * Q. Did you and Mr. Boyer have any side agreement or any conversation about anything more that was to be paid him, or anything else that was to be given him? A. No, sir. * * * Q. Did Mr. Boyer receive any part of the consideration directly or indirectly that you got for the property when you sold it to Mr. Van Geisling? A. No, sir; (I) never even discussed it or talked with him about it. He didn't know anything about it, as far as I know; I never told him. * * * Q. What did you get from Mr. Van Geisling when you sold the property to him? A. I got $3,000, and some lots in Yonkers, N. Y. * * * I got $2,100 for these lots, but had to pay back taxes, sewer, street assessments, etc. * * * Q. Mr. Fetterman, you never had any talk with Mr. Hillwig about his relations (with Mr. Boyer) did you? A. No, sir. Q. You are absolutely sure of that? A. Yes, sir."

[4, 5] From the foregoing testimony it sufficiently appears that the respondents Fetterman negotiated an independent sale of the real property, without knowledge of the trust relationship between the legal owner thereof and Boyer, that they were in no way implicated in any fraud or conspiracy with relation thereto, and that the court therefore properly awarded judgment in their favor. A bona fide purchaser of property from a trustee, without notice, is not liable to the owner for a breach of the trust. 2 Perry on Trusts (6th Ed.) 1342, § 815, page 1369, § 830.

[6] It also sufficiently appears that the respondent Boyer was in no way implicated or interested in the sale of said real property to Van Geisling, and obtained none of the consideration therefor; that his previous sale to Fetterman was in good faith, free from fraud, and for the highest market value which he was able to procure. In fact, there is some evidence to indicate that he did in fact sell the property for market value, for he testified:

"Q. What in your opinion was the value of the property at the time you sold it to Mr. Fetterman? A. What I sold it for. That was the best offer I had ever had. Q. State it (the value) in dollars and cents. A. I gave him an option for $11,000. Q. What were the incumbrances? A. $9,000 or $9,500."

By the weight of authority, it has been held that:

"Where lands were sold in breach of trust, * * * their value at the time of the sale has been fixed upon as the sum to be accounted for." 2 Perry on Trusts, supra, 1387, § 147.

The record discloses the fact that the interest which was paid to the mortgagee, Mr. Taylor, was $779. Thus it appears that Mr. Boyer obtained $2,000 plus $9,779, the amount of the mortgage and accrued interest, for the property, which was in excess of the $11,000 which he fixed as the market value. It is true that the purchaser Fetterman was more fortunate in securing a sale at a further profit of about $3,000. But, in the absence of fraud, if Boyer, in the exercise of his best judgment, with reasonable efforts to procure a purchaser, succeeded in obtaining not more than $2,000 in excess of the mortgage lien, he can be held liable for no more than the price for which the property sold. In 39 Cyc. 364c, it is said:

"A trustee who has made a wrongful sale is liable to account for the real value of the property, instead of the price at which it was sold; but this personal liability for the difference does not attach where he has acted in good faith and according to the best of his judgment."

[7] Since the entire evidence and judgment roll in the former action were received and considered in the present case, it must be assumed that the trial judge in this case accepted the theory disclosed by the former judgment, that Boyer held the property in question as a trustee. But, since it was found in the present case that, upon sale of the San Julian lots, Boyer received only the $2,000 with which he was charged in the former judgment, and held no money or property belonging to the appellant, and that no fraud, conspiracy, or lack of good faith was shown, it would be immaterial whether he held the property as a trustee or not. Under such circumstances the refusal to continue the trial

until the former judgment became final was harmless.

The record fails to disclose any proceeds of sale of said real property in the hands of respondents which belongs to the appellant, except the $2,000 for which appellant now holds a separate valid judgment.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

89 Cal. App. 306

GOODWIN v. RIVERSIDE HEIGHTS ORANGE GROWERS' ASS'N.

(Civ. 4895.)

District Court of Appeal, Second District, Division 2, California. Feb. 17, 1928.

1. Principal and agent 🔑40—Burden was on administrator to show that death of deceased revoked order for payments to third persons.

In administrator's suit to recover money ordered paid to third persons on ground deceased's death revoked order for subsequent payments, burden was on plaintiff to show that death of deceased revoked order.

2. Principal and agent 🔑43(2)—Deceased's order for payment to third persons for oranges harvested from deceased's orchard held not revoked by deceased's death under statute (Civ. Code, § 2356).

In administrator's action to recover money which defendant, pursuant to deceased's order, had paid to third persons, after deceased's death for oranges harvested from deceased's orchard, deceased's death *held* not to have revoked the order under Civ. Code, § 2356, since, if third persons under terms of order simply became subrogated as lessees to deceased's rights, there was no agency, and, if an agency existed, it was coupled with an interest, and not terminated by deceased's death.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Frank J. Goodwin, as administrator of the estate of William H. H. Goodwin, deceased, against the Riverside Heights Orange Growers' Association, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas K. Case, of Los Angeles, for appellant.

C. L. McFarland, of Riverside, for respondent.

VALENTINE, Justice pro tem. The above action was brought by plaintiff as administrator of the estate of Wm. H. H. Goodwin, deceased, to recover the sum of $2,771.96, which plaintiff claims is due him on account of oranges received by defendant from two properties formerly owned by said deceased. One property was located in San Bernardino county, Cal., and was known as the Moorman Hill or San Bernardino county property; the other was located in Riverside county, and was known as the Iowa avenue or Riverside county property.

The following facts are not disputed: That between December 14 and December 20, 1919, defendant and respondent entered into an agreement with said Wm. H. H. Goodwin, deceased, wherein and whereby defendant agreed "to pick, hand pack, ship, and market all the citrus fruit now growing on his [Goodwin's] land and all that, during the term of this agreement, may be grown upon his lands and premises." It is conceded that the two ranches above mentioned were the lands and premises referred to.

The agreement was to continue for five years, unless terminated on November 15th of any year by either party giving written notice during the last 15 days of the preceding August. It is not claimed that it was so terminated. Other provisions of the contract are not material here.

On January 14, 1920, Wm. H. H. Goodwin in writing notified defendant that he had leased his grove to W. A. Pfunder and S. D. Vincent, and to make all payments for December, 1919, and for the future, to them; that thereafter defendant during the years 1920 and 1921 made the following payments by check to the parties whose names appear after the respective amounts:

Date.	Amount.	Parties.
March 2, 1920	$895.75	Pfunder & Vincent
June 28, 1920	451.50	Pfunder & Vincent
August 19, 1920	701.27	Jennie Cook
January 31, 1921	250.00	Jennie Cook
February 8, 1921	100.00	Jennie Cook
March 8, 1921	99.25	Jennie Cook
May 4, 1921	150.00	Jennie Cook
May 26, 1921	150.00	Jennie Cook
June 15, 1921	300.00	Jennie Cook
August 11, 1921	407.25	Jennie Cook

No claim is made by plaintiff for the amount of $895.75 paid March 2, 1920. In addition, defendant has in its possession the sum of $162.69, which is the aggregate of the amount retained by defendant from the sale of the oranges taken from the San Bernardino county property, and certain refunds. Appellant only claims payments commencing with June 28, 1920.

On or about January 27, 1920, Wm. H. H. Goodwin executed two deeds to said Jennie Cook, one for the property in Riverside county and the other for the property in San Bernardino county. Wm. H. H. Goodwin died in San Bernardino county on May 6, 1920. On May 7, 1920, the above two deeds from him to Jennie Cook were recorded. Defendant was first notified of Goodwin's death on May 10, 1920. On May 18, 1920, notice of pendency of action was filed by plaintiff (this appellant) in Riverside and San Bernardino counties, respectively, in actions against said Jennie Cook et al., to set aside the aforesaid deeds. Judgment was rendered October 10, 1921, in the action in Los Angeles county of Frank J. Goodwin as administrator of the estate of Wm. H. H. Goodwin, deceased, against Jonathan Snyder, Jennie Cook et al., setting aside these deeds, and ordering said Jennie Cook to forthwith account to the plaintiff for all of his receipts and disbursements in the matter of her *occupation, maintenance, and control* of said parcels of real property in Riverside and San Bernardino counties, providing that plaintiff have judgment for any property shown to have been received and retained by her "*since she has been in possession of said real property.*" (Italics ours.)

There is much argument in appellant's and respondent's briefs as to the law establishing the right of parties to the crops from lands which are out of the possession of the owner of the land, tending to show that, where one is in alleged possession and subsequently ousted, where possession is recovered by the owner, he takes the growing crops with the land, but that crops harvested are the property of the one in unlawful possession, and the owner's remedy is only to recover the rental value of the land, citing Page v. Fowler, 39 Cal. 412, 416, 2 Am. Rep. 462; Rector v. Lewis, 46 Cal. App. 168, 188 P. 1018; Grossman v. Yip Wing et al. (Cal. App.) 216 P. 634; and Halleck v. Mixer, 16 Cal. 574, 579, all tending to show that defendant (respondent) was justified in making these payments to Jennie Cook while she was in possession under these deeds, even if they were subsequently set aside and the plaintiff restored to possession.

But appellant states that the only question in this suit is whether the death of Wm. H. H. Goodwin revoked the order to defendant to pay Pfunder and Vincent, and argues that, if it did, defendant is liable to plaintiff, because defendant never had any authority to make the payments to Jennie Cook.

Without reference to the last proposition at this time, we think this fairly states the issue, because, if Goodwin's death did not revoke the order to pay Pfunder and Vincent, they, and not plaintiff, would be the only ones entitled to object to the payments being made to Jennie Cook or to any one else.

[1] Under the order which Goodwin gave defendant January 14, 1920, to pay the money to Pfunder and Vincent, it is conceded by appellant that "the defendant was protected in making the payments as they became due to Vincent and Pfunder until the order was revoked." So that it clearly does not concern plaintiff to whom the money was paid until he has shown that the order was revoked. The respondent, having paid this money once, and nothing appearing to show it was not paid in good faith, is entitled to ask, as it does, that the rule be strictly invoked that the burden is upon the plaintiff to prove the necessary facts to entitle him to recover.

The plaintiff (appellant), in support of his contention cites section 2356 of the Civil Code, as follows:

> "The power of an agent * * * is terminated, as to every person having notice thereof, by:
> "1. Its revocation by the principal;
> "2. His death; or
> "3. His incapacity to contract."

We think he should have quoted the entire section, the remainder of which reads as follows:

> "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:
> "1. Its revocation by the principal;
> "2. His death; or,
> "3. His incapacity to contract."

The clause "unless the power of an agent is coupled with an interest in the subject of the agency," is the material part of the section in its application here. No point is raised as to Goodwin's "incapacity to contract." Appellant's argument assumes two propositions, first, that the so-called "order" constituted Vincent and Pfunder the agents of Goodwin, and, second, if it did, that it was not "coupled with an interest in the subject of the agency."

Assuming the agency for the moment (without deciding it), the first question to be decided is, Was it "coupled with an interest in the subject of the agency," and therefore not revoked by Goodwin's death?

If there was an agency—and respondent follows appellant's argument that there was—the "subject-matter" of it was the contract between respondent and Wm. H. H. Goodwin, which appellant admits was in force up to his death, under which Vincent and Pfunder were interested directly and continuously to the extent at least of being entitled to receive all money which, except for the said "order," Goodwin would have been entitled to receive; a very material "interest" it appears to us.

[2] So that it becomes apparent on either alternative that the order was not revoked under section 2356 of the Civil Code, for, if we consider that Vincent and Pfunder, under the terms of the "order," simply became subrogated as lessees to Goodwin's rights under the contract to receive the money, there was no agency, and section 2356 of the Civil Code does not apply. If, on the other hand, we assume the agency, then "the power of the agent was coupled with an interest in the subject of the agency," and the agency was not terminated by Goodwin's death. Norton v. Whitehead, 84 Cal. 263, 268, 24 P. 154, 18 Am. St. Rep. 172; Cox v. Hughes, 10 Cal. App. at p. 558, 102 P. 956; Travers v. Crane, 15 Cal. 12, 18.

Therefore, since appellant assures us that this question of whether, under section 2356 of the Civil Code, the death of Wm. H. H. Goodwin revoked the order to defendant (respondent), is the only question in this case, and it appearing clearly that such order was not so revoked, we deem it unnecessary to consider further any of the other arguments of appellant or respondent (Buena Vista Oil Co. v. Park Bank of Los Angeles, 39 Cal. App. at p. 713, 180 P. 12), which arguments might have been material had we decided this proposition differently, but which arguments now become merely academic.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

89 Cal. App. 253

MOX, Inc., v. LEVENTHAL et al.★

(Civ. 3397.)

District Court of Appeal, Third District, California. Feb. 14, 1928.

Hearing Denied by Supreme Court April 12, 1928.

1. Time ⇒10(4)—Where last day to commence action falls on a Sunday or holiday, suit may be filed on following day.

General rule is that where last day on which to commence an action falls upon a Sunday or holiday, suit may be filed on following day.

2. Mechanics' liens ⇒260(1)—Statute prescribing time within which action to foreclose mechanic's lien may be brought held one of limitations (Code Civ. Proc. § 1190).

Code Civ. Proc. § 1190, providing time within which action to foreclose mechanic's lien may be brought, *held* statute of limitations.

3. Time ⇒10(4)—Statute designating provisions applicable to practice in mechanic's lien proceedings held not exclusive in computing time for doing act (Code Civ. Proc. §§ 12, 1198; Civ. Code, § 10).

Code Civ. Proc. § 1198, providing that except as otherwise provided in this chapter provisions of part 2 of this Code (section 307 et seq.) are applicable to and constitute rules of practice in proceedings mentioned in this chapter, *held* not to furnish only rules to be employed in mechanic's lien cases, so as to bar application of Civ. Code, § 10, and Code Civ. Proc. § 12, providing means of computing time for doing act required by law to be done, to such cases.

4. Time ⇒10(1)—Statutory rule for computing time when last day falls on Sunday or holiday applies to any act required by law, except where statute specifically otherwise provides (Code Civ. Proc. § 12).

Code Civ. Proc. § 12, providing that time within which act required by law to be done is to be computed by excluding first day and including last, unless last is a holiday and then it is also excluded, is not merely a rule of proceeding, but is a general rule for computing time, applicable to any act which is required by law except where statute specifically provides otherwise.

5. Time ⇒10(4)—Ninety days to sue to enforce mechanic's lien having expired on Monday, October 13, "Columbus Day," commencement of action on October 14 was timely (Code Civ. Proc. §§ 10, 12, 1187, 1190; Civ. Code, §§ 7, 10).

Where 90 days for commencing action to enforce mechanic's lien under Code Civ. Proc. §§ 1187, 1190, expired on October 13, and day preceding was a Sunday and also "Columbus Day," under section 10 and Civ. Code, § 7, providing that if October 12 falls on Sunday, the Monday following is a holiday, *held* that under section 10 and Code Civ. Proc. § 12, action commenced on Tuesday October 14th was timely.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Mox, Inc., against Sam Leventhal and another to foreclose mechanic's lien. Judgment for defendants and plaintiff appeals. Reversed, with directions.

L. M. Pritchard, of Los Angeles, for appellant.

Chas. H. Brock, Earl E. Johnson, and Fred W. Mears, all of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment in an action to foreclose a mechanic's lien which was rendered against plaintiff after a demurrer to the complaint had been sustained without leave to amend.

The complaint alleged that the notice of lien upon which the action was based was filed pursuant to section 1187, Code of Civil Procedure, on July 15, 1924. The complaint was filed October 14, 1924. Section 1190, Code of Civil Procedure, declares:

> "No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same. * * *"

The 90 days allowed by the provisions of the last-quoted section expired on October 13th. The preceding day was Sunday, which was also "Columbus Day" by enactment of both section 7, Civil Code, and section 10, Code of Civil Procedure. These sections last cited provide that:

> "If the * * * twelfth day of October * * * falls upon a Sunday, the Monday following is a holiday."

Hence Monday October 13, 1924, became a holiday. Both section 10 of the Civil Code and section 12 of the Code of Civil Procedure declare:

★Hearing denied by Supreme Court.

"The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

[1] The general rule is that where the last day on which to commence an action falls upon a holiday, the suit may be filed on the following day. 23 Cal. Jur. 973. Section 1190, Code of Civil Procedure, supra, in effect, is a statute of limitations prescribing the period of time within which an action to foreclose a mechanic's lien may be brought. In Hughes Brothers v. Hoover, 3 Cal. App. 145, 150, 84 P. 681, 683, it is said:

"Giving to section 1190 the only force which it can possibly have is to interpret it as a statute of limitation which provides the time within which an action may be brought for the enforcement of a right."

Evidently, by the terms of section 1190, supra, the Legislature intended to grant to a claimant for compensation for materials or labor furnished 90 full days after the filing of the notice of lien in which to commence the action. It is said:

"The theory of the statute of limitations is that a creditor has the full statutory period on any day of which he may of his own volition commence an action, and if he cannot do so because of legal prohibition, the statute does not run." 16 Cal. Jur. 563, § 160; Hoff v. Funkenstein, 54 Cal. 233.

[2] The same principle would apply where the statutory period for commencing an action is prevented from running because the final day chances to fall upon a Sunday or a holiday, during which final day the claimant would be unable to file his action. Unless such final holiday is eliminated from the statutory period, it is apparent that the letter and spirit of the statute would be defeated, and the claimant would thereby be denied his full 90 days in which to commence his suit. The case of Branagh v. Chicago, B. & S. Co., 39 Cal. App. 610, 179 P. 543, was an action against the sureties on a bond for materials furnished to a construction company pursuant to the statute which permits the suit to be commenced at any time "within six months after the filing of the claim with the California Highway Commission." It appeared that the claim was filed April 12, 1915. The six months' limitation within which to commence the action therefore expired October 12. But this was the same holiday which has raised the controversy in the present case. Yet it was there held that under section 10, Civil Code, the action was authorized to be filed upon the following day.

[3] Respondent contends that neither section 10, Civil Code, nor section 12, Code of Civil Procedure, have any application to the provisions of the Mechanic's Lien Law, the procedure affecting which, they claim, is governed exclusively by section 1198, Code of Civil Procedure, which declares that:

"Except as otherwise provided in this chapter, the provisions of part two of this Code are applicable to, and constitute the rules of practice, in the proceedings mentioned in this chapter."

[4, 5] We are not in accord with this view. The foregoing section does not declare that part 2 of that Code furnishes the only rules to be employed in mechanic lien cases. Nor can it be said that section 12 is a rule of proceeding. It is a general rule for computing time, applicable to any act which is required by law, except where a statute specifically otherwise provides. Part 2 of the Code of Civil Procedure is devoted to the method of procedure required to be employed in prosecuting civil actions to judgment and in satisfaction thereof. Part 3, in which we find the Mechanic's Lien Law, is devoted chiefly to special proceedings such as the enforcement of liens, eminent domain, probate, arbitration, etc. Upon the contrary, section 12 does not come under any of the so-called "parts" of this Code, but is preliminary thereto, and appears to be general in its application to "any act provided by law." There appears to be no good reason for limiting the lien law so as to exclude therefrom the general rule for computing time allowed for the commencement of an action. The general rule is that when the last day for the performance of an act provided by law falls upon a Sunday or a holiday, that day is excluded in the computation of time, and the act may be performed on the following day. With a few exceptions on account of specific statutory provisions, this rule has been applied to a variety of acts and proceedings. 24 Cal. Jur. 585, § 13; 26 R. C. L. 748, § 23. The case of Johnston v. New Omaha T. H. E. L. Co., 86 Neb. 165, 125 N. W. 153, 20 Ann. Cas. 1314, reviewing a large number of authorities construing statutes which purport to establish a uniform rule for computing time, concludes by saying:

"After a full and careful consideration of the question * * * we hold * * * that section 1841, Ann. St. 1909, was intended by the Legislature to put an end to all confusion and uncertainty by adopting a uniform rule for the computation of time, alike applicable to matters of mere practice and to the construction of statutes, and that it applies to the computation of time * * * to be taken into account is days, months, or years, and that where an act is to be done, or is permitted to be done within a specified time, and the last day is Sunday, it shall be excluded, and the act may be done on the following day."

This language applies with like force to the present case.

Respondent has cited several cases from other jurisdictions which are in conflict with the foregoing rule, but these cases are no longer authority in this state, since the enactment of section 10, Civil Code, and section 12, Code of Civil Procedure. Many states have enacted similar statutes to establish a uniform rule of computing time. We are of the opinion that section 1190, Code of Civil Procedure, should be construed with section 12, Code of Civil Procedure, so that where the last of the 90 days allowed by that section in which to institute an action to enforce a mechanic's lien falls upon a Sunday or a holiday, the limitation of time will thereby become tolled so as to permit the suit to be commenced upon the following day.

The demurrer in the present case was therefore erroneously sustained.

The judgment is reversed, and the trial court is directed to overrule the demurrer and permit the defendants to answer.

We concur: FINCH, P. J.; HART, J.

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88 Cal. App. 627

ALYCE GEE v. FONG POY. (Civ. 6010.)★

District Court of Appeal, First District, Division 1, California. Jan. 26, 1928.

Hearing Denied by Supreme Court March 25, 1928.

1. Libel and slander ⟹104(1)—Evidence that defendant had been guilty of misconduct held inadmissible to establish malice in slander action.

In action for slander, evidence showing that defendant had been guilty of serious misconduct to plaintiff's knowledge *held* inadmissible to establish malice as basis for exemplary damages.

2. Appeal and error ⟹1170(6)—Conduct of plaintiff's counsel in offering inadmissible evidence held prejudicial in slander action (Const. art. 6, § 4½).

In action for damages for slander, conduct of plaintiff's counsel in offering inadmissible evidence tending to prejudice defendant on condition that he would later connect it *held* prejudicial, and to result in miscarriage of justice requiring reversal under Const. art. 6, § 4½.

3. Appeal and error ⟹1053(1)—Order striking objectionable testimony on plaintiff's failure to connect it up as agreed held not to cure error in slander action.

Where court in action for slander, after receiving evidence to effect that defendant had been guilty of serious misconduct to knowledge of plaintiff on condition that plaintiff would later connect it up, and on failure to do so ordered testimony stricken from record, such order did not have effect of curing error in its admission.

4. Appeal and error ⟹1170(7)—Constitutional provision held not to preclude reversal of judgment in slander action because of receiving improper testimony (Const. art. 6, § 4½).

Const. art. 6, § 4½, *held* not to preclude reversal of judgment in slander action because of error in receiving testimony tending to prejudice defendant in eyes of jury on condition that plaintiff later connect such testimony.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Alyce Gee against Fong Poy, also known as Fong Wan. Judgment for plaintiff, and defendant appeals. Reversed.

Peter S. Sommer and Nat Schmulowitz, both of San Francisco, for appellant.

James M. Hanley, of San Francisco, and Donahue, Hynes & Hamlin, of Oakland, for respondent.

PARKER, Justice pro tem. This is an appeal from a judgment rendered in an action for slander growing out of certain statements alleged to have been made by the defendant concerning plaintiff. The case was tried by the court sitting with a jury, and a verdict returned in favor of plaintiff and assessing damages against said defendant in the sum of $5,500. Upon the verdict judgment was entered as indicated.

Both plaintiff and defendant are Chinese. The main complaint, and, indeed, the sole complaint, of appellant, is that owing to misconduct of counsel for plaintiff the defendant was denied a fair trial in the court below. This ground embraces many factors all intimately connected therewith. When we state that the misconduct alleged is the sole complaint it may be understood that we include therein the effects of this misconduct as evidenced by the verdict and judgment.

In order that there may be an application of the law relative thereto it is necessary to detail in some particularity the facts of the case and the history of its trial.

The complaint sets up three causes of action, each alleging a separate slander, though in each instance the slanderous words alleged to have been spoken are practically the same, and all within a short period of time. In the first cause of action plaintiff alleges that on or about March 1, 1924, the defendant telephoned the mother of plaintiff, and at that time and in the ensuing conversation spoke of plaintiff as follows: "Fanny is worse than a prostitute"—the Fanny referred to being the wife of defendant. "You better take care of Alyce; she is doing the same thing as Fanny"—Alyce being the name of the plaintiff herein.

In the second cause of action it is alleged that on or about March 8, 1924, at the home of the mother of defendant's wife, the defendant spoke of plaintiff as follows: "Alyce was going with Fanny; she is worse than a prostitute."

The third cause of action sets up that on the 9th day of March, 1924, at the Chinese cemetery in the county of San Mateo, in the presence of more than 100 people, defendant spoke and uttered of and concerning plaintiff as follows: When the plaintiff asked the de-

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★Hearing denied by Supreme Court.

fendant, "Why do you say talk about me behind my back, that I am worse than a prostitute?"—the defendant replied "Yes; I said that you act like it." The plaintiff replied, "I can go to court about this, you have no proof"; and the defendant answered, "Any time I go; any time I go." The plaintiff answered, "You know that I am not. How can you say I am?" The defendant replied, "You better go whitewash yourself. You walk like one."

In each cause of action there are accompanying allegations of the words being false and defamatory and prompted and actuated by actual malice, hatred, and ill will of defendant toward plaintiff; likewise allegation concerning the use and meaning of the words employed. There are no allegations of special damage, and punitive damages are asked.

There is no question raised as to the sufficiency of the complaint, and therefore the allegations are merely outlined to indicate the slanderous words charged.

The answer of the defendant is a categorical denial of the allegations of each cause of action.

Upon the issues thus joined the verdict of the jury was in favor of plaintiff.

No specific contention is made that the evidence is insufficient to sustain the verdict. No claim of error is predicated upon the instructions given or refused. Excessiveness of verdict is not urged other than the claim of appellant that its size is of the utmost importance in determining the effect of the alleged misconduct.

The plaintiff is an American-born Chinese girl aged, at the time of trial, 19. She was at different times a worker in a factory, waitress in a tearoom, helper in a Chinese herb establishment, and at the time of trial a waitress in a Chinese restaurant. The defendant is a Chinese herb doctor aged, at the time of trial, 42. The plaintiff, as a young girl and up to the time of the happening of the events around which the issues center, had been a close friend and chum of one Fanny Ng, who in 1919 became the wife of the defendant. The plaintiff was a frequent visitor at the home of defendant and was at some time in his employ, mixing herbs and medicines. The wife of defendant and the plaintiff, after the marriage of the former, continued their friendly relations and visited back and forth with frequent regularity. The plaintiff was permitted to show, over the objection of defendant, that upon one of her visits to the house of defendant in November, 1923, defendant made improper advances to her accompanied with ardent professions of affection; that when she repelled his advances he then offered her money in consideration of her remaining silent as to the episode and particularly refraining from disclosing the incident to the wife of the defendant—the purpose of this testimony being to show that because plaintiff had spurned the proffered love of defendant the latter became angry and vindictive toward her, and out of this actual malice came the words complained of. Irrespective of this incident, however, there seems to have been no open breach in the general relations of the parties or cessation of general family friendship and intimacy. On or about March 3, 1924, the defendant intercepted a letter addressed to his wife, Fanny, which letter tended to disclose a relationship between the wife and a Chinese man. In the letter were many expressions of endearment and anticipation of renewal of past association. It also contained statements of the writer that he had seen the plaintiff, Alyce, and from the context it could easily be inferred that Alyce had knowledge of this clandestine relationship. On the same morning that defendant came into possession of the letter the wife became aware of the fact that the letter had been intercepted by her husband, and some words ensued between them. The wife threatened self-destruction and left her home. Defendant, becoming aware of her departure, endeavored to locate her, and it was in this endeavor that he first called by telephone the mother of the plaintiff here. In the ensuing conversation, it was testified by the mother, defendant used the words complained of, referring to his wife as a prostitute and likewise classifying the plaintiff. The efforts of the husband to locate his wife proved futile, until the day after the day of her departure he learned that she had committed suicide at the home of one of her relatives. Thereafter and during the period between the death and burial of the wife it was in evidence that at a family gathering, where there were present many Chinese people, the defendant condemned the activities of the wife and emphasized her immoral conduct, likening her to a prostitute. At that time he again associated the plaintiff with the wife, and referred to the former as likewise a prostitute and a bad woman. On the day of the funeral and at the place of interment at the brink of the grave plaintiff approached the defendant and asked him why he had talked about her and applied to her the word "prostitute," and cautioned the defendant that she could take him into court for this; whereupon defendant again repeated the slanderous words, with the further statement that she, the plaintiff, should whitewash herself, and assuring her further that he was willing to go to court at any time—all of this occurred and the language used being in the presence and hearing of many people.

This practically is the evidence upon which the verdict finds support. The defendant denied making any of the statements or using any of the slanderous words charged as against plaintiff. He offered testimony supporting his defense, and further to show that the plaintiff was being urged and encouraged by others of the Chinese race to harass and scold him and cause him trouble and annoyance. It was also shown at the trial that the defendant is a man of some wealth, having an income of at least $1,000 a month and owning property in excess of $150,000.

The trial of the case covered 12 days exclusive of the week-end recess from Friday until Monday following.

With this synopsis of the facts before us we now approach the contention of the appellant and set forth the acts and conduct complained of.

The first witness called by plaintiff was the defendant under the provisions of section 2055, Code of Civil Procedure. In the course of his examination by plaintiff he was asked concerning his acquaintance with two Chinese girls named Grace Moy and Rosie Ng, and it was admitted by him that these two girls came over and stayed at his home all the night of Saturday, March 1, 1924. Then these questions were asked him and these proceedings had:

> "Q. You had trouble with your wife about the two children, didn't you? A. No, not two children; with my wife.
>
> "Q. Didn't you and your wife have a row because you attempted to get in the bed of the two little girls? A. No; no such thing.
>
> "Mr. Crosby (Counsel for Defendant): Wait just a minute; we object to that as incompetent, irrelevant, and immaterial, and not responsive to any issues raised by the pleadings.
>
> "The Court (after repeating the question): I presume the plaintiff was one of them.
>
> "Mr. Hanley (Counsel for Plaintiff): No; she was not. I will withdraw the question for a minute. I will ask to have these two little girls brought into the room."

These girls were then brought into the courtroom, being Chinese girls of the age of 15 years. Nothing further along this line was attempted during the examination of the defendant.

The mother of plaintiff, to whom the first slanderous words were addressed, testifying as a witness for the plaintiff, was asked on cross-examination as to the employment of plaintiff by the defendant at a time after the alleged incident wherein defendant had made advances towards plaintiff. Defendant sought to show the wages paid plaintiff upon the theory that it would show she was working to earn money and get pay and thus controvert the inference of insult some weeks before. Whereupon Mr. Hanley, counsel for plaintiff, interjected this:

> "We have a right to show that after he was satisfied, after his wife did it, he still had the rottenness in his make-up and he wanted to get it out of his system, and he wanted to get it out of his system at his wife's funeral, because he caused his wife to kill herself, and"—

At this point he was stopped by the court on the ground that this was argumentative, and the cross-examination proceeded.

On the third day of the trial plaintiff called as a witness Grace Moy, one of the young Chinese girls who were called into court for identification at the time of defendant's examination. This witness testified to visiting the home of defendant on the night of March 2d, and testified to the events of the evening, going to a show and to a lunch, and finally going to bed at about 1 a. m. with the wife of the defendant and another girl, Rosie Ng, sister of defendant's wife. Then the plaintiff, after much discussion and argument between counsel and over the objection of defendant, was permitted to show by this witness that after the three named retired the door was broken open and the defendant, clad in pajamas, entered the room in an excited and exciting manner and attempted to get in bed with the girls; that the wife tried to shield them and finally fought off the defendant, who thereupon turned and went out of the room; that the wife of defendant thereupon got the girls out of bed and dressed and started to leave the house, but were met by defendant, who assured them they would not be further disturbed, whereupon they returned to bed. They left the house about 5 a. m. on Sunday morning, March 2d, accompanied by the wife.

Counsel for defendant interposed frequent objections to this line of testimony on the general grounds of irrelevancy, incompetency, and immateriality, further specifying that the asking of the questions eliciting this testimony was prejudicial misconduct, and offered and designed solely for the purpose of discrediting the defendant in the eyes of the jury. During the argument the following occurred:

> "Mr. Hanley (plaintiff's counsel): We will show not only that he did these things but that it was known to his wife, and that he and his wife rowed in the bedroom because of his conduct at that time. We are going to show that he forced the woman to go away, made her arm black and blue, causing her to leave with the girls on the first Key Route that pulled out in the morning at 5 o'clock. It is to show that the contention of the defendant in this, that he went into this talk because of certain letters that he received, is not true."

The court at the outset in overruling the objection of defendant took the view that plaintiff could prove by circumstantial evidence that the letter claimed to have been intercepted was a fabrication, and in this effort plaintiff might show facts from which this might be inferred. However, the court qualified the admission by stating that if it developed that the evidence was absolutely immaterial and should not have been admitted the court would entertain a motion to strike.

Counsel for defendant thereupon made this statement:

> "We apprise the court now of the vice of such an admission. The force of what they are seeking to offer will have exercised its influence, will have been heard by the jury. And regardless of how any human being may attempt to cause to pass from his memory such things as this it cannot be done. And to admit anything with the right to strike it out is securing the defendant no security whatever of his right against a design purposely to injure him in matters that do not concern the case.
>
> "The Court: Well; that is not the avowed purpose of the offer to make this proof. The testimony will be admitted."

After the testimony of the witness on this subject had been given defendant renewed his motion to strike, and the court stated there had been no sufficient connection, whereupon counsel for plaintiff said: "We propose to follow it up with testimony of other people."

Upon further objection by defendant, the court asked counsel for plaintiff if he undertook to connect it up, and Mr. Hanley, for plaintiff, replied that it was his intention to show that from the friendly relations existing between defendant's wife and plaintiff, the defendant knew that the wife had told plaintiff of the incident of the bedroom, and that it was an element of his malice that he would close the mouth of plaintiff by defaming her. The court thereupon reserved its ruling on the motion to strike to see whether it was connected up or not, in the light of plaintiff's undertaking to connect up and show the materiality and competency of the testimony.

Thereafter plaintiff called as a witness Rose Ng, a Chinese girl of the age of 15 years. This witness, over the objection of defendant, gave similar testimony as to the occurrence when defendant is said to have entered the bedroom of these young girls. Defendant throughout objected strenuously and at sufficiently frequent intervals, on each occasion further specifying and assigning the propounding of these questions to elicit that testimony as prejudicial misconduct on the part of counsel for plaintiff, being solely for the purpose of prejudicing the rights of the defendant before the jury. The court stated that the testimony was admissible on the question of punitive damages. Plaintiff's counsel again asserted his position as follows:

> "And the purpose of it is to show malice, that all of the subsequent acts of this defendant were brought about by malice because he knew that the young lady, the plaintiff, was in possession of certain knowledge with reference to his conduct, and he wanted to besmirch her character as a matter of protection for himself. That is our position."

Counsel for plaintiff further argued the admissibility of the testimony as a circumstance to explain the real cause of the difficulty between defendant and his wife, rebutting the testimony given by defendant. The court again remarked:

> "I think, as I thought the other day, the testimony was admissible, and I think so now."

In the course of the argument Mr. Hanley, counsel for plaintiff, said:

> "I do not want to comment again on the letter (meaning the intercepted letter to the wife) except in so far as it bears out inferentially and circumstantially the contention of the plaintiff that this letter was written either personally or at the instigation of the defendant."

This statement was assigned by defendant as prejudicial misconduct and purposely designed by counsel to cast aspersion upon the character and the integrity of defendant. As the testimony referred to was being given defendant renewed his objections and the court stated:

> "Overruled. It may be considered that defendant is deemed to raise the same objection to every question asked on this line, and the ruling of the court will be the same."

At the conclusion of the testimony of the witness Rose Ng, a motion to strike was made by defendant on the grounds previously urged, calling the court's attention to the promise of plaintiff to make the necessary connection. Counsel for plaintiff then stated that neither Rome nor the earth was made in one day, and that he expected to complete the connection when the plaintiff took the stand, but could not do it until that time.

When the plaintiff was being interrogated by her counsel she was asked concerning the incident of November, 1923, when it was alleged that defendant had made improper advances to her. On objection of defendant the court said, addressing counsel for plaintiff, "You offer it on the same theory that you offer what occurred on the night of the 1st and 2d of March of last year?" to which counsel replied "Yes"; and the court said: "The objection is overruled. If you don't connect it up thoroughly it will go out on motion." Thereafter, while plaintiff was a witness, an offer was made to show that the deceased wife told plaintiff of the occurrence of the bedroom, and upon objection of defendant the evidence was excluded.

At the close of plaintiff's case, or when plaintiff announced she rested her case, defendant renewed his motion to strike out all of the testimony concerning the alleged happenings of the night in question, renewing in his motion all of the assignments of error, prejudice and misconduct. This motion was granted by consent of all parties, and the jury were instructed to wholly ignore and disregard the testimony so stricken out. The court, in concluding its instructions to the jury on this point, asked the jury if they could and would so disregard the stricken testimony, and they replied affirmatively. The admonition of the court was thorough and sufficient in itself and as complete as any such instruction should be.

Later, during the presentation of defendant's case, the defendant offered testimony concerning the relationship of the deceased wife with the alleged author of the letter in dispute. Upon objection of plaintiff to the relevancy or materiality of this testimony defendant took the stand that, inasmuch as plaintiff had argued that the letter was a fabrication, he was entitled to rebut that inference and show its genuineness. Whereupon counsel stipulated, and pursuant to such stipulation, the court instructed the jury, that under the testimony and the stipulation of counsel, in deliberating upon a verdict it should be taken as a fact established by the testimony that the defendant did not write or cause to be written the said letter.

Plaintiff before resting her case presented the certificate of a physician that a certain witness who had been under subpœna could not be present, and that her condition was such that her presence could not be secured for some 10 or 12 days. Counsel for plaintiff stated that the testimony of the absent witness was merely in the nature of cumulative evidence. It was stated that the absent witness could testify to a conversation of March 2d with the defendant and others. The subject of the conversation had already been gone into quite extensively by others present.

We have thus at length detailed the testimony taken and proceedings had as the questions raised compel such a statement. It may be repeated here that the defendant stood on a straight denial. He did not plead justification in any way, nor did he set up the truth of the statements nor claim privilege. With the case thus summarized we may proceed with the claim of appellant.

Appellant bases his right to a reversal upon the ground that the offer of testimony covering the night of the alleged occurrence in the home of defendant was itself misconduct, and was made designedly to prejudice the rights of defendant and deny him a fair hearing on the merits; further, that the action of the court in admitting the same was error, and likewise of such damaging effect to his cause that the subsequent order striking it out was of no avail to cure the harm already done. Still further, appellant insists that even if there had been a connection sufficient to persuade the court to let the testimony remain, it was still irrelevant, incompetent, and immaterial.

[1] The ground upon which respondent urged the testimony to be admissible and upon which the court admitted it on counsel's promise to connect was that it would tend to establish actual malice as the basis of exemplary damages. In other words, plaintiff argued that she was entitled to show that defendant had been guilty of serious misconduct towards the young girls involved, and that defendant knew that plaintiff had knowledge of these acts on his part, and that defendant with a purpose and design of forcing plaintiff to remain silent, or, failing in this, to discredit her in advance, spread these defamatory charges of and concerning her. Respondent has cited no authority either here or in the court below supporting her contention.

The question of just what may be shown to establish malice in fact in actions has been before the courts of this state many times. Davis v. Hearst, 160 Cal. 143, 166, 116 P. 530; Scott v. Times-Mirror, 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007; Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1. The subject is exhaustively covered by Odgers in his work on Libel and Slander (5th Ed.) p. 348, and likewise by Newell on the same subject (3d Ed.) p. 937, and by Townsend in his work (4th Ed.) p. 653. From the authorities cited herein and those cited to support the text of the writers on the subject, it is manifest that there can be no basis for the claim here made. Repeating, respondent cites us to no authority or line of reasoning in support of his contention, and we do not feel the case now warrants a review of all that may have been written or said by the courts on the subject. Suffice it to say that if the rule contended for should be approved, then the trial of slander and libel cases would be interminable affairs of endless and confusing issues. Every act of a defendant's life that would in any wise disgrace him or cause him fear of exposure could be brought into issue upon the simple announcement that the defendant knew that the plaintiff was in possession of accusing facts against him, and that the defendant was therefore malicious in his statements as to the plaintiff. We do not approve such a theory, and decline to establish such a doctrine as the law of this jurisdiction.

[2] Of course, it is apparent that acts of defendant in relation to plaintiff, or acts between the parties to the action, are not under discussion here. Therefore, with reference to the testimony here under discussion, the court should not have admitted in either upon a promise to connect or at all. The court was apprized of counsel's theory at the outset and should have declined to admit the testimony on the theory advanced. In any event, the action of the court in the admission of the objectionable matter is not specifically urged. However, with the premise established that the testimony itself was inadmissible and improperly before the court and jury, we come to the contention that the acts of counsel in offering the same constituted prejudicial

misconduct sufficient to warrant a judgment of reversal herein. The concrete question presented is this: If evidence of a nature tending to degrade and vilify a party is admitted improperly under a promise of counsel to connect the same in such a manner as to render it admissible, and subsequently there is an admitted failure to so connect, what effect will the admission of such evidence have upon a verdict rendered after all of the said evidence has been stricken from the record?

That the testimony complained of was calculated to and necessarily would prejudice the defendant before any jury admits of little question. For seven trial days this testimony was being introduced or else indirectly referred to and before the jury under the expressed opinion of the court that it considered the same material. It surely cannot require argument beyond the facts hereinbefore stated to demonstrate that the offering and acceptance of this line of testimony was highly prejudicial and harmful to appellant. The defendant in this case was a native of China and of the Mongolian race. As stated, we deem further discussion and analysis of the facts unnecessary to support the conclusion that the admission of the testimony was prejudicial to the rights of the defendant.

[3] Next we reach the question as to the effect of the order striking the testimony from the record, and the instruction and admonition to the jury to disregard the same. Many cases are cited on this subject, and we may quote without comment therefrom. The greater number of cases are those wherein defendant was charged with the commission of some public offense. However, the reasoning of those cases is applicable alike to all cases irrespective of what the issues may be. Without attempting any historical or chronological development, we cite from a very recent case:

"It is clear that however good the intentions of the jury, or however sincere they may be in endeavoring to follow the instructions of the court to disregard such suggestions, it is well nigh inevitable that they should give weight to such suggestions. * * * It is a psychological impossibility for the jury to wholly eradicate the impression made by such questions from their minds in weighing the evidence as to the guilt or innocence of the defendant on the particular item charged. * * * The question of the district attorney asked of the defendant amounted to a charge against the defendant that he had been guilty of the offense of rape * * * upon two small girls in his custody. The human mind is not so constructed that a thing of that kind can be either forgotten or overlooked by a jury. * * * The real question is, has the defendant had a fair trial?" People v. Anthony, 185 Cal. 152, 196 P. 47.

See, also, People v. Tufts, 167 Cal. 266, 139 P. 78.

"While it is the general rule that if it can fairly be said, from all of the circumstances of the case considered in conjunction with the nature and extent of the assigned misconduct, that an admonition of the court had the desired effect, there can be no just cause for complaint, nevertheless it is a recognized exception to that rule that, where as here, in a closely balanced criminal case, misconduct is repeated and persisted in, despite the warnings and admonitions of the trial court, and is so pronounced and pernicious that it is not in human nature to forget or disregard its prejudicial effect, then manifestly a mere admonition or any number of admonitions will not suffice to right the wrong done, and the only remedy remaining is to be found in a reversal of the judgment." People v. Edgar, 34 Cal. App. 471, 167 P. 895.

In another case, referring to the asking of improper questions, the court says:

"The plain effect of the statement was that the prosecution had such proofs, but could not make them because the laws of evidence precluded such a course." People v. Fleming, 166 Cal. 357, 36 P. 291, Ann. Cas. 1915B, 881.

"When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the court is bound to so instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. * * *

"It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but while this was to the credit of the court, it does not change the fact that a matter not in evidence, and of a nature clearly prejudicial to the appellants, was laid before the jury for the purpose of affecting their verdict, and it is no answer to this to say that the jury may have disregarded it. * * * It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence." People v. Ah Len, 92 Cal. 282, 28 P. 286, 27 Am. St. Rep. 103.

As indicated, the foregoing citations are all from cases wherein defendant was being prosecuted for a criminal offense, and where the defendant was surrounded by the presumptions usually attaching to a defendant in a criminal case, wherein the law requires proof of guilt to be established beyond any reasonable doubt. However, the reasoning as to the impossibility of erasing from the minds of the jurors the effects of evidence improperly before them applies with equal force to the trial of a civil case. That little distinction is made on this point a brief examination will disclose.

In the case of Shay v. Horr, 78 Wash. 667, 139 P. 604, quoted in the case of Dameron v. Ansbro, 39 Cal. App. 298, 178 P. 878, it is said:

> "We have held * * * that it is improper to either directly or indirectly get before the jury any fact which conveys the information that the defendant is insured against loss in case of a recovery against it, and that the striking of the answers conveying such information and the instructing of the jury not to consider it will not save the error."

In the case of Wright v. Broadway Department Store, 49 Cal. App. Dec. 225,* the court says the testimony adduced "was offered for no other purpose than to prejudice the minds of the jury against the appellant and it must have had the effect for which it was designed, even though the trial court granted appellant's motion to strike it out."

In the case of Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538, the prevailing opinion held that the conduct complained of was improper, but that the harm was overcome by the action of the trial court, and, further, that whether or not prejudicial harm resulted was for the trial judge to determine on the motion made for a new trial. The dissent in this case, concurred in by three of the court, Justices Wilbur, Olney, and Lennon, reads as follows:

> "It seems to us that an entirely false quantity was injected into the case by plaintiff's counsel, over the repeated admonitions of the court, and that the false quantity so introduced was of a character so prejudicial to the defendant as to have prevented the jury from considering the case fairly upon its real merits. To sustain the verdict under these circumstances will, it seems to us, have the effect of encouraging similar conduct in other cases, when it should be discouraged strongly."

The case of Keena v. United Railroads of San Francisco, 197 Cal. 148, 239 P. 1061, affords an interesting illustration. When this case was before the District Court of Appeal the court considered the misconduct complained of and pronounced the same as clearly subject to criticism. But in view of the judgment of affirmance in the case of Lafargue v. United Railroads, the court was not prepared to hold that the situation demanded a reversal of the cause. A petition for rehearing was granted in the Supreme Court, and the opinion of the latter tribunal is found in 197 Cal. at page 148, 239 P. 1061. The Supreme Court adopted in toto the opinion of the District Court up to the point of misconduct of counsel, and the judgment was reversed solely on the ground that the misconduct of the attorney for plaintiff prejudicially and materially affected the substantial rights of the defendant and prevented it from having a fair trial. The court adopted the language of the dissent in the Lafrague Case, supra. The Supreme Court says:

> "It is altogether too evident that the purpose of the accusation that evidence had been willfully suppressed by the defendant was none other than to bolster up a weak case by creating a prejudice against the defendant in the minds of the members of the jury. Such means of winning a lawsuit cannot be commended or receive recognition and endorsement by this court, instituted and maintained, as it is, on the principle of administering justice."

In considering the language thus used it seems clear that by the term "bolstering up a weak case" the idea of the court intended to be expressed was "a case that might be weak." This is apparent from the fact that the trial jury, the trial judge, the District Court of Appeal, and the Supreme Court all considered the facts sufficient to sustain the judgment.

Passing from our own state, we have authority from many jurisdictions. See Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854.

In Lopresti v. Sulkin, 49 Pa. Super. Ct. 417, appears this language, commenting upon alleged misconduct of counsel:

> "But there are certain kinds of objectionable remarks which have been held to be so prejudicial in their nature as to be beyond correction by any admonition the court may give the jury to disregard them,"—cited and approved in Dannals v. Sylvania Twp., 255 Pa. 156, 99 A. 475.

In the case of Rinehart & Dennis v. Brown, found in 137 Va. 670, 120 S. E. 269, many authorities are reviewed and the question extensively discussed in all of its phases. The court adopts the rule, namely, "If it appears that the unfavorable influence of the argument was probably not wholly removed by the court's action, a new trial may be allowed." Further quoting from this case:

> "Counsel for plaintiff lay stress on the fact that the trial court was emphatic in instructing the jury to disregard the improper reference to the insurance, and obtained from them an indication that they understood the court's instruction. We do not attach special importance to these facts."

In Coon v. Manley (Tex. Civ. App.) 196 S. W. 606, it is said:

> "It is true the court seems to have promptly acted in the endeavor to have excluded from the jury the harmful and irrelevant matter referred to; but the references to the subject were so frequent and pointed, even after repeated rulings of the court, that we do not think appellee can now complain because of the conclusion, which as it seems to us is quite natural, that the vice and harmful effect of the matter objected to were not destroyed by the court's rulings."

Also, in Kirby Lumber Co. v. Youngblood (Tex. Civ. App.) 192 S. W. 1109, another Texas authority, we find this statement:

> "When the seeds of passion and prejudice are sown and fall in fallow ground, it is difficult, indeed, to destroy its effect, even by the most careful admonition and painstaking instructions;

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*Hearing granted. For opinion of Supreme Court, see 199 Cal. 562, 250 P. 572.

and when counsel, either in their argument to the jury or during the trial, in the presence of the jury, go outside of the record, and indulge in remarks that are clearly intended to arouse the passion or prejudice of the jury, and likely to influence them, such conduct not only authorizes, but requires the trial court to set aside the verdict of the jury, and this should be done, even though the court may have instructed the jury to disregard such argument."

An ancient case, Stewart v. Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 631, sets forth the conditions prevalent even then. We quote:

> "It has grown into a habit, within these few years, for counsel to propose a chain of evidence, the first links of which depend on those which follow, and would not be supportable without them. Now, although gentlemen of honor, and such I take the counsel in this cause to be, would scorn to impose on the court, by pledging themselves for what they knew they could not perform, yet, it may happen that there may be others who would make no scruple of liberal promises, provided they could smuggle into the jury box a piece of evidence which ought not to have got there."

In the case of State v. Meader, 54 Vt. 126, we find this language:

> "It is now the settled law in this state, that illegal evidence, if objected to, though admitted under an offer to so connect it with other proofs as to make it competent will vitiate a verdict for the party offering it, if the proposed connection is not established, unless the court is able to say affirmatively, that such evidence worked no injury to the adverse party. It is not apparent how any embarrassment can arise in the trial of cases under this rule. The party offering such evidence is simply compelled to take the risk of the experiment. If he fails, he, not his adversary, should be the loser. He has no more right to hold a verdict obtained by such evidence when offered in good faith, than one, when he offers the evidence in bad faith. The rights of the adversary are imperiled to the same extent in either case, and these are the rights calling for protection. The rule has a tendency to discourage bad faith in parties, in their offers of evidence, as they understand that such evidence cannot ultimately aid them."

No further citation of authority seems necessary.

In the case at bar plaintiff urges her good faith in the premises and her attempt to connect the testimony under discussion here. This, of course, must appear from the record, if at all. We assume that all counsel act in good faith, generally speaking. But good faith in the abstract is not an all-saving virtue. Here it appears, as a demonstration of good faith, that a witness under subpœna could not appear. However, the statement of counsel to the court was that the testimony of this witness was purely cumulative; and in explanation of this counsel referred to the incident and the occasion concerning which she would testify, and this record discloses that several witnesses had already given testimony concerning the same matter. There is not a single word in the record or offer of proof or statement of counsel to the effect that testimony to connect was or had been available, or that counsel had any reason to believe in his ability to so connect. Plaintiff's counsel had stated that he could connect by the testimony of plaintiff. When plaintiff was called and objection made, the court inquired of plaintiff's counsel if the knowledge upon which they based their contention could be brought home to defendant; whereupon counsel for plaintiff replied:

> "I don't know that. I won't say that, because I don't want to promise something that I may not be able to meet. But so there will be no question about it we withdraw the question."

Respondent here contends she made the offer to connect by attempting to show by plaintiff whether the deceased wife discussed with her what happened on the night in question, but was precluded from so doing owing to appellant's sustained objection. We have held hereinbefore that the evidence would have been inadmissible, even if connected; but on this particular phase we might add that the testimony offered would not tend to connect the defendant except remotely, and that the essential connection would be defendant's knowledge of what information had been conveyed to plaintiff. We deem it futile to follow this phase further. Quoting from Smith v. Sedalia, 182 Mo. 9, 81 S. W. 167:

> "It is in the discretion of the trial court to allow counsel some choice as to the order in which they will introduce their evidence, but when counsel have been permitted to introduce evidence out of its usual order on their assurance that it will be connected and its relevancy shown later, if the promised evidence is not brought forward, and if the irrelevant evidence is of a character likely to influence the jury, and if the verdict is on that side, a new trial should be granted. The fact that the promise may have been made in good faith does not alter the effect of the illegal evidence. In this instance there had been a change of venue and a change of counsel since the former trial, and doubtless the counsel who gave the promise expected they would be able to fulfill it, but in that respect they were disappointed."

A new trial was granted.

It must be added that throughout the trial to the time the evidence was stricken out it was for seven days being constantly urged and argued; that throughout the trial there was constant and continuous strife between counsel, often requiring the caution of the court, and throughout this strife were interjected side remarks and comments reflecting on the defendant and his cause, and drawing unfair inferences from the death of the wife, as instanced by the statement of plaintiff's counsel hereinbefore referred to, and also the statement of counsel for plaintiff that he would show that she was pregnant at the time. It is unnecessary to further detail these other than to illustrate the atmosphere created and the "fallow ground into which were cast the seeds of prejudice and passion."

We conclude the conduct complained of was harmful and prejudicial, and prevented the defendant from having a fair and impartial trial on the issues submitted.

We are again confronted by section 4½, art. 6, of the state Constitution, and are called upon to determine whether or not from the errors complained of there has been a miscarriage of justice.

[4] Notwithstanding an abundance of authority going to an explanation and construction of this constitutional provision, from necessity its application depends upon each particular case as it arises. Whatever else may be said on the subject it is clear that the intent of the provision was to promote justice rather than obstruct it. It was intended, in our opinion, to insist upon substantial compliance with the law, the very foundation of justice. If there had been a substantial compliance with the law then alleged or admitted irregularities should not prevail to change a result which it might be apparent would have resulted notwithstanding. But the effect of this provision is not to permit a reviewing court to simply scan the alleged rights of one party and deny the other any rights at all. The term "justice" includes the idea of equality, and in some instances the terms are used interchangeably. The law necessarily represents and embodies man's highest concept of human justice as between individuals. Under our system no man can be said to have had justice accorded to him who has not had the opportunity to present his case and have that case heard dispassionately and fairly. To say that you can bring a person into court and, before the presentation of his case to a jury, by offering incompetent and irrelevant testimony, disgrace and degrade him to a degree that both he and his case may be deemed unworthy to be heard and he subject to punishment, and that thereby you are not infringing upon his right to a fair and impartial hearing, is to declare what is obviously absurd. In the Keena Case, before cited, it appeared that the plaintiff had been afflicted by the loss of a child; that two juries had passed upon the sufficiency of the evidence as well as two trial judges; that in the District Court of Appeal and in the Supreme Court there was no question on that score, nor were there any errors complained of other than the conduct referred to. The Supreme Court nevertheless took the view that the substantial rights of the defendant had been impaired and that justice must have miscarried. Surely the constitutional provision was intended to prevent a miscarriage of justice and not to condone it. The present chief justice of the Supreme Court in People v. De Vries, 52 Cal. App. 711, 199 P. 870, uses this apt language:

> "There are bounds beyond which the saving grace of that provision may not pass, and the appellate courts should not be called upon to spread it, like 'a mantle of sweet charity,' over intentional acts of misconduct. Frequent warnings in relation to the practice proving ineffectual, reversals on appeal must be anticipated if right of defendants to a fair trial is to prevail."

In any event, applying the section to the case here, there is little to invoke the constitutional provision. Without further commentary we repeat that section 4½ of article 6 does not compel that we halt in this case.

Counsel involved in the case are all men of highest repute in the profession. But that does not alter the situation. It simply demonstrates the necessity for some restraining influence. In the instant case, again, when defendant's counsel was making some argument to the court he was interrupted by counsel for plaintiff, and answered the interruption by stating that he was addressing the court, whereupon plaintiff's counsel replied: "But the jury is sitting here and hears it." It is unfortunate to note—and every trial judge has noted—that a trial before a jury is often a battle of wits between opposing counsel, and an occasion for delicate finesse and elusive insinuation. Modern thought and discussion seem to leave the layman with the impression that there is something deficient in the administration of justice. The courts must sooner or later meet the question and present the remedy. And we think a great step in anticipation is to give some assurance to the profession and the litigant that in a case where issues are framed the trial will be confined thereto.

Judgment reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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89 Cal. App. 322

WHYLER et al. v. RECLAMATION DIST. NO. 2047. (Civ. 3357.)

District Court of Appeal, Third District, California. Feb. 17, 1928.

1. Drains ⚿68—Reclamation district may levy assessment to provide drainage for artificial waters.

A reclamation district may levy an assessment to provide drainage for artificial waters.

2. Drains ⚿91—Reviewing court may not interfere with findings of fact triers relative to reclamation district assessments unless assessment was arbitrarily or unreasonably made.

A reviewing court may not interfere with findings of triers of fact relative to assessments for reclamation districts unless assessments appear to have been arbitrarily or unreasonably made.

3. Drains 🔑76—In reclamation and drainage district matters, much must be left to discretion of officers and to court making judicial review of proceeding.

In reclamation and drainage district matters, much must be left to sound judgment and discretion of the officers appointed by law to determine the benefit and to the court which makes a judicial review of the findings.

Appeal from Superior Court, Colusa County; J. O. Moncur, Judge.

Action by Annie F. Whyler and others against Reclamation District No. 2047. Judgment for defendant, and plaintiffs appeal. Affirmed.

Seth Millington, of Gridley, for appellants.

Thomas Rutledge, of Colusa, and George R. Freeman, of Riverside, for respondent.

PULLEN, Justice pro tem. This is an appeal by the plaintiffs from a judgment in favor of the defendant reclamation district No. 2047. This was a reclamation district organized after the development of the rice industry in the upper Sacramento Valley had shown the necessity of the drainage from the lands within the district of surplus waters which had been artificially placed upon the lands for the irrigation of the lands devoted to rice culture.

The judgment complained of upholds the validity of an assessment on the lands of appellants lying within the exterior boundaries of the district.

[1] Appellants argue that it is not within the scope of the powers of a reclamation district to provide drainage for artificial waters, such a function being provided for by the organization of a drainage district, but the grounds here urged, that the assessment for drainage purposes is invalid, were before the court in the case of Abel v. Reclamation District No. 2047 (Cal. Sup.) 257 P. 504, which case involved the validity of an assessment for drainage purposes and was decided adversely to the contention of appellants in this case, and it is to that extent binding upon this court.

The other objections of appellants are directed to the method used in levying the assessment by the assessors, in that the factors are unreasonable and variable. The evidence offered in respect to the methods was very general in character and does not tend to show that the lands of appellants were not correctly classified and that the amount assessed against this land was not at the rate as that assessed against all other lands in the district of like character similarly situated and deriving a similar benefit from the works of the district.

[2, 3] The court in the case of Abel v. Reclamation District No. 2047, supra, said:

> "But there are other alleged elements of benefit, which were considered by the triers of the facts in the order provided by the statute, and we are not permitted to interfere with the findings of those tribunals unless the assessments appear to be arbitrarily or unreasonably made. Much must be left to the sound judgment and discretion of the officers appointed by law to determine the question of benefit in reclamation and drainage matters and finally to the court which makes a judicial review of the proceedings."

For the reasons stated and upon the authority of Abel v. Reclamation District No. 2047, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

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89 Cal. App. 177

SMITH v. SUPERIOR COURT IN AND FOR YUBA COUNTY et al. (Civ. 3424.)★

District Court of Appeal, Third District, California. Feb. 9, 1928.

Rehearing Denied with Modifications March 10, 1928. Hearing Denied by Supreme Court April 9, 1928.

1. Certiorari 🔑28(2)—Sole office of "writ of review" is to determine whether judicial tribunal has in particular case exceeded its jurisdiction (Code Civ. Proc. § 1068).

Sole office of "writ of review," under Code Civ. Proc. § 1068, is to try the question of jurisdiction in particular case; that is, to examine the question whether judicial tribunal has in particular instance exceeded its lawful jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Writ of Review.]

2. Certiorari 🔑64(2)—Decision of tribunal within its jurisdiction is not disturbed on certiorari on account of errors, but jurisdictional facts must appear.

Where, on writ of review it is found that tribunal whose judgment is under determination acted within bounds of its lawful jurisdiction, its decision will not be disturbed even though it committed error or irregularities in arriving at results, but it must appear that jurisdictional facts were present such as existence of pleadings and formal presentation of issues.

3. Contempt 🔑44—Essential jurisdictional facts must appear before lower court can exercise jurisdiction to punish for contempt (Code Civ. Proc. §§ 1068, 1218, 1219).

In cases of contempt, essential jurisdictional facts must be shown to exist before court, in exercise of general jurisdiction conferred upon it by law under Code Civ. Proc. §§ 1068, 1218, 1219, can act in given case.

4. Contempt 🔑67—Question of sufficiency of proofs to uphold judgment in contempt proceedings held reviewable on certiorari (Code Civ. Proc. § 1068).

On writ of review under Code Civ. Proc. § 1068, to set aside judgment entered in con-

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★Rehearing denied. Hearing denied by Supreme Court.

tempt proceedings, determination as to sufficiency of proofs to uphold lower court's decision *held* within scope of writ as involving jurisdictional facts, though error in conducting investigation could not be considered.

5. Divorce 🔑245(3)—Order modifying alimony award held void in so far as it granted wife attorney's fees for services of attorney already rendered (Civ. Code, § 137).

Order modifying award of alimony, in so far as it awarded wife attorney's fees for professional services of attorney in prosecuting proceeding for modification of decree, *held* void, under Civ. Code, § 137, for reason that professional services for which allowance was made were fully performed at time fees were awarded.

6. Divorce 🔑222—Court is without jurisdiction in divorce proceedings to award wife counsel fees after professional services have been performed (Civ. Code, § 137).

Court in divorce cases or proceedings arising therein collaterally or otherwise is without jurisdiction to award counsel fees after professional services have been performed under Civ. Code, § 137, which permits court to require husband to pay as alimony money necessary to enable wife to support herself or to carry on litigation.

7. Divorce 🔑245(3)—Order modifying award of alimony held not void, rendering contempt judgment based thereon invalid, because of invalid provision in order requiring payment of counsel fees (Civ. Code, § 137).

Order modifying interlocutory divorce decree and requiring payment of monthly sums of alimony together with sum for attorney's fees to wife *held* not void in its entirety, so as to render judgment of contempt based thereon invalid, by reason of fact that provision requiring payment of attorney's fees was void under Civ. Code, § 137; provision for alimony being separate, distinct, and independent.

8. Divorce 🔑245(1)—Allowance for alimony for specified period of one year in interlocutory decree held not conclusive, preventing subsequent order modifying award after expiration of year (Civ. Code, §§ 137, 139).

Allowance for support of wife, originally made in interlocutory decree of divorce for period of one year, *held* not conclusive so as to prevent modification after expiration of year by increasing the amount of alimony by subsequent order under Civ. Code, §§ 137, 139, where divorce was granted for husband's offense.

9. Divorce 🔑236, 245(1)—Stipulation for husband's payment of monthly sum to wife for one year held not permanent settlement, or to divest court's jurisdiction to increase alimony (Civ. Code, §§ 137, 139).

Stipulation between husband and wife relative to custody of children and providing for husband's payment to wife of specified monthly sum for period of one year cannot be construed as settlement of matter of alimony for all time or as divesting court of jurisdiction, under Civ. Code, §§ 137, 139, to increase amount after expiration of year, where circumstances requiring change were brought to its attention.

10. Divorce 🔑286—Construction of trial court in modifying alimony award, as to parties' stipulation, held conclusive on proceedings to review contempt judgment.

Construction of trial court in modifying alimony award, as to meaning of agreement between husband and wife for alimony, was conclusive in proceedings to review contempt judgment based on modification of award of alimony.

11. Divorce 🔑236—Agreement between spouses for alimony was not binding upon trial court in divorce suit (Civ. Code, § 139).

Court, in trial of divorce action, was not bound by stipulation between husband and wife, in so far as it concerned award of alimony, since agreements between spouses in this regard are subject to court's power to modify or reject, under Civ. Code, § 139.

12. Divorce 🔑286—Where interlocutory divorce decree differed from agreement between spouses relative to alimony, it was presumed on review of contempt proceedings court refused to approve agreement (Civ. Code, § 139).

Where interlocutory divorce decree did not follow agreement between spouses relative to alimony, it was presumed, in proceedings to review contempt judgment based on modification of award of alimony, that trial court refused to approve of agreement under power given it by Civ. Code, § 139, even if the agreement was introduced in evidence.

13. Divorce 🔑269(11)—Evidence in contempt proceedings held to support finding that husband was possessed of sufficient means to satisfy alimony award.

Evidence in contempt proceedings *held* to sustain finding that husband was possessed of sufficient means to satisfy award of alimony fixed by final decree in divorce suit.

Application by Sidney V. Smith, Jr., for writ of certiorari to be directed to the Superior Court of Yuba County, Eugene P. McDaniel, Judge thereof, and others, to review a judgment of contempt for violation of a divorce decree awarding alimony. Writ denied, and judgment of contempt affirmed so far as it involves petitioner's refusal to obey the decree.

Devlin & Devlin, of Sacramento, for petitioner.

Charles A. Wetmore, Jr., of San Francisco, for respondents.

HART, J. This is an application for a writ of review for the purpose of having reviewed, annulled, and set aside a proceeding and the judgment therein entered adjudging the petitioner guilty of contempt of court, in that he violated a certain order of the respondent court fixing and awarding alimony to be paid to one Elaine T. Smith by the petitioner in an action for divorce in said court between the former and the latter.

From the petition and the return thereto the general facts may be taken and stated as follows: The petitioner and said Elaine T. Smith intermarried on the 4th day of June, 1917. Three children were born to said parties, as the issue of said intermarriage, one son and two daughters, who were minors at the time of the trial of the action culminating in the divorcement of the parties. On or about the 24th day of June, 1926, an appeal was pending from the judgment in a certain action (the nature of which is not clearly made to appear by this record, but it is fairly inferable that it was an action for maintenance) between Elaine T. Smith, plaintiff, and the petitioner here as defendant, and at the same time there was pending in the respondent court an action for divorce, instituted by said Elaine against the petitioner on the 24th day of June, 1926. The grounds upon which the divorce was sought by plaintiff in said action were willful neglect and extreme cruelty. It was alleged therein that the parties separated on the 5th day of June, 1926, and also that "there is no community property existing between plaintiff and defendant." By his answer, which was filed the day the complaint was filed, the petitioner admitted all the allegations of the complaint but those charging willful neglect and cruelty, and those he denied. Said action came on for trial before the court, sitting without a jury, on the 24th day of June, 1926, and an interlocutory decree was entered declaring the plaintiff, Elaine T. Smith, to be entitled to a divorce from the petitioner here, Sidney V. Smith. After so declaring and disposing of the matter of the custody of the three minor children of the parties, said decree proceeded:

> "It is further ordered, adjudged and decreed, that, commencing with the 1st day of July, 1926, and on the 1st day of each and every month thereafter, continuing for a period of one year, or twelve months, defendant Sidney V. Smith, Jr., shall pay to plaintiff as alimony the sum of $100."

The petition alleges that, on the 24th day of June, 1926, the parties entered into a written stipulation with reference to the disposition the court might make of the custody of their minor children by and in its interlocutory decree, in the event that such a decree was entered upon sufficient competent testimony; that, at the same time, said parties entered into a further written agreement as follows:

> "That, in consideration of the dismissal of the appeal heretofore taken on the judgment obtained by the wife against him in the superior court of the state of California, in and for the county of Yuba, and his agreement not to seek repayment of any moneys heretofore paid by him to the wife under said judgment, the wife hereby releases and discharges the husband from all claims and demands of every kind and nature, whether for moneys owing or to any community property or alleged community property in his possession or control, or for alimony, or for maintenance or support heretofore accrued or hereafter to accrue, and for said consideration the wife further agrees that the husband may have undisturbed the custody and control of the children of the parties."

On June 6, 1927, the said Elaine T. Smith served the petitioner herein with written notice that she intended to and would apply to the respondent court for an order modifying the interlocutory decree, in so far as it related to the award of alimony to said Elaine, fixing and awarding to her the sum of $250 per month "as and for permanent alimony, commencing on the 1st day of July, 1927, and continuing thereafter monthly, until the further order of said court," and also would apply for a further order requiring the petitioner to pay said Elaine $250 "as and for her counsel fees and such allowance for costs as might be necessary to pay the expenses of the proceedings upon said motion." On the 19th day of September, 1927, pursuant to said notice, counsel for said Elaine moved the court for the modification and for counsel fees, as indicated in said notice, and thereafter, and on the 21st day of October, 1927, respondent court made and entered an order modifying the order contained in the interlocutory decree relating to alimony by fixing and allowing alimony to said Elaine and directing that the same be paid by the petitioner herein to the former, the sum of $175 per month, "payable monthly, commencing on the 1st day of July, 1927, and monthly thereafter until the further order of said court, and further allowing to the said Elaine T. Smith the sum of $200 as and for attorneys' fees in said proceeding; * * * and it is further ordered that the provisions of said order be incorporated in and be made a part of the final decree of divorce." Thereafter, and on the 24th day of October, 1927, said court made and entered its final decree of divorce in said action, and included in said decree the order modifying the interlocutory decree as to alimony. The petition alleges that the petitioner refused and "wholly failed to pay or comply with said attempted and purported order for the payment of alimony and counsel fees" provided in the said modified order and in the final decree, and that on the 4th day of November, 1927, the respondent, Hon. K. S. Mahon, judge presiding pro tempore in and for the respondent court, "made and issued an order directing petitioner herein to appear before said court, on November 14, 1927, at 10 o'clock a. m. of said day to show cause, if any he might have, why he should not be punished for contempt of said court for failure" to comply with the terms of the final decree as to alimony; that, on said day, petitioner appeared before said court and said judge pro tempore, and that, examining the petitioner upon his oath and the evidence, oral and documentary, introduced in said proceeding, the petitioner was found and adjudged guilty of contempt for refusal and failure to comply with the mandates of said order of modification contained in the final decree of divorce as to alimony and counsel fees, and his refusal and failure to pay all sums claimed to be then due under the terms of said modified order, and ordered petitioner to be committed to the custody of the sheriff of Yuba county for imprisonment in the county jail of said county until payment in full of said moneys so purporting to be due should be made by him; that thereafter the respondent court and respondent judge pro tempore made a further order "substantially to the same effect, except that petitioner was therein found and declared to be able to pay the moneys therein mentioned." It is alleged in the petition that, upon the examination of petitioner and from the other evidence received in said contempt proceedings, it was shown that petitioner is without financial means or the ability to pay said money or any money which might become due under the order modifying the original order fixing and awarding alimony to said Elaine T. Smith.

The return consists of the entire record of the proceedings had on the citation for contempt. The order adjudging petitioner guilty of contempt and committing him to imprisonment in the county jail because of such contempt is in the following language:

> "And it further appearing to this court that on the 21st day of October, 1927, the above-entitled court duly made and entered its order requiring the defendant above named to pay to the plaintiff, commencing as of the date July 1, 1927, the sum of $175 per month, payable monthly, as permanent alimony, and the further sum of $200 as and for her counsel fees, and that said order was duly entered by the clerk of the court on the 21st day of October, 1927, and that said defendant ever since said time has wholly failed and refused and still does fail and refuse to comply with the order of the court aforesaid, without any just or legal ground or cause to show why he has not complied with such order of this court, and defendant at all of the times mentioned was and he now is able to pay the sums of money so ordered by this court, and it further appearing to this court that there is now due under the terms of said order as aforesaid to the plaintiff from said defendant the sum of $875 on account of permanent alimony, and the sum of $200 as and for her counsel fees:
>
> "Wherefore, the court finds that, because thereof, said defendant, Sidney V. Smith, Jr., is guilty of contempt of this court; and it is adjudged that, unless said defendant pay to the plaintiff within five days the sum of $1,075, the amount due plaintiff under said order, as aforesaid, it is adjudged that said defendant, Sidney V. Smith, Jr., be punished for such contempt by imprisonment in the county jail of the county of Yuba, state of California, until such time as he fully complies with said order."

[1, 2] The sole office of the writ of review, as is obvious from the description of that writ by our Code (Code Civ. Proc. § 1068), is to try the question of jurisdiction in a particular case—that is, to examine the question whether any tribunal exercising judicial functions has in a given instance exceeded its lawful jurisdiction. It is not, nor could it be, disputed that the superior court or any court may punish as for contempt the violation of any order, judgment, or mandate of any nature which such court by the law is vested with the jurisdiction to make, pronounce, enter, or issue, and may, where a judgment of contempt of its processes has been made and entered, impose a sentence of imprisonment, or a fine, or both, upon the offending party (Code Civ. Proc. § 1218), or may, as in the present case, employ the power to punish for contempt as a coercive measure to compel the performance of an act enjoined by a judgment or order which it has the lawful jurisdiction to make by imprisoning the offender until he complies with such order or judgment. Code Civ. Proc. § 1219. It is the general rule that, when it is found and determined that the tribunal whose judgment or act is under examination through the agency of said writ has remained within the bounds of its lawful jurisdiction in rendering the judgment or doing the act thus attacked, the inquiry is at an end, although it may appear that error or irregularities were committed in arriving at the result complained of.

[3, 4] But the rule as thus stated must be understood as being subject to this qualification: That, even where, under the law, the tribunal is vested with jurisdiction of and over certain matters or subjects, yet, before it can perform an act or make and enter an order or a judgment in the exercise of its general jurisdiction of and over such matters or subjects there must first be made to appear the jurisdictional facts essential thereto. While the superior courts have jurisdiction to hear and determine as at nisi prius issues of fact and law in all cases which are not by law made cognizable by the courts inferior thereto, no one would for a moment hold that said courts would have jurisdiction to hear and determine such cases in the absence of pleadings or the formal presentation or the tendering of the issues of fact or of law to be tried. So, in cases of contempt the essential jurisdictional facts must be shown to exist before a court, in the exercise of the general jurisdiction conferred upon it by law, can acquire the right to exercise such general jurisdiction in a given or particular case. These general observations result from the contention of counsel for the respondents to the effect that, since admit-

tedly the respondent court has the jurisdiction, not alone conferred by law but inherently, to protect, maintain, and preserve its dignity or enforce obedience to its processes by proceedings in contempt, there cannot legally be a review of the proceedings below, in so far as is concerned the question of the sufficiency of the proofs to uphold the order or judgment of contempt or the question of the legal propriety of the evidence upon which the order or judgment was and is predicated or other errors which may have been committed in conducting the investigation. As to the question of the admissibility of evidence or other errors committed in the trial of the issue, counsel for respondents is right. As to the other proposition, as stated, he is in error. And what counsel for the petitioner contend here is, not that the court is not clothed with power to hear and determine proceedings in contempt of its decrees, orders, or processes, but that the jurisdictional facts essential to the upholding of the order or judgment of contempt in the present case were not shown at the hearing thereof. In truth, the simple question in effect is whether the proofs support the judgment.

Several propositions in support of the petition herein are urged. Stated in the order in which they are presented in the briefs filed on behalf of the petitioner they are: (1) That the respondent court was without jurisdiction to award counsel fees for professional services rendered on behalf of Elaine T. Smith in the proceeding for the modification of the alimony clause in the interlocutory decree. (2) That, this being so, the judgment for contempt must fall, since the petitioner was adjudged guilty of contempt for refusing to do two things, conjunctively set forth in the final decree, to wit: To pay the accumulated alimony under the modified order as to alimony, and to pay counsel fees of $200 awarded for legal services rendered Elaine T. Smith in the application for further alimony. The argument as to this is that, where two distinct acts are required by the order or the decree to be done or performed and they are therein stated in the conjunctive form, and one of such acts was beyond the jurisdiction of the court to require to be done, the entire judgment purporting to be predicated upon the order or judgment requiring both acts to be performed is invalid, even if it be true that it was within the jurisdiction of the court to order one of such acts to be performed, since, as counsel argue, "the word 'and' required both (the acts ordered to be done) to be valid before the order of contempt based upon both would be valid," citing Kraner v. Halsey, 82 Cal. 209, 212, 22 P. 1137. (3) That, in fixing and awarding alimony in the interlocutory decree the court exhausted its jurisdiction to make any further order or adjudication as to alimony for the wife. (4) That the evidence shows that the petitioner is without financial means or property from which he can secure the means necessary to enable him to pay the amount awarded.

[5, 6] 1. So much of the modifying order allowing Elaine T. Smith the sum of $200 as counsel fees for the professional services of her attorney for inaugurating and prosecuting the proceeding eventuating in the making of said order is void, for the reason that the professional services for which said allowance was made were fully performed before the awarding of such fees. In other words, the fees were allowed for past professional services, and the court in divorce cases or proceedings arising therein collaterally or otherwise is without jurisdiction to award counsel fees after the professional services have been performed. Civ. Code, § 137. So much of said section as is pertinent here provides:

> "When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action."

Of course, it will not be doubted that the situation presented here falls within the reason underlying the foregoing language of said section. Our higher courts have uniformly held, in construing said section, that the award of attorneys' fees to the wife in divorce actions or for maintenance without a divorce must be made prior to the performance of the services, compensation for which is asked; the reason given being that such an allowance for past services are "clearly not *necessary* to enable the wife * * * to prosecute * * * the action." Lacey v. Lacey, 108 Cal. 45, 46, 40 P. 1056; Stampfli v. Stampfli, 53 Cal. App. 126, 132, 199 P. 829; Loveren v. Loveren, 100 Cal. 494, 35 P. 87; Wickland v. Wickland, 19 Cal. App. 562, 126 P. 507; Sheppard v. Sheppard, 15 Cal. App. 619, 115 P. 751.

[7] 2. There is no merit in the proposition that, because the order allowing counsel fees is invalid, the entire modifying order and consequently the judgment of contempt based thereon are invalid. The central object of the application for a modification of the interlocutory decree was to secure an increase in the amount of alimony awarded the wife and to make it permanent, or until otherwise ordered by the court. The application for counsel's fees was merely incidental thereto. Both matters are, in their nature, so far as the effect thereof is concerned, entirely separate and distinct. They were not interdependent. The jurisdiction of the court to award alimony was in no sense dependent upon whether the court had jurisdiction to award counsel fees. There is noth-

ing ambiguous in the language of the order. It is plainly manifest that the court intended to make both awards, and that it succeeded in making a valid order as to alimony but failed, for technical legal reasons, to make the other. It seems to us that it would be carrying technicality to a most unreasonable extreme to hold that the fact that the futile attempt to award counsel's fees has the effect of destroying the validity of the order as to alimony. The case of Kraner v. Halsey, supra, held that, as one of the grounds of the demurrer to the complaint was stated conjunctively, viz. that said complaint was "uncertain, ambiguous, *and* unintelligible," all three grounds would have to exist to justify an order sustaining the demurrer. We do not think that that case is in point here.

[8] 3. The allowance made by the court in its interlocutory decree as for alimony for the support of Elaine T. Smith, wife of the petitioner, for a specified period was not conclusive, or, in other words, the court's power in that particular was not exhausted by reason of the provision in said decree for the support of the wife. In Tayian v. Tayian, 64 Cal. App. 632, 636, 222 P. 377, 378, it is said:

> "Alimony merely means provision for the support of the wife in cases of divorce, either temporary or permanent, as the exigencies of the case [may] warrant. * * * It is an incident of divorce. Divorce or separation without divorce and alimony spring from the same root, to wit, the marriage relation. It has repeatedly been held that the right of a court to allow alimony in actions for divorce may proceed from its inherent power to make such provision in such cases and therefore the court could make an allowance of alimony in the absence of express statutory authority for such action. (Dunphy v. Dunphy, 161 Cal. 87, 90, 91, 118 P. 445.)"

See Duss v. Duss (Fla.) 111 So. 382, 383. There is, however, in section 139 of the Civil Code authority for the exercise by the superior courts of a broad discretion in such matters. So much of said section as is directly pertinent to the present consideration reads:

> "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

The divorce here was "granted for an offense of the husband." Speaking of this section of the Code, it is said in Soule v. Soule, 4 Cal. App. 97, 100, 87 P. 205, 206:

> "This statutory provision enters into every decree in an action for divorce which provides for the payment by the husband of an allowance for the support of the wife, as fully as though it should be incorporated into the terms of the decree. The authority of the court to modify its decree in this respect does not depend upon a reservation therefor in the decree itself, but exists by virtue of a statute, and, being conferred upon it by the Legislature, it is beyond its power to divest itself of such authority. Campbell v. Campbell, 37 Wis. 706."

Again, in the same case, it is further said:

> "The section of the Code places no limitation upon the extent to which it may make such modification; the principle upon which the authority is to be exercised being that which determines its original order, viz. that the allowance to be made by the order as modified shall be such as the court may deem just, 'having regard to the circumstances of the case.' Under this section it may modify its former order either by increasing or reducing the amount of money to be paid at any one time, or enlarging or diminishing the frequency with which the payments are to be made. Neither is the authority to modify the decree limited by the section to a mere change in the *amount* of the allowance to be paid, but it includes a modification of the order in any respect which, under the circumstances of the particular case, may seem just to the court."

To like effect is Gates v. Gates, 54 Cal. App. 407, 202 P. 151; the opinion being prepared by late Justice Burnett, and approved by the Supreme Court by a denial of a hearing by that court. Therein the following language, cogently pertinent to the present case, is used:

> "That the interlocutory judgment had become final before the modification was made does not render said section 139 inapplicable. The provision rests upon the theory that the trial court has a continuing jurisdiction in reference to such award. Its authority is not exhausted by the original order, nor is it foreclosed by the expiration of the time for an appeal. It is equally plain that the court is not required by express provision to reserve the authority to modify the award in order to justify such action. The language of said section becomes a part of the original order as though written therein. The section itself *reserves* to the court the authority to modify the allowance."

See, in addition to the authorities above considered herein, cases cited in the footnotes of 1 California Jurisprudence, at pages 1032 and 1033.

It is true that "there is no statutory authority giving the court jurisdiction to modify a divorce decree by the allowance of alimony where originally no provision was made therefor. * * * There can be no modification of an allowance for alimony where there is no allowance to modify it." 1 Cal. Jur. p. 1035, § 85, and cases therein cited. But where, as here, there is such a provision in the interlocutory decree jurisdiction over the matter of alimony as well as that of the persons of the parties is continuing. See opinion by Mr. Justice Richards in the very recent case of Moore v. Superior Court in and for City and County of San Francisco (Cal. Sup.) 263 P. 1009. Of course, the provision in the interlocutory decree adjusting "the property rights" of the parties does not involve also a definitive settlement of the matter of the wife's support.

[9, 10] The stipulation entered into between the petitioner and his wife, agreeing that the court might award the custody of their minor children as specified therein, and also that he would pay to his wife, in case the latter was granted a divorce, a specified monthly sum for the period of a year, and which stipulation was in effect adopted by the court in its interlocutory decree, cannot reasonably be construed as a settlement of the matter of alimony for all time, or as divesting the court oi jurisdiction of changing the order or decree after the expiration of the year during which the life of the stipulation was to exist, whenever circumstances were in an appropriate manner brought to its attention. The stipulation did not provide for a "lump" sum, but merely that the particular amount specified was to be paid each and every month for the period of one year, still leaving it to the court, in the exercise of its continuing jurisdiction of and over the matter of alimony, and of the parties, to increase or decrease the amount so awarded, or entirely expunge from the decree the provision awarding alimony according as its discretion, regulated by the circumstances presented, might justify or require. The respondent court, in making the modified order, thus construed the stipulation, and, even if it were necessary to concede that the language of the document was ambiguous in the particular in which it has been here considered (and we think it is not), such construction would be and is conclusive upon this court.

[11, 12] As to the written agreement above quoted herein, there is no showing in the return to the writ herein sought that it was introduced in evidence at the trial of the divorce action. Counsel for respondents, in his brief, states that it was not so introduced, and this statement is not denied. But, assuming that it was so introduced, the court was not bound by it in the matter of awarding alimony. Agreements between the spouses relative to alimony or fixing by and between themselves the amount which the court may allow are subject to the power of the court, under section 139 of the Civil Code, to modify or wholly reject, as provided in said section. Mathews v. Mathews, 55 Cal. App. 661, 662, 204 P. 27; Hughes v. Hughes, 68 Cal. App. 195, 228 P. 675; Greene v. Greene, 260 P. 845. See note Jennison v. Jennison (33 Ind. App. 275, 71 N. E. 244) Ann. Cas. 1912C, 441. The interlocutory decree, as is obvious, did not follow the agreement referred to, and therefore the presumption is, even if the agreement was introduced in evidence at the trial of the suit for divorce, that the trial court refused to approve or follow it in fixing and awarding alimony.

[13] 4. The respondent court had before it ample evidence, both direct and circumstantial, to support its implied finding that the petitioner was possessed of sufficient means to satisfy the award of alimony as made in the final decree. The affidavit of Elaine T. Smith upon which the citation for contempt was issued alleges, among other things, that petitioner, on numerous occasions, after the modified order was made and incorporated in the final decree, stated to affiant that "he would not pay the sums of money so ordered by the court to be paid by him to plaintiff (Elaine T. Smith) or any part thereof to affiant." The petitioner, in his counter affidavit, denied that he ever made such statements to said Elaine, or any other person, on any occasion, "or at all."

It is not necessary to present herein any extended statement of the evidence bearing upon the ability of the petitioner to pay the alimony fixed in and by the final decree. It was shown that petitioner was a beneficiary under a testamentary trust created by his deceased mother; that the California National Bank Association, in San Francisco, and Felix T. Smith, brother of petitioner, are the trustees of the trust and the property thereof; that the annual income from said property, prior to and at the time of the hearing of this proceeding by the respondent court amounted to the sum of $29,000, of which the petitioner was entitled to be paid as his share seven twenty-fourths, or a little in excess of $8,000 annually, in monthly installments or payments. It also appears that the trustee bank was the trustee under a testamentary trust created by the deceased father of petitioner. The trust officer of the bank trustee testified that petitioner was indebted to the estate of his father in the sum of $50,000, evidenced by promissory notes; that the trustees of the estate of the mother of petitioner paid to the latter the share of the income to which he was entitled from said estate regularly up to and including the month of November, 1926, at which time they paid petitioner the sum of $7,250; that the witness and the brother of petitioner, the cotrustee of the bank of the mother's estate, after consultation subsequent to the entry of the final decree of divorce, decided that they would not make petitioner further payments on his share of the income from his mother's estate, but would apply such income to the payment of petitioner's indebtedness to his father's estate, and continue so to do until the indebtedness was extinguished. The trustees, it appears, paid the alimony for the support of Elaine T. Smith and their children provided for in the interlocutory decree out of petitioner's share of the income.

It was further shown that petitioner had a life estate in and possession of a 600-acre ranch in Yuba county; that wine grapes were grown by him on 80 or 100 acres thereof; that, although the trustees of the father's estate held a mortgage on the crops produced thereon and the implements of husbandry as security for his indebtedness to said estate, they not only paid the taxes on the ranch but permitted petitioner to receive and use for his personal purposes the proceeds from the sale of the grapes and other products of the ranch, while also at the same time paying him his share in monthly installments of the income from his mother's estate.

Further specific reference to the evidence will not be made. It is sufficient to say, as to the witnesses for the petitioner whose testimony has above been briefly considered, that neither on their direct nor cross examination did they give a reasonable or any satisfactory explanation of the reason for so suddenly, after the final decree was entered, deciding to appropriate the petitioner's income entirely to the payment of the debt he owed his father's estate; that they wholly failed satisfactorily to explain why they permitted the petitioner to use for his own individual purposes the income from the crops produced on his 600-acre ranch when, at the same time, such crops, together with the implements of husbandry used on said ranch, were under mortgage to his father's estate to secure payment of the indebtedness to said estate. These, and other considerations arising from the evidence, which need not to be mentioned here, would seem clearly to have justified the remark of the judge, when reviewing the evidence in this proceeding, in deciding the issue herein, that the circumstances so developed plainly warranted the conclusion that the whole scheme was in furtherance of petitioner's asseverations which Mrs. Smith testified that he had in effect made to her that he did not intend to pay the alimony provided for in the final decree. Moreover, the award of alimony constituted one of the most sacred of contractual obligations—sacred because it is the creation of a solemn decree of a court of justice, sacred because it is an obligation to furnish support for the indigent and physically incapacitated (as the evidence shows) mother of the petitioner's children, the woman to whom, under the most sacred circumstances, he pledged his unswerving fealty and love for all human time, a pledge the destruction of the force of which was the product of his own offense. If the large income was to be used for the payment of his debts, why not have included in the schedule this all-important and pressing debt, of which the trustees were in possession of full knowledge. All these matters the respondent court undoubtedly considered in adjudging petitioner guilty of contempt. It must be conceded that they were of overwhelming evidentiary force in the determination of the issue.

The order to show cause is discharged, and the judgment of contempt, in so far as it involves the contumacious conduct of the petitioner in failing and refusing to obey that part of the final decree of divorce awarding alimony to Elaine T. Smith, plaintiff in the divorce action, is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM.[1] All the points made in the petition for a rehearing are substantially the same as those made on the first hearing hereof. We are satisfied with the conclusions announced in the original opinion as to said points. There is disclosed by this record sufficient evidence to support the implied finding of the respondent court that the petitioner is possessed of ample means to pay the alimony allowed.

The petition for rehearing is denied.

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89 Cal. App. 275

PERRY v. A. PALADINI, Inc., et al.
(Civ. 6224.)

District Court of Appeal, First District, Division 1, California. Feb. 16, 1928.

Hearing Denied by Supreme Court April 16, 1928.

1. Master and servant ⚷332(1)—Evidence of defendant's ownership of truck and drivers' agency held sufficient to necessitate submission of question to jury.

In action for personal injuries resulting from negligence in operation of motortruck, evidence *held* sufficient to create real conflict necessitating submission of questions of defendant's ownership of truck and agency of driver to jury.

2. Evidence ⚷75—It is presumed that evidence in possession of party who fails to produce it is adverse to his contention.

When it is shown that evidence which would explain transaction or show its true nature is in possession or available to a party, and he fails or neglects to produce it, it is presumed that such evidence, if produced, would be adverse to his contention.

3. Master and servant ⚷332(1)—Sufficiency of defendant's evidence to controvert inference of driver's agency following defendant's ownership of truck held for jury.

In action for personal injuries resulting from negligent operation of motortruck, whether defendant motortruck owner's controverting evidence was substantial controversion of inference of driver's agency following ownership of truck *held* question for jury.

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[1] The balance of this per curiam corrected the opinion of Feb. 9, 1928, published above, which corrections have been incorporated in that opinion.

4. Master and servant ⚷330(3)—Prima facie case of truck driver's agency for owner stands in absence of "substantial" contrary proof.

In action for personal injuries arising from negligent operator of motortruck prima facie case of driver's agency for owner of truck will stand, in absence of substantial proof to contrary; term "substantial" including terms "credible" and "trustworthy."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Substantial.]

5. Appeal and error ⚷994(2), 1005(1)—Weight of evidence and credibility of witnesses are primarily for jury and next for trial judge.

Throughout procedure of trial and review, accepted rule is that questions of weight of evidence and credibility of witnesses are primarily for jury and next for trial judge.

6. Appeal and error ⚷1005(1)—Appellate court cannot, without positive showing, hold that error has been committed, where both jury and trial judge refuse to credit witnesses.

Where both jury and trial judge refuse to credit witnesses or accept as true evidence adduced, appellate court cannot, without positive showing, hold that error has been committed.

7. Evidence ⚷53—Presumptions are recognized as inferences, but are of somewhat greater strength, being deductions which law directs.

Presumptions are recognized as inferences, but of somewhat greater strength, by reason of being deductions which law directs or draws itself.

8. Evidence ⚷87—Disputable presumption is sufficient as proof, in absence of contradiction (Code Civ. Proc. § 1963).

In case of disputable presumption within Code Civ. Proc. § 1963, all law intends is that, in absence of contradiction, it is satisfactory.

9. Trial ⚷127—Generally it is not permissible to show that automobile owner is insured against liability.

As general proposition, in action for damages arising from negligent operation of automobile, it is not permissible to show that owner is insured against liability.

10. Master and servant ⚷330(2)—Evidence that defendant denying ownership of truck causing injuries had liability insurance on truck held admissible to show ownership.

In action for damages arising from negligent operation of truck, where defendant denied ownership of truck, evidence that defendant had taken out liability insurance on truck *held* admissible to show defendant's ownership.

11. Appeal and error ⚷171(1)—Where case is tried on certain definite theory, appellate court will review record accordingly.

Where case is tried before a court on a certain definite theory, appellate court will review record accordingly.

12. Appeal and error ⚷1050(1)—Testimony of truck driver's statements after accident as to ownership of truck, if improperly admitted as original evidence, held not prejudicial; being admissible to impeach driver.

In action for damages arising from personal injuries sustained by negligent operation of truck, where ownership of truck was in issue, plaintiff's testimony as to statements made by driver shortly after accident respecting ownership of truck, if improperly admitted as original and independent evidence or as res gestæ, *held* not prejudicial to defendant, since testimony was admissible to impeach driver's testimony that he did not recall making any such statements.

13. Appeal and error ⚷1170(1)—Appellate court must affirm judgment when defendant's claims, given fullest strength, do not result in slightest suspicion of miscarriage of justice (Const. art. 6, § 4½).

Where appellate court is satisfied that defendant's claims, when given their fullest strength, do not result in slightest suspicion of miscarriage of justice, Const. art. 6, § 4½, limits its power to do other than affirm judgment.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action by Frank O. Perry against A. Paladini, Inc., and others, for damages for personal injuries. Judgment for plaintiff, and named defendant appeals. Affirmed.

Daniel W. Hone, Derby, Single & Sharp, Joseph C. Sharp, and Lloyd M. Tweedt, all of San Francisco (Loring Davis, of counsel), for appellant.

Harry I. Stafford and Cyril Appel, both of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for respondent.

PARKER, Justice pro tem. Plaintiff brought action against defendants to recover for damages resulting from personal injuries sustained by him through the negligence of defendants. In the court below, plaintiff recovered judgment against the defendant A. Paladini, Inc., a corporation, and from this judgment said defendant presents the appeal. Included in the review is the lower court's order denying appellant's motion for a new trial.

The question here presented centers about the liability of appellant corporation. For the purposes hereof, certain facts are conceded. It is admitted that plaintiff did receive injuries as the result of the negligence of one Raymond Zanetta in the operation of a certain automobile truck. It is conceded that plaintiff was without contributory negligence, and no claim is made that the damages awarded are excessive. It is the contention of appellant that it was not the owner of the truck driven by Zanetta, nor was it in any manner connected with or interested in the operation of the truck. Aside from attacking the sufficiency of the evidence on the issue, appellant further contends that the court below erred in its rulings on the admissibility of certain testimony offered. The evidence adduced by plaintiff in fastening a liability upon appellant may be detailed.

[1] Alexander Paladini is and was at all of the times involved herein the president of A. Paladini, Inc., a corporation, with its main place of business at 542 Clay street in the city and county of San Francisco. Said Alexander Paladini made application to the division of motor vehicles of California for registration of the truck in question, and in the said application the name of the applicant was given as A. Paladini Company with address at 540 Clay street, San Francisco, which latter address was that of a mat-making concern and not in anywise connected with the Paladini Company or Paladini, Inc. In this application for registration the name of the legal owner was set forth as A. Paladini Company. Indorsed on the application and as a part thereof was the report of sale of registered dealer. This report shows that one De Maetini, a licensed motor car dealer, on June 7, 1923, sold to A. Paladini the truck therein described. The registration certificate for 1924 showed registration in the name of A. Paladini & Co., 540 Clay street, and in the spaces reserved therefor appears the name "A. Paladini, Inc.," as registered owner, and "A. Paladini, Inc.," as legal owner, signed by J. Chicca, the acknowledged secretary of said corporation. Thereafter a policy of insurance was issued to A. Paladini Company or to A. Paladini, Inc., covering said truck during the years 1923 and 1924. The state of the record here is as indicated, not specifying whether the insurance policy issued to Paladini Company or Paladini, Inc.

Such are the facts set up to and including the time of the accident. After the date of the accident there appears a transfer or sale of the truck in question. The sale is evidenced, as required by the Motor Vehicle Act of this state, by indorsement of the certificate of ownership issued by the division of motor vehicles. On the face of this certificate of ownership the signature of registered owner is "A. Paladini, Inc., by J. Chicca." On the back of this certificate of ownership is shown the transfer of the truck. In the transfer designated as registered owner appears "A. Paladini, Inc., by J. Chicca, secretary," and likewise is the corporation specified as legal owner. This certificate of transfer was received by the division of motor vehicles in June, 1924, some months after the date of the accident involved herein. The transfer was to E. F. Zanetta, codefendant. In rebuttal of this evidence of ownership defendants' explanation was to the effect that neither A. Paladini, Inc., nor Alex Paladini had any interest in the truck. Alex Paladini testified that one E. F. Zanetta was and had been a personal friend of his; that Zanetta had some little financial reverses, and that he (Paladini) made a loan of $1,000 to him, to apply as first payment on the truck. This ended Paladini's connection with the affair. He did testify, however, that the $1,000 was paid by check of the corporation, and upon inquiry it was learned that the canceled check had been lost; in some way even the check stub had vanished. This witness Paladini testified further that he did not know anything about the insurance. Further, the appellant claimed that the $1,000 was simply as an initial payment, and that Zanetta took the car under contract to pay out the balance of the purchase price, not disclosed. There was nothing to evidence the indebtedness of Zanetta either to Paladini or to the corporation, and the books of the corporation were not produced. The dealer, from whom the car was purchased, was not called as a witness. It is fair to assume that, had there been a conditional sale on contract, the dealer would have a demonstrative record thereof or at least sufficient memory of events from which to testify. It may be added that the truck referred to throughout is the truck involved in the accident which forms the basis of this action.

On this branch of the case, without further detail, we conclude that the evidence was abundantly sufficient to support a conclusion that A. Paladini, Inc., appellant, was the owner of the truck at the time of the accident.

We deem it important, for what might follow, to state further that the character of testimony adduced by appellant on this subject was such as to warrant the jury in the belief that the same was sham and evasive and unworthy of belief.

Appellant in its further argument makes the concession that the ownership is sufficiently shown, but that mere ownership of the truck is not sufficient to fasten liability upon the owner. It is argued that proof of ownership is put prima facie that at the time in question the truck was employed in the business of the owner, and that, when this prima facie evidence is controverted, the one seeking to fasten the liability through mere proof of ownership must go further and show additional facts sufficient to prove his case aside from the presumption. Before discussing the rule of law invoked, we will narrate the additional facts going to establish liability.

A. Paladini, Inc., is a corporation engaged in the handling and distribution of fresh fish as a wholesaler. It has a place of business in San Francisco and also in Monterey, between which said places is maintained a generally traveled and much-used highway or boulevard. The driver of the truck at the time of the accident was one

Raymond Zanetta, who at a time previous to the date of the accident was in the employ of A. Paladini, Inc., and who for ten months preceding the trial and at the time of the trial was in the employ of said concern. At the time of the accident, the truck was loaded with fish crates or fish boxes, and the scene of the accident was on the highway between San Francisco and Monterey. At the time of the accident—conceding it to be a point of time sufficiently remote to exclude it being a part of the res gestæ—the driver of the truck stated he was hauling fish for Paladini and gave to a public officer the card of Paladini.

Summarizing the evidence of plaintiff, we have these facts: The truck of appellant, engaged in a business similar to that of the appellant, at a place where the appellant would usually be engaged in the conduct of his business, and being operated by one who previous to the accident and subsequent thereto was in the employ of appellant. It will thus be noted that plaintiff went much beyond the establishing of a prima facie case resting upon mere ownership.

As against this, appellant sought to show the loan transaction negativing ownership. Then he produced a brother of the truck driver, and this witness testified that he was engaged in a general trucking business hauling fish from Monterey to San Francisco, and that in his business he served many wholesale fish dealers, including Paladini, that he was the sole owner of the truck involved, and that the driver was in his employ. This witness was named Ernest Zanetta. Appellant produced a number of dealers who testified that Ernest Zanetta had hauled fish for them at various times, and had presented bills in his own name therefor. Ernest Zanetta also testified that neither Paladini nor A. Paladini, Inc., had any interest in his business or in the truck, and that the driver of the truck was employed by, under the direction of, and solely engaged in the business conducted by, Ernest Zanetta. He produced no evidence of wage payments and no evidence of contract payments upon the truck. The driver likewise testified that he was in the employ of Ernest Zanetta.

Conceding that Ernest Zanetta had conducted or even was conducting an independent trucking business, we have simply his statement and the statement of Paladini and the driver, both interested parties, that he (Ernest Zanetta) was the owner of the truck involved and the employer of the driver. We are satisfied that the evidence was sufficient to create a real conflict sufficient to submit both questions of ownership and agency to the jury, and we will not disturb the conclusion reached on these issues.

[2] It suggests itself easily that the claims of appellant could have been proved by competent evidence readily available. For instance, the motorcar dealer who first sold the truck would have some evidence of the later payments if the sale had been one on deferred payments. The records of A. Paladini, Inc., in the usual course of business would have shown the charge to Ernest Zanetta on the loan as testified to by Paladini. The records of the insurance company would have shown the application for insurance and the circumstances surrounding the policy, which said policy, appellant argues in his brief, would have been void "if the interest of the subscriber in the property be other than unconditional and sole ownership." As a matter of giving weight to testimony, it is a cardinal rule that when it is shown that evidence which would explain a transaction or show its true nature is in the possession of or available to a party, and he fails or neglects to produce it, it is presumed that such evidence if produced would be adverse to his contention. Sufficient has been stated to apply such principles of law as are contended for.

Appellant's chief contention is, as indicated, the insufficiency of the evidence. Much of the briefs filed are on the question as to the effect of the inferences drawn from proof of ownership. We are called upon to decide this one point, namely, "Is the inference of agency as drawn from the fact of ownership sufficient in itself to create a conflict in the testimony, and prevail as against evidence to the contrary when such evidence produced remains uncontradicted by direct evidence?"

It would serve no useful purpose to attempt herein to outline all of the authority on the subject. The terms "presumption," "inference," and "circumstance" have been used interchangeably throughout almost all of the decisions, and it may be safely said that a state of apparent confusion exists. As indicated before, the record in this case renders it unnecessary for us to speculate upon what would have been the effect if plaintiff had rested upon the mere proof of ownership. In the case of Randolph v. Hunt, 41 Cal. App. 741, 183 P. 361, the entire subject was reviewed. The conclusion reached in that case was as follows:

> "It is not disputed that from the ownership of the automobile the presumption arises that it was being used for appellant's purposes [citing authorities]. But is is claimed that this presumption was no longer of any effect, after the introduction of testimony by witnesses to the contrary, and that the jury could not legally be influenced by it in finding a verdict. It amounts to the contention that said presumption would be sufficient to support the verdict if there were no evidence to the contrary, but it is insufficient in the presence of adverse evidence. We cannot understand how a presumption can be thus changed in its character as evidence. If it is legally sufficient to support a

verdict, it must be legally sufficient to create a conflict in the evidence."

In the cited case the court said, referring to the testimony offered by defendant there to overcome the inference arising from proof of ownership:

> "It cannot be said here that the jury was bound to accept the statement of said witnesses as true. Being the exclusive judges of the weight of the evidence and the credibility of the witnesses, if the testimony did not carry conviction to their minds, they had the legal right to reject it. We must assume that they did not believe the story, and we cannot say, in the absence of any showing to the contrary, that the jury acted arbitrarily, or otherwise than in good faith and with an honest purpose. We would not be justified by the record in branding the statement of these witnesses as false, although there are certain circumstances that tend somewhat to discredit it, but we are not in a position to interfere with the jury's discretion in that particular."

The Supreme Court, in acting upon an application to have the matter transferred to that tribunal after determination by the district court, used this very significant language: In denying a rehearing of this case we limit our approval on the question of liability of the owner, to the reason assigned in the opinion and summarized as follows:

> "The question of the alleged agreement with Triggs was submitted to the jury; it was resolved against appellant on conflicting evidence, and this finding cannot be reviewed by this court."

Explanatory, the facts of that case were that the owner of the car sought to show by the testimony of himself and one Triggs, that the car had been loaned to Triggs, and that the owner had not the custody or control thereof at the time of the accident. But the only testimony on the subject was that of the owner of the car and his son and Triggs, all of whom testified that Triggs had borrowed the car and was in complete charge thereof. And the trial court instructed the jury that, whether or not such agreement of loan or arrangement had been made was a question for the jury to decide.

[3, 4] So in the case at bar we conclude that whether or not the evidence of appellant here was to be taken as a substantial controversion of the inference of agency following ownership was a question for the jury to decide. Much has been said by the courts on the effect of the inferences flowing from proof of ownership. Without further extended quotation of authorities, the rule is succinctly stated by Mr. Justice Richards of the Supreme Court in the case of Ransford v. Ainsworth, 196 Cal. 281, 237 P. 748, as follows:

> "There is a proposition of law which is also conceded to be correct by the briefs and arguments of the appellant herein. It is that an inference arises from the foregoing facts [showing ownership by wife] that the husband was the agent of his wife in the driving and operation of her car at the time of said collision and that such inference would be sufficient prima facie to support the verdict herein in the absence of substantial proof, sufficient to destroy such inference."

[5, 6] The doctrine thus announced clearly is to the effect that the prima facie case made will stand in the absence of substantial proof to the contrary. And, as a mere matter of expression the term "substantial" includes the terms "credible" and "trustworthy." But who shall say just which evidence is trustworthy and credible? Throughout the procedure of trial and review the accepted rule is that the questions of weight of evidence and credibility of witnesses are primarily for the jury, and next for the trial judge. Where, as here, both the jury and the trial judge refuse to credit the witnesses or accept as true the evidence adduced, surely without positive showing this court cannot hold that error has been committed and injustice worked on appellant. As we have stated before, and without going into minute details, the jury did have the right to discredit much testimony adduced, and the jury likewise had before them the manifest interest of the various witnesses.

In the case of Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161, we find this language:

> " 'The property being proved to belong to the defendant, * * * a presumption arises that it was in use for his benefit, and on his own account.' * * * This presumption was not destroyed, as a matter of law, by the testimony for the defendant. Even though his explanation of the use of the car would absolve him if credited, the question whether it should be credited was one of fact for the jury. * * * *The jury * * * may have thought that witnesses who would falsely disclaim ownership of a car would falsely disclaim responsibility for its management.* These and like considerations were for them."

[7, 8] Elementarily, there are two classes of evidence, direct and indirect, and our Code recognizes both. The law, founded upon human experience, has noted the frequent concurrence of certain facts and the conclusions usually resulting therefrom. From this experience the law has established certain rules defining what are presumptions and what are inferences. These terms are often used interchangeably and with little apparent distinction. Indeed, given a premise from which a certain conclusion flows, and that conclusion being well within human experience as a natural and logical conclusion, it makes little difference whether it be called a presumption or an inference. Presumptions are recognized as inferences but of somewhat greater strength by reason of being deductions which the law directs or draws itself.

But in the case of a disputable presumption, all that the law says or intends is that in the absence of contradiction it is satisfactory. Code Civ. Proc., § 1963. It says the same thing about the inference to be drawn from ownership of an automobile. In concluding this phase of the instant case, we may say that, if we are to hold that the showing here was not sufficient as a matter of law, and that a mere denial by defendant is all that was required to overthrow plaintiff's case, then it is apparent that for years past grave injustice has resulted from the law, because upon facts and circumstances far less convincing in the question in issue many unfortunates have served long prison sentences and some even have suffered the extreme penalty.

[9, 10] The next claim of error upon which appellant urges the reversal of the judgment is the action of the court in admitting testimony showing that the defendant A. Paladini Company was insured. There would seem at first blush some merit to this claim, but upon analysis the seeming error fades away. It is true that as a general proposition in an action of this sort it is not permitted to show that the defendant is insured against liability. Roche v. Llewellyn Iron Works, 140 Cal. 576, 74 P. 147. The same case, however, recognizes the law to be that the rule is not of invariable application, and approves the holding in Barg v. Bousefield, 65 Minn. 355, 68 N. W. 45, to the effect that under certain conditions it is proper to show insurance. However, in the instant case there was no effort to show that the defendant was insured against public or any other liability. The whole extent of the testimony offered was to show that A. Paladini & Co. or A. Paladini, Inc., had procured a policy of insurance upon the truck in question. This evidence was offered to prove ownership and was properly received. Defendant had denied that it was the owner of the truck and had denied knowing anything about an insurance policy, and this testimony had been given by the president, Alex Paladini. It was competent to show every act of ownership on the part of defendant or its officers, and, if results flowed therefrom not anticipated, this is appellant's misfortune, brought about by his own misconduct. It has been a well-established principle of law for many centuries that upon a trial for a particular crime evidence which shows or tends to show the commission of another and distinct crime by a defendant is inadmissible, and it is prejudicial error, to let it go before the jury. This rule has its exceptions, and, where it appears that evidence of the commission of such other crime has a direct and logical bearing upon the guilt of the accused as to the crime with which he is on trial, evidence of the commission of such other offense is admissible. People v. Argentos, 156 Cal. 725, 106 P. 65. By analogy the rule as to the instant case should be that, while it is improper and highly prejudicial to allow evidence to be introduced showing a defendant is insured against liability in case of accident, yet evidence of general insurance of certain property by a defendant who denies ownership does have a direct and logical bearing upon that particular question and is therefore admissible. The plaintiff could have gone much further than he did. He would have been permitted upon his insistence to offer in evidence the application for insurance if the same had been executed by defendant or any of its authorized officers. Plaintiff, mindful of the defendant's claim of error, went no further than to show the fact of insurance. Ordinarily men do not insure the property of others; and likewise insurance companies do not usually issue policies covering property to one having no interest therein. And, going still further, insurance companies do not roam around the byways issuing policies at their own instance and without the application of any one. And it may be further noted here that when the evidence was offered plaintiff expressly restricted the offer as "a circumstance proving ownership."

Lastly, appellant contends that the judgment must be reversed because of error in the admission in evidence of certain statements made by the driver of the truck at or about the time of the accident.

In discussing this claim we are confined to the record before us. This appeal is presented under the alternative method, and in a supplement to its opening brief plaintiff presents such portions of the record as he desires to call to the attention of this court. The appellant in his brief merely sets up that error was committed in receiving the evidence, but does not point out what the evidence was. The supplement filed with the opening brief contains the evidence which is sought to be called to our attention, but no references are made to such supplement in the briefs of appellant. However, we have reviewed the supplement and will determine the point as it is urged. The specific error alleged by appellant is thus put:

> "The court erred in admitting the pretended hearsay statement supposed to have been made by the driver after the accident to the effect that he was hauling fish for Paladini."

At the trial, while the plaintiff was on the stand, he testified that immediately after the accident he was taken to a doctor for treatment, and that upon his return to the scene of the accident there still remained quite a few people, including the driver of the truck. The driver was talking to one Schwarz, a deputy constable, who was making some inquiries into the accident. Plaintiff testified then as follows:

"They asked him what he was doing. He said he was hauling fish for Paladini, and he had some fish boxes on his wagon at the time."

Then followed this:

"Mr. Bradley (Counsel for Appellant): We ask that that be stricken in view of our objection and for the reason that the driver has not been identified as the agent.

"The Court: If the matter is not connected up, Mr. Bradley, and it is not shown that he was in the employ of the company and it was not in the course of employment, then the court will grant a motion to strike out the evidence, but a party cannot put in their entire case all at one time. If this man was an employee of the company, then his statement would be competent.

"Mr. Bradley: Otherwise not?

"The Court: Otherwise not."

When Schwarz, the deputy constable, was called, this question was asked him:

"Q. Did you speak to the driver? A. Yes.

"Q. What did you say to him?

"Mr. Bradley: Objected to as not binding on the defendant Paladini Company unless it is shown the driver was in some way connected with them.

"The Court: Overruled."

[11] This much of the record indicates that it was the theory of the case below that if agency were shown the statements were admissible. We do not concede this to be a correct statement of the law, but, if a case is tried before a court on a certain definite theory, we will review the record accordingly. As indicated hereinbefore, we have concluded that the fact of agency was sufficiently shown.

[12] The driver of the truck was called as a witness and denied that he was in the employ of Paladini, Inc. He was not interrogated as to the statement particularly, but testified that he did not recall talking to any one except some person who claimed to be a roadmaster. Another witness for defendant gave testimony that the driver did not have conversation with any one excepting the roadmaster. When the driver denied that he was employed by Paladini it certainly would have been permissible to ask him on cross-examination regarding any statements he may have made contrary to his testimony. While not exactly in point, the case of Williams v. Kidd, 170 Cal. at p. 653, 151 P. 1, Ann. Cas. 1916E, 703, applies to the instant case. Following the doctrine of that case, plaintiff here could and did make out his case without the statements of the driver. Plaintiff was practically compelled to call the driver as a witness to prove the nature of his employment and the identity of his employer. The statements of the driver, if improperly admitted on the trial as original and independent evidence, still, as by adopting a different order of proof they must unquestionably be admitted as impeaching evidence on another trial, the mere fact that the trial court in admitting them did not fully recognize their true character as impeaching evidence could work no prejudicial injury to appellant. We may concede and readily do that the statement of the driver was no part of the res gestæ, and no claim of admissibility could be urged on that ground. Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286; Froeming v. Stockton Elec. R. R. Co., 171 Cal. 401, 153 P. 712, Ann. Cas. 1918B, 408. However, the statement in no way bore upon the facts of the accident itself, and in no wise reflected itself upon the facts going to disclose negligence on the part of the driver. It had no bearing whatever upon the question of negligence. Its sole effect, if any, was to establish some relationship of agency. It was defendant's claim throughout the trial that this truck often did haul fish for Paladini as well as other people; that it was used in the general trucking business by Ernest F. Zanetta, and the fact that at the time of the accident it might have had a load for Paladini was as consistent with defendant's claim as it was in support of plaintiff's contention. The undisputed evidence also discloses that at the time of the occurrence the registration card showing Paladini Company to be the legal owner of the truck was exhibited in the usual place thereon. Taking all of these facts together, we see no serious harm resulting to appellant from the evidence in view of all the facts of the case.

In conclusion, we think that the case was fully and fairly tried and the verdict amply supported by facts.

With reference to the case of this appellant, we feel in a measure that we can resort to those provisions of law which trial judges are directed to give to juries by section 2061, Code of Civil Procedure, and particularly subdivisions 6 and 7 thereof, which are: (6) That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, etc. (7) That, if weak or less satisfactory evidence is offered when it appears that stronger or more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

[13] Upon denying a motion for judgment notwithstanding the verdict, the learned trial judge, who had observed all of the witnesses and heard the evidence stated, "The court feels that it is a justified verdict." In this too we concur; and thus agreeing, and from the record before us, we hold that, if the error assigned should be deemed more grevious than we admit, nevertheless the result of the trial would have been no different in the absence of such error. We are satisfied that giving appellant's claims their fullest strength still the result gives not the slightest suspicion of a miscarriage of justice. The

Constitution (art. 6, § 4½) limits our power therefore to do other than affirm the judgment.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 292

STANDARD SOAP CO. v. FISHER et al.

(Civ. 6052.)

District Court of Appeal, First District, Division 1, California. Feb. 17, 1928.

Corporations 🔑573(1)—Evidence held to sustain finding that bondholder and others did not enter contract with corporation and its president for corporation's reorganization.

Evidence *held* sufficient to sustain finding of trial court that holder of corporate bonds and others did not enter alleged contract with corporation and its president to effect reorganization of corporation by means of payments to corporate treasury and issuance of stock.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action for damages for breach of an oral contract brought by the Standard Soap Company and another against Paul Fisher and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Jesse Robinson, of Oakland, for appellants.

Henry C. McPike, of Oakland, for respondents.

TYLER, P. J. Action for damages for alleged breach of an oral contract. The complaint, in substance, recites: That on the 16th day of January, 1923, the parties hereto entered into an agreement whereby defendants agreed to pay to plaintiff John M. Simpson the sum of $32,000 and also agreed to pay into the treasury of plaintiff corporation the sum of $25,000, and of this latter sum $12,500 was to be paid by defendant Paul Fisher and a like amount by defendant Julius Wilbur. That defendants likewise agreed to pay into the treasury of plaintiff corporation a sum of money sufficient to cancel or pay off $40,000 of a total bonded indebtedness of $100,000 which was then outstanding against said corporation. That plaintiff John M. Simpson on his behalf agreed to pay into the treasury of plaintiff corporation the sum of $12,500 and further agreed to pay into such treasury a sum of money sufficient to pay off or cancel $60,000 of the said total bonded indebtedness of the company. That the respective sums of $12,500 to be paid by plaintiff Simpson and defendants Fisher and Wilbur were to be used by the corporation for the general purpose of carrying on its business. That it was further agreed by the respective parties that the plaintiff corporation should remain liable to the Mercantile Trust Company for approximately $60,000 on an unsecured indebtedness. That, after the payment of said sums as aforesaid, the corporation was to be reorganized and the entire issue of its capital stock was to consist of 500,000 shares, 250,000 of which was to consist of preferred and a like amount of common stock. That said issue of capital stock was to be divided between Simpson, Fisher, and Wilbur in equal proportions. It is then charged that defendants Fisher and Wilbur failed to perform their part of the agreement, and damages are prayed for in the sum of $85,000. Defendants denied that they ever entered into such agreement and as a separate defense pleaded lack of consideration and in an amended answer set up the statute of frauds.

The trial court found in effect that no contract as alleged was ever entered into between the parties. It is here claimed that the findings are contrary to and not supported by the evidence. There is no merit in appellants' contention. At the trial it was shown that defendant Fisher was the owner of certain bonds in plaintiff corporation. During the year 1922 he called upon plaintiff Simpson, the president of the company, and discussed with him the condition of its business and the probability of collecting the interest on the bonds which he owned. The company was engaged in the manufacture of soap and was heavily indebted. Simpson suggested that Fisher purchase stock in the company. Nothing definite was proposed at this meeting. Some time later Fisher again called upon Simpson, accompanied by defendant Wilbur. The subject of the purchase of stock was again taken up. There is evidence to show that a tentative agreement was presented by Simpson to the defendants containing certain terms upon which he was willing to make a sale. Simpson testified that the parties finally reached an agreement upon the subject, which was essentially one of partnership. Respondent, on the other hand, claims that the alleged agreement was not one by which the parties agreed to enter into a partnership, but, if anything, it was merely an oral agreement to purchase for the sum of $45,000 a two-thirds interest in the capital stock of the corporation, or, as a possible alternative, to buy and sell a two-thirds interest in a going manufacturing business as represented by its stock, an agreement which the statute requires to be in writing. The evidence upon the subject as to whether defendants ever entered into a partnership or any agreement was sharply conflicting. Defendants positively denied that they made any offer of any kind or character to enter into a partnership and likewise denied that they agreed to purchase any stock in the corporation. The testimony introduced on their behalf showed that there were certain conversations had between the parties which were directed to a sale of an interest in the going business by the purchase of certain shares of its stock. There was also evidence to show that it was impossible for plaintiff Simpson to perform the agreement which he alleged had been made for the reason that he was not the owner of the requisite number of shares of stock or bonds in the company which he engaged to transfer under his alleged agreement, nor had he the control over the same. He did not own the stock and the bonds were pledged as security for a large sum of money and his personal resources were exhausted. The trial court found upon this subject that Simpson could not perform the agreement he alleged had been entered into. The evidence as a whole justifies and fully supports the findings of the trial court to the effect that defendants never entered into any agreement of any character as alleged in plaintiffs' complaint. This being so, the appeal is without merit.

The judgment is affirmed.

We concur: PARKER, Justice pro tem.; KNIGHT, J.

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89 Cal. App. 101

RADDANT v. WATSON et al. (Civ. 4866.)★

District Court of Appeal, Second District, Division 2, California. Feb. 8, 1928.

Hearing Denied by Supreme Court April 5, 1928.

Highways ⚿184(2)—Evidence justified finding driver of autmobile with which bus collided while attempting to pass was not negligent in passenger's action for injuries.

In action for damages for personal injuries sustained by plaintiff as passenger in automobile bus with which defendant's automobile collided when bus attempted to pass defendant's automobile on highway, evidence *held* sufficient to justify trial court in finding that defendant automobile driver was not guilty of negligence contributing to plaintiff's injuries.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Esther Raddant against A. B. Watson, etc., defendant, and S. W. Mims. Judgment for plaintiff, as against A. B. Watson only, and plaintiff appeals. Affirmed.

See, also, 264 P. 589.

Marks & Launer, of Fullerton, for appellant.

Culver & Nourse, of Los Angeles, for respondent.

HAZLETT, Justice pro tem. This is an action in damages for personal injuries, pain and suffering, loss of time, etc., resulting to plaintiff in a collision of an autostage in which she was a passenger, operated by defendant Watson with an automobile operated by defendant Mims.

Plaintiff was given judgment against defendant Watson for $2,850.50, but was awarded nothing against defendant Mims.

Plaintiff appeals from that portion of the judgment denying her relief against defendant Mims and awarding him costs, contending that the evidence shows that respondent Mims was negligent in the operation of his automobile to such extent that his negligence was one of the causes which contributed directly to the accident, and was one of the proximate causes of appellant's injuries and losses.

The evidence introduced by the parties to this action shows substantially the following events occurring immediately preceding and at the time of the collision:

The stage was operated on a public highway as a common carrier for hire by a servant and employee of defendant Watson, appellant was a passenger therein, and respondent was driving his automobile on the highway in the direction the stage was being driven. The stage was driven past respondent's machine, and shortly thereafter was stopped at a railroad crossing or for passengers, when respondent drove past the stage. A few minutes later the stage driver drove to the center of the highway at a speed of 35 to 38 miles per hour and attempted to again pass respondent's machine, which was traveling on the right half of the highway, when the stage driver discovered a third automobile approaching in the opposite direction and distant about 200 to 250 feet. Thereupon, when the front of the radiator of the stage had reached a point about opposite the center of respondent's machine, the stage driver looked for respondent's machine but did not see it, applied the brakes of the stage, and swerved the stage to the right towards respondent's machine crowding it partly off the highway to the right. The back end of the stage was wider than its front end. Respondent found his machine in a pocket, leaving him the probable alternative of having his machine hit by the back end of the stage or attempting to drive ahead of the stage by speeding up, which latter course appeared to be the safer for him to follow in the emergency. Respondent then swerved his machine slightly to the right and drove ahead, hitting the hub of the right front wheel of the stage with the left rear wheel of his machine, thereby cramping the front wheels of the stage to the left, the stage skidded about 40 feet and turned over on its right side, injuring appellant. The skid marks commenced about four feet from the right side of the highway, indicating that respondent's machine was crowded off the highway. The third machine was driven suddenly off the highway to the left into an

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★Hearing denied by Supreme Court.

adjacent orange grove to avoid colliding with the stage.

Those facts show but a conflict of evidence, and justify the trial court in finding that respondent was not guilty of negligence which contributed to appellant's injuries.

The findings and judgment of the trial court have sufficient support in the evidence.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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89 Cal. App. 103

RADDANT v. WATSON et al. (Civ. 4878.)

District Court of Appeal, Second District, Division 2, California. Feb. 8, 1928.

1. Carriers 🔑318(7)—Evidence sustained findings that bus driver was negligent, which negligence proximately contributed to passenger's injuries (Vehicle Act 1915, § 20, subds. [c] [d], and § 22, as amended by St. 1919, pp. 215, 220).

In bus passenger's action for injuries against bus operator when bus collided with automobile it was attempting to pass, evidence showing where violation of Vehicle Act (St. 1915, pp. 406, 409) § 20, subds. (c) (d) and section 22, as amended by St. 1919, pp. 215, 220, in not giving suitable signal when passing another automobile driving to right before being reasonably clear of other automobile, and driving faster than 30 miles per hour in passing, when another machine was approaching within 400 feet, *held* to sustain finding that bus driver was negligent, which negligence proximately contributed to passenger's injuries.

2. Appeal and error 🔑997(2)—Where defects in plaintiff's case are overcome by evidence subsequently introduced, and evidence as whole supports judgment, order denying nonsuit will not be disturbed.

Where defects in plaintiff's case are overcome by evidence subsequently introduced by defendant, and all evidence given at trial, considered together, supports the judgment, order denying nonsuit will not be disturbed on appeal, however weak a case plaintiff may have made.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Esther Raddant against A. B. Watson, etc., and another. Judgment for plaintiff as against defendant named, and he appeals. Affirmed.

See, also, 264 P. 588.

B. P. Gibbs, of Los Angeles, and Clyde Bishop, of Santa Ana, for appellant.

Marks, Launer & Collins, of Fullerton, for respondent.

HAZLETT, Justice pro tem. This is an action for damages suffered by plaintiff by reason of personal injuries, pain, and suffering, loss of time, etc., caused in a collision of an autostage in which she was a passenger, operated as a common carrier for hire by defendant A. B. Watson, with an automobile operated by defendant S. W. Mims, on a public highway.

Plaintiff was given judgment against defendant Watson for $2,850.50, but was awarded nothing against defendant Mims.

Defendant Watson appeals and assigns as errors on the part of the trial court that the court erred in denying plaintiff's motion for a nonsuit; the proof fails to show negligence on the part of Watson or the driver of the stage; and the decision is contrary to the evidence and is against the law.

Appellant Watson discusses the above assignments together, stating that but one question of law is involved in the errors assigned, to wit: Whether the stage driver, who was the employee of appellant, so negligently operated the stage as to make appellant liable for plaintiff's injuries and her consequent pain and suffering and loss of time.

The facts that the stage was a common carrier for hire, that respondent was a passenger therein, that the collision with the automobile operated by Mims occurred, and that respondent suffered thereby, are established by respondent and not controverted by the evidence for defendants.

Respondent testified in relation to the events occurring immediately before and at the time of the collision, as follows: That the two machines were traveling in the same direction on the public highway; that before the collision the stage passed Mims' automobile and stopped at a railroad crossing; that Mims then passed the stage, and in a few minutes the stage driver drove to the center of the highway and attempted to drive past the automobile; that the stage was then traveling about 25 to 38 miles per hour; that, when the front of the radiator of the stage was about opposite the center of the automobile, the automobile was speeded up and cut into the left, its rear left wheel caught the right front wheel of the stage, and the stage turned over on its left side at the center of the pavement; and that she heard no signals or horn from the stage at any time before or while passing.

Defendant Mims, called by respondent for cross-examination, testified that, when the driver of the stage attempted to pass his machine just preceding the collision, another car was approaching in the opposite direction distant about 200 feet; that the radiator of the stage was about the center of his car when he (Mims) stepped on the *car* and swerved to the right side of the road to get away from the stage; that the stage was going 32 to 35 miles per hour and his machine a little faster.

Thereupon respondent rested and appellant moved for a nonsuit on the ground that respondent had failed to make out a case of negligence against him, asserting that the injuries suffered by respondent were the proximate result of negligence on the part of defendant Mims. The motion was denied, to which ruling appellant excepts.

It is true that respondent made a rather weak case, but, after the motion for nonsuit was denied, the testimony of the stage driver and the evidence given by and in behalf of defendant Mims showed substantially the following facts: When the stage driver attempted to drive around Mims' machine immediately before the collision, he drove the stage at about 35 to 38 miles per hour, and he discovered the third automobile approaching distant about 200 to 250 feet. He then applied his brakes, looked for Mims' machine, but did not see it, and, when the front end of the radiator of the stage was about opposite the center of Mims' machine, he swerved the stage to the right towards Mims' machine, crowding it partly off the highway and leaving Mims the probable alternative of having his machine struck by the back end of the stage, which end was wider than its front end, or attempting to drive ahead of the stage. The latter course appeared to be the safer course for Mims to follow in the emergency in which he found himself. Mims then swerved his machine to the right so that his two right wheels were off the highway and drove ahead fast, hit the right rear wheel of his machine against the hub of the left front wheel of the stage, thereby cramped its front wheels to the left, and the stage skidded about 40 feet and turned over on its right side. The skid marks commenced about four feet from the right side of the highway, indicating that Mims' machine was crowded partly off the highway by the stage. The third machine was driven suddenly off the highway to the other side into an orange grove to avoid colliding with the stage.

[1] By reasons of the provisions of sections 20 and 22 of the Vehicle Act of 1915 (Stats. 1915, p. 397), as amended (St. 1919, pp. 215, 220), then in effect, under the circumstances shown by all of the evidence considered together, it was the duty of the stage driver, in attempting to pass Mims' machine, to make a "suitable and audible signal," in order to require Mims "to give way to the right" in favor of the stage (section 20, subd. [d]); the stage driver was required "to not again drive to the right until reasonably clear" of Mims' machine (section 20, subd. [c]); and the stage driver was prohibited from driving faster than 30 miles per hour in passing, for the reason that the third machine was approaching within 400 feet (section 22).

The stage driver violated each of those requirements and that prohibition, and he also violated the general requirement of section 22 in failing to drive the stage in a careful and prudent manner and at a rate of speed not greater than reasonable and proper, having regard to the traffic and use of the highway.

The stage driver was negligent in the operation of the stage, and his negligence was the proximate cause of respondent's injuries and losses. Therefore the findings and judgment of the trial court have sufficient support in the evidence.

[2] Referring to the order of the trial court denying the motion of appellant for a nonsuit, and his exceptions thereto, it appears that the somewhat weak case made by respondent was greatly strengthened by the evidence afterward introduced by defendants. Under such circumstances, where the defects in a plaintiff's case are overcome by evidence subsequently introduced, and all the evidence given at the trial by the plaintiff and defendants, considered together, supports the judgment, the order denying the nonsuit will not be disturbed, however weak a case plaintiff may have made. Carter v. Canty, 181 Cal. 749, 753, 186 P. 346; Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 576, 98 P. 678; County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 175, 200 P. 27; and cases therein cited.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

203 Cal. 414

In re ELLIS' ESTATE.★

ELLIS v. McDOWELL et al.

(L. A. 10205.)

Supreme Court of California. Feb. 21, 1928.

Rehearing Denied March 22, 1928.

1. Husband and wife 🔑249—Proceeds from loan made to spouse on credit of his separate property are his separate property.

Proceeds from loan made to spouse on credit of his or her separate property are the separate property of that spouse.

2. Husband and wife 🔑264—Evidence supported finding that proceeds of stock sold were separate property of deceased husband and not community property.

In proceeding on petition for distribution of deceased's estate, evidence *held* sufficient to support court's finding that loan on notes used to pay for stock was made on faith and credit of husband's separate property and his financial standing with bank, and that proceeds of sale of stock were separate property of deceased husband, as against contention that proceeds were community property and belonged one-half to the wife.

Department 2.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Petition by Mary Gertrude McDowell and others, opposed by Pray Ellis, for distribution of the estate of George B. Ellis, deceased. From the decree, Pray Ellis appeals. Affirmed.

Walter J. Little and Wm. B. Gilroy, both of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

SHENK, J. This is an appeal from that portion of a decree of distribution in the matter of the estate of George B. Ellis, deceased, which orders one-fourth only of a cash item of $22,126.43 distributed to Pray Ellis, the surviving widow and appellant herein.

Prior to July 14, 1923, the decedent was a widower having adult children and minor grandchildren. On that day he married the appellant. On November 1, 1924, he died. He left a will whereby he bequeathed one-fourth of his estate to his widow and the remaining three-fourths to his children by the former marriage and to his grandchildren. The estate was originally inventoried at $137,245.74, and it is not questioned but that this estate was the separate property of the decedent. A controversy arose on petition for distribution as to the character of 210 shares of stock of Associated Telephone Company, subsequently inventoried, which on a sale by the executrices netted $22,126.43. It is contended by the appellant that the proceeds of this sale are community property and should be distributed one-half to her as her share of the community and the other half in accordance with the provisions of the will, to wit, one-fourth to her and three-fourths to the children and grandchildren. The respondents claim that the stock was the separate property of the decedent. The circumstances surrounding the acquisition of the stock by the decedent were stipulated to be the following:

"That in December, 1923, an arrangement was entered into between four parties, Mr. Fishburn, Mr. Heffley, Mr. Ellis, and Mr. Judkins, whereby they had issued by the Associated Telephone Company 843 shares of its capital stock; that those shares of stock were issued in three certificates and were issued in the names of three banks, the First National Bank of Long Beach, the First National Bank of Los Angeles, and the Hellman Commercial Trust & Savings Bank of Los Angeles; that, as a part of the same transaction and consummated at the same time, these four men either executed as makers or as guarantors three promissory notes to these banks; that the stock was pledged or held as security for these notes; that none of these men paid anything to the Associated Telephone Company for the stock except the money they received from the banks by signing their notes and putting this stock up as collateral; that that situation remained until the death of Mr. Ellis, and that at no time from the date in December, 1923, until Mr. Ellis died, were any payments made on those notes except that the money

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★Rehearing denied.

which was derived from dividends paid on the stock was credited to the payment of the interest on the notes and in a very slight degree to reduce the principal; that these three notes were signed by Mr. Heffley and guaranteed by a separate instrument by the other three gentlemen named; that there was a verbal agreement between these four men to the end that they would use this stock to make some money out of."

[1] The trial court found that—

> "Said loan, as far as said Geo. B. Ellis was concerned, was made upon the faith and credit of his separate property, and his financial standing with said banks, at the time of entering into said agreement, for the purchase of said stock."

The appellant contends that this finding is not supported by evidence sufficient to overcome the presumption that property acquired by the husband after marriage is community property, and cites Estate of Holbert, 57 Cal. 257, and Moulton v. Moulton, 182 Cal. 185, 187 P. 421. In each of these cases, however, it appeared that there was no evidence showing that the loan was made on the personal credit of the spouse owning the separate property. In the Holbert Case the court said, at page 259:

> "There was no evidence to go to the jury upon which they were authorized to find that Holbert borrowed money upon the strength of credit created entirely by his separate property."

In the Moulton Case, in holding that the loan was not made upon the wife's personal credit, the court said:

> "The note was unsecured, and was not indorsed or guaranteed, and there is no evidence to show that the members of the [loan] committee, other than decedent, had any knowledge that plaintiff was possessed of any separate property."

Both of these cases recognize the general rule that the proceeds from a loan made to a spouse on the credit of his or her separate property are the separate property of that spouse. See cases cited in Moulton v. Moulton, supra, at page 189 (187 P. 421).

[2] In the present case there is evidence to support the trial court's finding. The appellant was not known in any way in the transaction. All of the property owned by the decedent was his separate property. In addition to the impelling inference from other portions of the record that his guaranty was accepted on the faith and credit of his separate property, there is direct evidence that the guaranty was accepted on the financial standing of the decedent. One of the officers of the First National Bank of Long Beach testified:

> "I had a guaranty with this note signed by J. E. Fishburn and George B. Ellis. * * * We took the note of Sam R. Heffley; inasmuch as we loaned practically the market value, we took the guaranty of Mr. Ellis and Mr. Fishburn as security. * * * At the time we loaned Mr. Heffley this large sum of money, he was manager and I think vice president of the Associated Telephone and had been for years. He was a man on a salary down at the city of Long Beach, and the people we had guarantee these notes were men of large financial interests, Mr. Fishburn and Mr. Ellis."

It is clear from the record that the credit was extended on the faith of the separate property of the decedent existing at the time the loan was made. The court was therefore correct in finding that the cash item in the estate and over which this controversy arose was the separate property of the decedent.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

203 Cal. 398

HIGGINS et ux. v. SECURITY TRUST & SAVINGS BANK. (L. A. 9154.)

Supreme Court of California. Feb. 17, 1928.

1. Pleading ⚷34(4)—It is presumed pleader has stated case as strongly as it can be stated in his favor.

It is presumed that pleader has stated his case as strongly as it can be stated in his favor.

2. Pleading ⚷34(4)—Ambiguity must be resolved against pleader.

Ambiguity in pleading must be resolved against pleader.

3. Pleading ⚷34(4)—Pleading must be most strongly construed against pleader.

Pleading is to be most strongly construed against the pleader.

4. Negligence ⚷2—Generally, negligence cannot arise where there is no duty owing by person charged to person injured or contractual relation existing between them.

Generally, negligence cannot arise where there is no duty owing by person charged to person injured or a contractual relation existing between them.

5. Vendor and purchaser ⚷214(5)—Assignees of land contract could not recover damages from vendor because of statements vendor made to assignees regarding condition of title, where vendor gratuitously inquired, over telephone, of title company regarding condition of title and plaintiffs acted on information thus obtained, in buying property (Civ. Code, § 1975).

Assignees of land contract could not recover damages from vendor of property alleged to have been caused by statements negligently made by vendor to assignees regarding condition of title of property, where vendor gratuitously, in good faith, inquired, over telephone, of an abstract and title company regarding condition of title of property and plaintiffs acted on information thus obtained in buying property from assignor, since defendant's act amounted to exercise of slight care required under Civ. Code, § 1975, of one who, without consideration, undertakes to do service for another.

Department 1.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by James Robert Higgins and wife against the Security Trust & Savings Bank for damages alleged to have been sustained by reliance upon statements concerning the condition of the title to real property. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

Arnold Praeger, of Los Angeles, for appellants.

Newlin & Ashburn and W. C. Mathes, all of Los Angeles, for respondent.

SEAWELL, J. The above-entitled action was commenced in the superior court in and for the county of Los Angeles by the assignees of a contract to recover damages from the vendor of the property alleged to have been suffered by said assignees by reason of statements negligently made by said owner to said assignees as to the condition of the title of said real property. The facts are stated below:

The second amended complaint, which the trial court held did not state a cause of action, and accordingly entered a judgment of dismissal of the action, from which judgment this appeal was taken, alleged: That appellants' assignor, Charles S. M. Segelbaum, entered into a contract with respondent, Security Trust & Savings Bank, for the purchase of a certain described lot or parcel of real property situate in the county of Los Angeles. One George W. Markens was the agent of said Segelbaum. That on or about January 30, 1925, Segelbaum assigned said contract and his interest therein to appellants, who paid to said Segelbaum as a consideration therefor the sum of $3,000. That prior to the assignment of said contract, and prior to the payment of said sum of $3,000 by appellants, appellants and said George W. Markens called at the office of respondent corporation. That the purpose of Markens' visit was to pay respondent the balance due from Segelbaum to respondent on account of said contract of purchase, "and for the further purpose of the plaintiffs [appellants] ascertaining from defendant [respondent] that said balance was paid and ascertaining that the title to said lot was free and clear of incumbrances, and to arrange with defendant [respondent] for a deed to said property conveying the title thereof to plaintiffs as joint tenants, and to secure a certificate of title showing the title thereto vested in plaintiffs free and clear of incumbrances." That one T. H. Boysen was assistant trust officer of said respondent corporation. That Markens "talked with said Boysen with regard to the transfer of the interest of said Segelbaum in said lot to plaintiffs, * * * the plaintiffs informing said Boysen that they were paying the said Segelbaum cash for his interest in said lot, and that they wanted a deed from defendant to said lot with themselves named as grantees * * * and that they desired defendant to furnish a certificate of title showing the title to said lot vested in plaintiffs free and clear of all incumbrances, and that they wanted to know if the title to said lot was clear before they paid the said sum of $3,000 to said Markens. * * * That when advised of the fact that the plaintiffs were buying said contract for the purchase of said lot * * * and that they wanted to know if the title was clear * * * and that they desired a certificate of title showing the title * * * vested in them free and clear of incumbrances, the said Boysen stated he would ascertain if the title to said lot was clear. That before the payment of said $3,000 * * * the said Boysen undertook to ascertain if the title was clear, knowing that the plaintiffs were relying thereon, stated to the plaintiffs that the title to said lot was clear," and plaintiffs, relying on said statement, paid the sum of $3,000 to said Markens, agent of Segelbaum. That at said time Boysen accepted from plaintiffs the sum of $6.75 "to cover the cost of recording the deed from defendant [respondent] to plaintiffs, conveying the title to said lot to them, and the charge for showing in said certificate of title the title thereto vested in the plaintiffs." The usual allegations in such cases, to the effect that the statements as to the title being clear and free from incumbrances were relied upon by plaintiffs and they would not have entered into the transaction but for their faith in said statements, follow. It was further alleged that subsequent to the payment of said $3,000 by appellants to said Markens, said Boysen informed appellants that a search of the title of said lot made by respondent disclosed that an action had been filed in the superior court in and for the county of Los Angeles prior to said payment and a lis pendens filed against said lot, and by reason thereof respondent was not able to convey a title free and clear of incumbrances.

It is plaintiffs' contention that Boysen, by stating to plaintiffs in the manner set out in the second amended complaint that said title was clear and free of incumbrances, failed to take or exercise ordinary, customary, or usual care in the premises.

[1-3] Whatever may be said in support of the sufficiency of the allegations of the complaint as stating a cause of action as above epitomized is, we think, put to rest by paragraph V of said second amended complaint, which purports to state the facts by which appellants were influenced to consummate said transaction. Read in the light of the familiar rules of construction, which are to

the effect that it is presumed that the pleader has stated his case as strongly as it can be stated in his favor, and that ambiguities must be resolved against the pleader, and that the pleading is to be most strongly construed against the pleader, it would seem that the matter set forth in said paragraph V was sufficient to defeat plaintiffs' action. It is therein alleged:

> "That said Boysen * * * before stating to plaintiffs that the title to said lot was free and clear of incumbrances, *in that said Boysen called a title company on the telephone to ascertain if said title was clear,* instead of having title to said property searched by a title or abstract company before stating that the title to said lot was free and clear of incumbrances when such search would have disclosed the existence of the said incumbrance against said lot, and the fact that such a search would disclose any incumbrance against said lot was, or should have been, known to the said Boysen, and that by reason of the carelessness and negligence of said Boysen as aforesaid, plaintiffs have been damaged in the sum of $3,000."

The inference from the foregoing quoted paragraph is that the only time Boysen's opinion was asked as to the condition of title was when the plaintiffs visited him in company with Markens, and it was then that he called the title company on the telephone in the presence of plaintiffs to obtain the information imparted by him, and that plaintiffs were fully informed as to the source and extent of his information on the subject. This construction is in harmony with the recital in paragraph III of said amended complaint, which alleges that Boysen, when asked by plaintiffs concerning the title, "undertook to ascertain if the title to said lot was clear," etc. The inference is that he "undertook" to gain the information by the use of the telephone from said title company. It is wholly unreasonable to suppose that he would have had a search made during the visit of appellants to respondent's place of business. The amended complaint nowhere alleges that Boysen agreed to furnish plaintiffs with a certificate of title or agreed to have the title searched in order to answer plaintiffs' question. It was not reasonable to expect that Boysen would have assumed so onerous a service gratuitously. Besides, there existed a valid and binding contract on the part of Segelbaum to purchase the property, and it was doubtless a matter of indifference with either respondent corporation or Boysen, its agent, whether Segelbaum did or did not assign his contract to plaintiffs. If it had been alleged that the transfer of Segelbaum's contract to appellants would have benefited respondent in any way, a different situation would be before us. But such is not the case.

Appellants state at the outset that the action is not based on fraud and concede that at the time of the commission of said negligent acts no privity of contract existed between appellants and respondent. It is also admitted that respondent's alleged undertaking was wholly gratuitous. Respondent was a stranger to appellants and owed them no contractual duty. The title record was as accessible to appellants as to respondent.

[4, 5] Appellants' sole point is that the amended complaint states a case of negligence, disassociated with any imputation of fraud. It is very doubtful if the major premise upon which appellants rely, to wit, that an action may be maintained against another for an injury occasioned by want of due care and skill in doing what one has promised to do, although there was no consideration for the promise, is present in the instant case. Does the amended complaint allege a promise on the part of respondent? Certainly it does not so far as the preparation of a certificate of title was concerned.

The inference to be drawn from the allegations of the pleading is that Boysen did not undertake or assume to do more than to make a telephonic inquiry of a title company as to whether or not the title was clear, and that appellants were satisfied to act upon the information thus obtained. It is nowhere alleged in the amended complaint that he misrepresented or misreported the title company's statement as to the condition of the title. It is a general rule, in the absence of a statute governing the particular case, that negligence without fraud, express or implied, is not actionable, and that negligence cannot arise when there is no duty owing by the person charged to the person injured or a contractual relation existing between them.

Section 1975, Civil Code, provides:

> "One who, without consideration, undertakes to do a service for another, is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein."

If, under the foregoing section, respondent in good faith inquired of an abstract and title company which would be likely to have knowledge on the subject as to the condition of the title of said property, as alleged in the amended complaint, this would certainly amount to the exercise of slight care.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.

203 Cal. 409

BONFIGLIO v. BONFIGLIO. (L. A. 9144.)

Supreme Court of California. Feb. 21, 1928.

1. Husband and wife 🔑262(1)—Record title to property being in wife creates presumption that it is her separate property.

Where record title to property was in the wife, presumption is created in support of her claim that it was her separate property.

2. Appeal and error 🔑1011(1)—Where there is conflict in testimony, reviewing court is disposed to follow trial court's finding.

In suit by creditor against husband, where land was attached as belonging to community of debtor, reviewing court is disposed to follow trial court's finding on conflicting evidence that property attached was wife's separate property, where trial court had better opportunity to judge of credibility of witnesses.

3. Attachment 🔑291—Claimant to real property attached in action on debt, in which claimant is not interested, may intervene in defense of property attached.

Claimant to real property which has been attached in action between two other persons to recover on debt, in which action claimant of property is not interested, may intervene in defense of his property against attachment.

Department 2.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Pietro Bonfiglio against Pellegrino Bonfiglio, in which Rosa Bonfiglio intervened. From a judgment quieting title to land in the intervener, plaintiff appeals. Affirmed.

Ernest M. Torchia, of Los Angeles, for appellant.

Robert P. Carrey, Andreani & Haines, and Harold E. Prudhon, all of Los Angeles, for respondent.

LANGDON, J. [1, 2] This is an appeal by the plaintiff from that portion of the judgment entered herein which quiets the title to a certain piece of real property in the plaintiff in intervention. Plaintiff was a creditor of the defendant, and the trial court gave judgment in his favor for the amount of his debt. In the action he had attached certain real property, alleged to be the community property of defendant and his wife. The wife, by leave of court, intervened, claiming the property to be her separate property, and to have been purchased with funds inherited from her father. The record title to the property was in the wife, creating a presumption in her favor, and, in addition thereto, her testimony and that of her husband was emphatic that she had paid the consideration for the property with money which she had brought from Italy, and which she had inherited from her father. The appellant relies upon other testimony in the record which would contradict the testimony supporting the finding of the trial court, but this merely creates a conflict in the record, and under such circumstances this court is disposed to follow the trial court, which has had a better opportunity than this court to judge of the credibility of the witnesses. This disposes of the objection that the evidence does not support the findings and judgment.

[3] The other matters urged, i. e., that the court erred in permitting the filing of the complaint in intervention, and that the demurrer to said complaint should have been sustained because the said complaint does not state grounds for intervention, are answered by the cases of Carter v. Garetson, 56 Cal. App. 238, 204 P. 1090, and Vincent Whitney v. Superior Court, 48 Cal. App. Dec. 692,[1] both holding that a claimant to real property which has been attached in an action between two other persons to recover upon an indebtedness, in which action the claimant of the property has no interest, has the right to intervene in defense of his property against the attachment.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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203 Cal. 422

LYNCH et al. v. COE et al. (L. A. 9581.)

Supreme Court of California. Feb. 24, 1928.

1. Appeal and error 🔑640—Defects appearing in request for transcript are not jurisdictional to appeal.

Defects appearing in a request for a transcript are not jurisdictional to appeal.

2. Appeal and error 🔑1034—Supreme Court does not favor technical objections, and, where possible, seeks to review decisions on all facts lower court had before it.

Technical objections are not favored by Supreme Court, and, wherever possible, it seeks to review decision of lower court on all facts which that tribunal had before it when it made such decision.

3. Appeal and error 🔑640—Certification of transcript by trial judge is, in effect, equivalent to relief from default for appellant's failure to notify clerk to prepare transcript (Code Civ. Proc. §§ 473, 953a).

Certification of transcript by trial judge is, in effect, equivalent to relief from default under Code Civ. Proc. § 473, for failure to notify the clerk, within proper time, as provided by Code Civ. Proc. § 953a, to prepare it.

4. Appeal and error 🔑607(1)—Reporter's transcript, properly certified and filed, held available on appeal, though request for record was defective.

Reporter's transcript, properly certified and filed in Supreme Court, *held* available to appel-

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[1] Hearing granted. For opinion of Supreme Court, see 250 P. 666.

lant on appeal from judgment, though his request for record was defective.

In Bank.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by Thomas R. Lynch and others against Clarence E. Coe, Ernest E. Gagnon, and others. From the judgment, Ernest E. Gagnon appeals. On motion for diminution of record. Motion denied.

Leonard S. Barnes, of Los Angeles, for appellant.

Frank P. Jenal, Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for respondents.

PER CURIAM. The respondent Lynch presents herein a motion for diminution of record, and seeks thereby to have stricken from the files of this court the transcript of the testimony taken before the lower court. This attempt to have the reporter's transcript stricken is based upon the assertion that the appellant's notice to the clerk to prepare a record neglected and failed to request that a transcript of the testimony be made up. The appellant seeks to explain the omission or defect by stating that he had contemplated making an independent arrangement with the reporter in connection with the preparation of a transcript of the proceedings in the trial court. Appellant's notice to the clerk, which was timely filed, reads in part as follows:

> "* * * Said defendant hereby requests that the judgment roll be made up and prepared and contain any and all matters of record herein, together with all exhibits and documentary evidence introduced and on file, and any and all matters and facts pertaining to said action except the transcript of testimony."

[1] The most cursory examination readily discloses that said notice and request is, to say the least, inartificially drawn. In fact, it may be stated to be wholly defective in so far as the preparation thereunder of a transcript of the testimony might be concerned. However, the defect is not fatal, nor such as would preclude an appellate court from considering upon an appeal from the judgment a properly certified transcript of the proceedings in the court below. In this connection the case of Carr v. Stern, 17 Cal. App. 397, 402, 120 P. 35, may be said to be in point. It is there declared:

> "As to the omission to embrace in the notice a request that a transcript of the testimony offered or taken and evidence offered or received be made up and prepared, the reply is that such record was made up, was approved by the judge, and as so prepared and approved is now before us."

[2] It has consistently been held that defects appearing in a request for a transcript are not jurisdictional to an appeal. Tasker v. Warmer (Cal. Sup.) 261 P. 474. Moreover, technical objections are not favored, and this court, whenever possible, seeks to review the decision of the lower court upon all the facts which that tribunal had before it when it made such decision. McMahon v. Hamilton (Cal. Sup.) 260 P. 793.

[3, 4] The authorities cited by respondent in support of the motion are not in point. In Des Granges v. Des Granges, 175 Cal. 67, 165 P. 13, and the other cases relied upon, the appellant had failed to file any request for a transcript within the time prescribed by section 953a, Code of Civil Procedure, and it was held that, in the absence of a timely filing of request for a transcript, or of relief from default, a transcript thereafter filed did not merit consideration. The later cases, however, have modified this rule, and declare that the act of certification by the trial judge is, in effect, the equivalent of relief from default under section 473, Code of Civil Procedure. Upon this point see Stenzel v. Kronich (Cal. Sup.) 255 P. 199. From what has been said we conclude that the reporter's transcript properly certified and filed herein is available to the appellant upon the appeal from the judgment even though his request for a record is, as already indicated, defective.

The motion is therefore denied.

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203 Cal. 459

HISS v. SUTTON et ux. (L. A. 9261.)★

Supreme Court of California. Feb. 27, 1928.

Rehearing Denied March 26, 1928.

1. Brokers ⚿40—Under option in terms running to real estate agent but also providing commission for securing purchaser, such agent acted as broker.

Real estate agent *held* to be acting as broker under option contract in which option in terms ran to him, where it also contained express provision for commission to him for procuring purchaser and landowner, without objection, entered agreement with purchaser procured, to whom option was assigned.

2. Brokers ⚿61(1)—Broker held entitled to commission though sale contract was canceled due to owner's inability to transfer title free from incumbrances, as agreed.

Under agreement with broker whereby owner was to convey land free and clear of all incumbrances, and commission was to be paid "through and at the close of escrow," broker securing purchaser *held* entitled to commission though sale contract was canceled due to owner's inability to transfer property free of incumbrances.

Department 2.

Appeal from the Superior Court, Los Angeles County; C. W. Miller, Judge.

★Rehearing denied.

Action for a commission as real estate broker by B. H. Hiss against Ernest E. Sutton and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

J. J. McMahon, of Los Angeles, for appellants.

Bernard G. Hiss and William P. Boland, both of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff in an action instituted by him for the recovery of a commission alleged to be due in pursuance of an agreement between himself and the defendants involving an option for the sale of the latter's real estate. The evidence in the case is practically without conflict, showing that on March 1, 1924, the defendants executed an option agreement to plaintiff for the sale of their said real estate "free and clear of all incumbrances" upon certain specified terms. The agreement contained the following further provision: "First party agrees to pay B. H. Hiss as commission, in the event of the exercise of this option, 5 per cent. of the total purchase price, to be paid through and at the close of escrow;" that the plaintiff assigned the foregoing option to one J. J. O'Regan, reserving the commission to become due in the event of the exercise of the option, and that O'Regan thereafter notified the defendant of his election to purchase their said property pursuant to the terms of said option, and that thereupon an escrow agreement was entered into between said defendants and said O'Regan, wherein it was provided for the delivery of the property free and clear of incumbrances, with the exception of certain easements, leases, and taxes for the ensuing year, and which escrow agreement contained the following clause: "Pay commission to B. H. Hiss, 261 So. Western Ave., $2,500." Before the time when said escrow agreement was to be completed, it appeared that the defendants' property, together with all other properties within a certain area, was subject to a restriction agreement to the effect that the property within the area in question was not to be used for any other than residential purposes. When this restriction agreement was brought to the attention of the proposed purchaser, he notified the defendants that he could not take the property subject to the foregoing restriction, and the defendants being unable to remove the same the purchaser withdrew from the escrow, and upon his demand the money which he had deposited was returned. Thereupon the plaintiff herein demanded the payment of his commission from the defendants, which, being refused, this action followed. The foregoing being the stipulated facts in the case, the trial court rendered judgment in the plaintiff's favor for the recovery of said commission; whereupon the defendants have taken and prosecuted this appeal.

[1] The appellants' first contention is that the plaintiff was not, under the terms of said option, an agent or broker employed by the defendants to obtain a buyer for their property, and that they never agreed to pay any commission to the plaintiff for any such service. While it is true that the option in terms ran to the plaintiff, the fact that it contained an express provision providing for the payment of a commission to him, and the further fact that after plaintiff had procured a purchaser for the property in question, to whom he assigned said option, the defendants without objection entered into an escrow agreement with said purchaser, fully justifies the inference that it was the intent of the parties in entering into said option with the plaintiff, who was a real estate agent, that he was to act as such in the procurement of a purchaser, and in the event of doing so was to receive the commission stipulated in the option agreement. This contention on the part of the defendants is, therefore, without merit.

[2] The defendants further contend that since the contract for the sale of the property to O'Regan was rescinded and canceled, the plaintiff's cause of action was thereby terminated and his right to the recovery of the commission provided for in the option agreement was at an end. This contention is equally without merit, since the option agreement, if construed to be one which sufficiently authorized the plaintiff to procure a purchaser for the defendants' property thereunder, was fulfilled prior to its said rescission by the plaintiff's procurement of O'Regan, whom the defendants accepted as a purchaser under the terms and conditions of said option, which provided that they should furnish to the purchaser title to the property free and clear of all but the specified incumbrances. Having failed to furnish such title, and the escrow agreement for that reason alone being rescinded, the plaintiff's right to a recovery of the stipulated commission was complete. The fact that in the option agreement it was provided that the plaintiff's commission was to be paid "through and at the close of escrow" is not to be interpreted to mean that the plaintiff was to be entitled to no commission unless the agreement for the sale of the property was fully executed through the medium of such escrow, but only that if such escrow was completed plaintiff was to receive his commission through and at the time of such completion. But this interpretation does not militate against the right of the plaintiff to receive his agreed commission when it appears that the failure to carry into effect such escrow agreement was wholly due to the defendants' inability to furnish title to their property in accordance with both their option and escrow agree-

ments so to do. The plaintiff, having fully completed his part of the option agreement to be by him performed, became therefore entitled to his commission, notwithstanding defendants' failure to perform.

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.

SCHADE v. STEWART. (L. A. 9233.)★

Supreme Court of California. Feb. 23, 1928.

Rehearing Granted March 22, 1928.

1. Deeds ⚿31—Parties who are to take as grantees must be sufficiently identified in deed.

Since a conveyance of real property must be in writing, parties who are to take as grantees must be sufficiently identified in deed, or it does not pass title.

2. Deeds ⚿31—Deed to "heirs or devisees" held void for uncertainty in designation of grantees.

Deed purporting to convey certain property to "heirs or devisees" of deceased *held* void for uncertainty in designation of grantees.

Department 2.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action in ejectment by Clara K. Schade, as executrix of the estate of Jennie C. Hurd, deceased, against Addie L. Stewart. Judgment for plaintiff, and defendant appeals. Reversed.

Matthews & Walter, of Los Angeles, for appellant.

Hugh A. McNary, of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action in ejectment. The plaintiff brought the action in her representative capacity as executrix of the estate of Jennie C. Hurd, deceased. She prayed for a judgment of possession and damages for unlawful withholding. The decedent in her lifetime had been the owner of the real property in question. She sold it to the defendant, who executed, as part of the purchase price, a note payable in installments and a trust deed conveying the title to said property as security to Title Guarantee & Trust Company, a corporation, as trustee. At the time of the death of the decedent said note and trust deed were a part of the assets of her estate. She left a will in which the Salvation Army, a corporation, was named as a legatee. In addition to this provision she named some sixteen natural persons as legatees and devisees. The defendant failed to make her payments required by said promissory note. The plaintiff, as executrix, declared the defendant in default, and directed the trustee to sell the property pursuant to the terms of the trust deed. The sale was held, and the plaintiff, as executrix, bid in the property, and received a purported deed thereto in which Title Guarantee & Trust Company was named as grantor, and the "heirs or devisees of Jennie C. Hurd, deceased," were named as grantees. At the trial, the defendant objected to the introduction of this deed in evidence on the ground, among others, that the same was void for uncertainty in the designation of the grantees. The objections were overruled, and the court received the deed in evidence as proof of the plaintiff's title and right of possession. At the close of plaintiff's case, the defendant moved the court for a nonsuit, which was denied. The alleged errors of the court in admitting the deed in evidence and in denying the motion for a nonsuit form the principal grounds now urged for a reversal of the judgment.

[1, 2] The plaintiff cites and relies on numerous authorities to the effect that a deed naming the "heirs of a deceased person" as grantees is a sufficient designation, and that a designation of the "executors" of a deceased person is also sufficient, on the theory that that is certain which may be made certain. Newlove v. Mercantile Trust Co., 156 Cal. 657, 105 P. 971; Peeples v. Rudulph, 153 Ga. 17, 111 S. E. 548; Hoover v. Malen, 83 Ind. 195; Shaw v. Loud, 12 Mass. 447; Hill v. Jackson (Tex. Civ. App.) 51 S. W. 357. The plaintiff also relies on section 1582 of the Code of Civil Procedure as authority for bringing the action as personal representative. That section provides that an executor or administrator may bring an action for the recovery of real or personal property in all cases in which the same might have been brought by the testator or intestate. But the plaintiff has cited no authorities holding that the "heirs or devisees" of a deceased person is a sufficient designation. Nor have we discovered any authority where it has been held that a deed so uncertain in the description of the grantees as the one here involved is sufficient to pass the title. Since a conveyance of real property must be in writing, the parties who are to take as grantees must be sufficiently ascertained by the written instrument or it is a nullity, and fails to pass the legal title. Rixford v. Zeigler, 150 Cal. 435, 438, 88 P. 1092, 119 Am. St. Rep. 229. Assuming that a deed to "the heirs" alone of a deceased person is sufficient, it still cannot be ascertained from an inspection of the present deed whether it is a conveyance to "the heirs," who constitute one class, or to "the devisees," who may constitute another entirely different set of grantees. It is difficult to perceive how a court, upon an inspection of the document, could find and adjudge who the

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★Superseded by opinion, 272 P. 567.

grantees were intended to be. If the designation had been to the "legatees and devisees" of the deceased, the conveyance might have been sufficient under the authority of Webb v. Den, 17 How. (58 U. S.) 576, 15 L. Ed. 35, a case relied upon by the plaintiff. Again, if the designation in the present deed had been to the "heirs and devisees" of the decedent, the situation might have been different. This, of course, we do not decide. But, when the words are, as here, used in the disjunctive, it is impossible to tell to which class it was intended to convey the title.

We are satisfied that the said deed was and is void for uncertainty, and passed no title. It must therefore be held that the proof failed to show title or right of possession in the plaintiff, and the motion for a nonsuit should have been granted.

The foregoing determination renders it unnecessary to pass upon other points made by the parties.

The judgment is reversed.

We concur: RICHARDS, J.; LANGDON, J.

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203 Cal. 462

RANDALL v. RANDALL. (L. A. 8804.)★

Supreme Court of California. Feb. 28, 1928.

Hearing Denied in Bank March 29, 1928.

1. Divorce 🔑79—Service by publication and mailing, of "supplemental complaint," complete in itself, held sufficient without service of original complaint (Code Civ. Proc. § 410).

Where plaintiff's original complaint for divorce was on grounds of cruelty and habitual intemperance, service by mail and publication of copy of so-called "supplemental complaint" asking divorce for desertion, which complaint was complete in itself, *held* sufficient without service of original complaint, under Code Civ. Proc. § 410, providing copy of complaint must be served.

2. Divorce 🔑79—Service by publication and mailing held not void because summons and complaint were mailed to defendant in care of attorneys (Code Civ. Proc. § 410).

Service by publication and by mailing in divorce action *held* not void, under Code Civ. Proc. § 410, because summons and copy of complaint were mailed to defendant in care of attorneys instead of to residence, where after due diligence exact residence could not be found.

3. Judgment 🔑142—Defendant served by publication on application to vacate judgment need not present any excuse, except lack of personal service (Code Civ. Proc. § 473).

Defendant in divorce action, served by publication only, on application made, under Code Civ. Proc. § 473, to vacate judgment against him and to be allowed to answer to merits, need not present any excuse for failure to appear, except fact that he was not personally served; there being no presumption against him of knowledge of proceedings or of inexcusable negligence.

Department 1.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Hazelle M. Randall against James W. Randall. From an order denying motions to set aside service of summons and default judgment, defendant appeals. Affirmed.

Tobias R. Archer, of Los Angeles, for appellant.

Jesse R. Shafer, of Los Angeles, for respondent.

PRESTON, J. Appeal in an action for divorce by defendant from order denying his motions to set aside alleged attempted service of summons and default judgment.

On July 19, 1920, plaintiff filed a complaint for divorce upon the grounds of cruelty and habitual intemperance, upon which no further action was ever taken. On March 2, 1922, she filed a so-called "supplemental complaint," praying for divorce upon the ground of desertion. Pursuant to order of the court, service of summons upon defendant was made by publication and by the mailing of a copy of the summons and so-called "supplemental complaint" to him in the care of his attorneys in Detroit, Mich. On April 23, 1924, the cause came on for hearing. Plaintiff appeared and the court rendered an interlocutory judgment of divorce in her favor, based upon the ground of complaint set forth in the second pleading, and containing the following recital:

> "And it appearing that defendant was duly served with process and has not appeared or answered the supplemental complaint; that the default of defendant has been entered," etc.

Almost a year later, but before entry of final judgment, viz. April 17, 1925, plaintiff and defendant both being personally present in court and represented by counsel, defendant moved the court to quash the alleged attempted service of summons upon him and to set aside said default and judgment entered against him. Both these motions were denied by the court and final judgment of divorce was entered on May 22, 1925, whereupon appeal was taken from the order denying said motions.

The original complaint appears in the judgment roll, but no reference is made to it therein, and all orders, affidavits, and other papers are based upon and refer only to said so-called "supplemental complaint." Section 410 of the Code of Civil Procedure provides that:

> "A copy of the complaint must be served, with the summons, upon each of the defendants. * * *"

★Hearing denied in bank.

The sole question here is whether the service made upon defendant in the manner above set forth satisfied said provision of section 410. If it did, the court had jurisdiction to enter the default and render final judgment.

The second complaint, although designated "supplemental complaint," was in reality a substituted pleading, complete in itself. It stated the same cause of action, to wit, a cause of action for divorce, but, however, based upon a new ground of complaint, namely, desertion. It contained no reference to the allegations of the original complaint. As stated, it was complete in itself and alleged all necessary facts upon which to base jurisdiction of the court.

[1] Had said second complaint been in reality a supplemental pleading, supplying facts occurring after the filing of the original pleading, supplementing the allegations thereof, it is plain that service of a copy of the original complaint would have been required to give the court jurisdiction. But where, as here, the complaint, irrespective of its erroneous title is in itself a complete new pleading, alleging all necessary facts, it is the true complaint in the cause and the action as to the new ground set up therein must be considered as being commenced when said pleading is filed (Valensin v. Valensin, 73 Cal. 106, 109, 14 P. 397); hence, service of a copy thereof is all that is required under the statute. Service of a copy of the original complaint would be wasted effort, for that pleading is dead, being superseded in its entirety by the new complaint. Said copy would be of no value to defendant for any purpose whatsoever, nor would it convey to him any other or further information relative to the allegations against him than is given him by service of a copy of the true pleading.

[2, 3] There is no merit in the contention that said service was void because, pursuant to order of the court, the summons and copy of complaint were mailed to defendant in care of his attorneys in Detroit, Mich., instead of to his residence in that city, where, as here, a proper showing was made that, after due diligence, the exact residence of defendant in said city could not be found and he could be reached only through his said attorneys.

It is to be noted that a defendant served by publication only, on application made, under section 473 of the Code of Civil Procedure, to vacate a judgment against him and to be allowed to answer to the merits, need not present any excuse for his failure to appear, except the fact that he was not personally served with summons and that in such case there is no presumption against him of knowledge of the proceedings or of inexcusable negligence on his part. Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990. Although defendant here was present in court for the special purposes of this proceeding, yet he made no attempt to take advantage of the provisions of the above statute, as he would doubtless have done had he really desired to answer to the merits of the cause.

The order and judgment are affirmed.

We concur: SEAWELL, J.; CURTIS, J.

203 Cal. 411

In re MORRIS' ESTATE.

MORRIS v. MORRIS.

(L. A. 10160.)

Supreme Court of California. Feb. 21, 1928.

1. Executors and administrators ⚷20(7)—Evidence held to justify refusal to appoint administratrix on ground that petitioner was not decedent's lawful wife (Civ. Code, § 61).

Evidence *held* to justify order refusing to appoint petitioner as administratrix of decedent's estate on ground that she was not decedent's lawful wife, in view of Civ. Code, § 61.

2. Costs ⚷260(4)—Appeal from order refusing to appoint administratrix on ground that petitioner was not decedent's lawful wife held frivolous, so as to authorize penalty.

Appeal from order denying application for appointment as administratrix on ground that petitioner was not decedent's lawful wife *held* frivolous as intended only to delay course of administration, so as to authorize imposition of penalty.

Department 2.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Application by Nellie J. Morris for letters of administration in the estate of Lewis R. Morris, deceased, opposed by Barnett Morris. From an order denying the application, petitioner appeals. Affirmed.

John J. Craig, of Los Angeles, for appellant.

McPherrin & Ottofy and L. Frank Ottofy, all of Los Angeles, for respondent.

RICHARDS, J. [1] This is an appeal from an order denying the application of the appellant for letters of administration in the matter of the estate of Lewis R. Morris, deceased. The application of the appellant for such letters was made upon the alleged ground that she was the lawful widow of said deceased and as such the proper party to be appointed administratrix of his estate. The trial court denied her application after a hearing thereon, upon the ground that said applicant was not the lawful widow of the decedent, and upon findings of fact wherein it set forth the basis of its conclusion in that regard, and which findings of fact are fully supported by the evidence in the case, and from which it appears: That Lewis R. Morris, the decedent, was, prior to July, 1922, lawfully married and living with his wife, Margaret Morris, in Chicago, Ill. That in July, 1922, having become enamored of the appellant herein, he deserted his said wife in said city and removed to Los Angeles, where he was joined by the appellant, and where for the following two years or more they lived together in adultery, but as man and wife. In March, 1925, the said Lewis R. Morris, while so living with the appellant, filed an action for divorce from his lawful wife Margaret in the superior court of Los Angeles county. That service was had by publication, the proof thereof showing Margaret to be then living in Chicago, and that an interlocutory decree of divorce was granted upon such showing on December 9, 1925, which interlocutory decree was docketed and entered in said court on December 15, 1925. On December 26, 1925, Lewis R. Morris and the appellant proceeded to Tia Juana and there entered into what purported to be a marriage, immediately after which they returned to Los Angeles, where they continued to reside until the death of the decedent on January 19, 1927. That a final decree of divorce between said decedent and his wife Margaret was docketed and entered on December 22, 1926. That no marriage ceremony other than that performed in Tia Juana ever occurred between the deceased and the appellant.

The evidence in the case abundantly shows that the appellant, during all of the times between July 22, 1922, and the date of her said purported marriage to Lewis R. Morris in Tia Juana, knew that he had a lawful wife living, and also knew of the fact of said divorce proceeding and of the making and entry of the interlocutory decree therein. It is true that the appellant upon the hearing of her said application testified that at the time of her marriage with the deceased she did not know that his lawful wife was still living and did not know of the institution and result of said divorce proceeding. But her testimony in these respects is directly contradicted and is found to be untrue by the express findings of the trial court, in connection with which the court further found that the appellant, knowing of the fact that Lewis R. Morris had a lawful wife still living, went with him to Tia Juana and had the marriage ceremony between herself and the deceased performed there for the sole purpose of attempting to evade and avoid the force and effect of the laws of California. The foregoing facts sufficiently supporting the findings of fact and conclusions of law of the trial court were such as would fully justify its order refusing to appoint the appellant administratrix of the estate of Lewis R. Morris, deceased, upon the ground that she was not his lawful wife. The cases of Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95, and Estate of Hughson, 173 Cal. 453, 160 P. 548, cited by the appellant, afford her no comfort upon this appeal, since the presumption in favor of the validity of marriage referred to in those cases was fully overthrown by the evidence presented in the instant case. Neither can the appellant derive any support from the provisions of section 61 of the Civil Code, which declare that:

> With certain exceptions, "a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife is illegal and void from the beginning."

And which further provides that:

> "In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce."

The appellant utterly failed to bring herself within the exceptions noted in said section of the Civil Code and there was, therefore, no basis either for her application to be appointed administratrix of the estate of Lewis R. Morris, deceased, upon the ground that she was his lawful wife and widow, or for her appeal to this court from the order denying her said application.

[2] This is a gross case of a plainly frivolous appeal, having for its only apparent purpose delay in the course of administration of said estate. For that reason a penalty of $100 for the taking and prosecution of a frivolous appeal is hereby imposed upon the appellant herein, the same to be charged as costs against the appellant and paid to said estate.

The order is affirmed.

We concur: LANGDON, J.; SHENK, J.

203 Cal 433

ALDRICH v. ALDRICH. (L. A. 9275.)

Supreme Court of California. Feb. 24, 1928.

1. Appeal and error 🔑241—Matters not raised by motion are not considered on appeal from court's ruling thereon.

Matters not raised by motion to set aside decree may not be considered on appeal from court's ruling thereon.

2. Divorce 🔑161—Refusal to set aside default divorce decree held abuse of discretion under uncontroverted evidence showing decree was obtained by affidavit for publication falsely stating defendant's last-known residence.

Refusal to set aside default divorce decree entered against wife, whom husband had sent from his home to residence of her brother in another state, *held* abuse of discretion, where uncontroverted evidence on motion to set aside judgment showed that plaintiff had made false statement in affidavit for publication relative to defendant's last-known place of residence.

3. Divorce 🔑161—Six months' delay in moving to set aside default divorce decree held not fatal, where defendant's return was hampered by distant location and lack of funds.

Six months' delay prior to filing motion to set aside default divorce decree *held* not to show lack of diligence on part of defendant, where defendant at time she first heard of decree was located in California and was delayed, not only by distance, but by lack of funds.

4. Divorce 🔑161—Default divorce judgments are not favored, and courts are alert to detect fraud therein.

Law does not favor default judgments in divorce actions, and courts are always alert to detect and correct fraud therein.

5. Divorce 🔑165(3)—Procuring of default divorce by false statement in affidavit for publication held fraud on court, which permitted setting aside judgment independent of statutory time limitation (Code Civ. Proc. § 473).

Action of plaintiff in divorce suit in filing affidavit for publication containing known false statement with regard to defendant's last-known place of residence *held* to constitute extrinsic fraud upon defendant and upon the court, which gave court inherent power to set aside the judgment of divorce obtained through the fraud without regard to time limitation prescribed by Code Civ. Proc. § 473.

6. Divorce 🔑161—Right to set aside by motion divorce decree obtained by fraud held not affected by existence of alternative equitable remedy.

That wife against whom default divorce decree was procured by fraud had remedy in equitable proceeding to set aside judgment *held* not to affect her right to relief by means of motion to set aside divorce decree.

Department 2.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Eddy M. Aldrich against Mary M. Aldrich for a divorce. A default divorce decree was granted plaintiff, which defendant moved to have set aside. From an order denying defendant's motion, she appeals. Reversed.

Schauer & Ryon, of Santa Barbara, for appellant.

Mygatt, Robertson & Crawford, of Santa Barbara, for respondent.

LANGDON, J. This is an appeal from an order of the superior court of the county of Santa Barbara refusing to grant a motion by defendant to set aside a decree of divorce granted by said court to plaintiff. The interlocutory decree was entered in April, 1923, and the final decree was granted in April, 1924. No personal service was made upon the defendant; the summons having been served by publication. The motion to set aside the judgment was made on the ground that a fraud had been committed on the court by plaintiff in causing to be filed an affidavit to secure service on defendant by publication, which stated that defendant's last-known place of residence was Vermont, when plaintiff well knew that defendant was a resident of Champlain, N. Y., and on the further ground that defendant received no notice of this action and was thereby prevented from protecting her interests by defending the same.

[1] Defendant, in her brief, advances additional reasons for granting said motion; i. e., that service by publication founded on this affidavit was wholly void and of no effect, and that the court obtained no jurisdiction over defendant, and that plaintiff never secured a bona fide residence in this state on which to ground this action. These matters were not raised by the motion made in the trial court, and we shall not consider them upon appeal. Upon the questions raised by the motion of defendant, she filed an affidavit stating that the parties had married in Vermont and had lived together as husband and wife from 1896 to 1919, and that since that time they have been living separate and apart, that during said marriage the parties lived in New Hampshire and saved and invested the sum of $20,000 out of plaintiff's earnings as a locomotive engineer, and that this amount was invested in the name of plaintiff. The affidavit continues as follows:

> "That without cause, on or about the said 3d day of June, 1919, plaintiff herein ordered defendant herein to return to her brother in Champlain, N. Y. She protested and wanted to stay with him in Nashua, N. H., but he insisted and put her on the train after buying her a ticket to Champlain, where her parents lived. Shortly thereafter he sent her clothes, and, though she begged to return, he refused. That, after said defendant was compelled to leave

plaintiff, as aforesaid, he, the said plaintiff, transmitted to her the sum of $50 nearly every month to live on, he, the said plaintiff, depositing the said amount for defendant in the Second National Bank of Nashua, N. H. That the plaintiff well knew that defendant was living in Champlain, N. Y., as he had considerable correspondence with her through the medium of the said bank, and Champlain, N. Y., was the town to which he had forced her to go as aforesaid. That plaintiff kept up said payments of $50 a month until the month of January, 1924, when he ceased making the payments."

Defendant then set forth that through the investigations of her attorneys she learned, in June, 1924, for the first time, that plaintiff had secured a divorce and that he refused to pay further for her support; that thereafter a search was made by defendant's attorneys through the records of New Hampshire to ascertain if plaintiff had secured a divorce in that state, and they could find no such record; that defendant had no knowledge of where plaintiff claimed to have secured such divorce; that, after considerable searching through different firms of attorneys, defendant learned for the first time on September 27, 1924, that plaintiff had secured a divorce in California; that thereupon defendant, through her eastern attorneys, took the matter up with a California firm of attorneys, and it was not until October 24, 1924, that a report was received from said California attorneys which was sent to defendant several weeks later; that with due diligence she took up the matter with the attorneys in California, making her motion in April, 1925.

The plaintiff meets this affidavit by the following evasive and nonrelevant allegation in his affidavit:

> "That I personally spoke with John Betters, now deceased, and Fred Betters of Nashua, N. H., as to the whereabouts, if they knew, of Mary M. Aldrich. Previous to the service of the libel on Mary M. Aldrich, both John Betters and Fred Betters returned to their home in Champlain, N. Y., and had previously thereto moved from said Champlain."

There is no allegation as to what John and Fred Betters replied to plaintiff's alleged questions, and there is no denial of the facts which would show personal knowledge of defendant's whereabouts on the part of the plaintiff. The only portion of the affidavit of plaintiff which has any force or effect herein is the portion wherein he states that in January, 1924, before the final decree of divorce, he sent defendant her customary yearly railroad pass, which she returned to the office of the railroad, stating that she was not entitled to it, as divorce proceedings were pending. He further alleges:

> "Since Mary M. Aldrich left her home in Nashua, N. H., no correspondence was made between herself and myself, *excepting two or three letters* relative to money."

Plaintiff filed a second affidavit, the only portions of which are pertinent upon the motion before the court are the following:

> "That on the 3d day of June, 1919, she (defendant) returned to Champlain, N. Y., to live with her brother without my knowledge or consent," and that, when she returned to Champlain, N. Y., she used her yearly railroad pass, and "that her said statement that I put her on a train after buying her a ticket is not, and cannot be true."

It is to be observed that plaintiff does not deny that he put her on a train for Champlain, N. Y., but only that he put her on a train after buying her a ticket.

[2] Respondent concedes the power of the superior court to grant defendant's motion under the facts of this case, but states that there was no abuse of discretion in denying the same. It is true, of course, that, if there is a substantial conflict in the facts presented by the affidavits, the determination of the controverted facts by the trial court will not be disturbed; but, from the foregoing allegations, and from other matters appearing in the record, it is apparent that there is no such condition existing here. The defendant has made positive allegations in her affidavit, showing that plaintiff committed a fraud upon the court and upon the defendant. The plaintiff has introduced nothing to controvert this. His affidavit is evasive and insincere on its face, and it is obvious from the entire record that he knew the residence of defendant and planned to have notice mailed to her at an address which was never her address during the married life of the parties. This is extrinsic fraud—fraud on the defendant which prevented her from having her day in court and which, according to her affidavit, has deprived her of the savings of a lifetime, and it was also a fraud upon the court.

[3, 4] Nor does the record show a lack of diligence on the part of the defendant. Defendant alleged that her eastern attorneys received a report from counsel in California on October 24, 1924, and that two or three weeks elapsed before they could communicate with her. The notice of motion to set aside the decree was filed on April 28, 1925, six months later. This is not such an unreasonable time under all the circumstances. Defendant was across the continent and claims that she was hampered, not only by distance, but by lack of funds. Her action, under the circumstances, was within a reasonable time. Furthermore, the law does not favor default judgments in divorce actions and courts are always alert to detect and correct fraud.

[5] The limitation of time prescribed by section 473, Code of Civil Procedure, is inapplicable here. In the case of McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110, it was held that a trial court has inherent power to set aside a judgment

obtained through a fraud committed upon it, and its right so to do is not derived from section 473 of the Code of Civil Procedure, nor limited to the time therein specified.

[6] Respondent urges that defendant has a remedy in a new equitable proceeding to set aside this judgment on the ground of fraud, and with this we agree, but it seems useless to subject her to the delay and expense of another action when relief could and should be given herein, and we have concluded, therefore, that the order appealed from should be reversed. It is so ordered.

We concur: RICHARDS, J.; SHENK, J.

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203 Cal. 427

BANNISTER v. LOS ANGELES RY. CORPORATION. (L. A. 9210.)

Supreme Court of California. Feb. 24, 1928.

1. **Trial ⚷165—Court can grant nonsuit at close of all evidence only where evidence would not sustain verdict for plaintiff, when disregarding conflicting evidence and giving plaintiff's evidence full value.**

Right of court to direct verdict and right to grant nonsuit at conclusion of all evidence in case are same, and court can grant such nonsuit only when evidence would be insufficient to support verdict in favor of plaintiff, when disregarding conflicting evidence, giving plaintiff's evidence all value to which it would be legally entitled, and drawing every legitimate inference therefrom.

2. **Street railroads ⚷117(8)—Negligence of street car company held for jury where pedestrian struck at intersection claimed that car was stationary just before accident and gave no signals.**

Whether street car company was guilty of negligence *held* question for jury, where pedestrian was struck by street car while attempting to cross street intersection and claimed that street car was not in motion when she started to cross street and gave no signals.

3. **Street railroads ⚷117(22)—Contributory negligence held for jury, where street car struck pedestrian at intersection, and pedestrian claimed that car was stationary just before accident and gave no signals.**

Whether pedestrian was guilty of contributory negligence *held* question for jury, where street car struck pedestrian while she was attempting to cross street at intersection, and pedestrian claimed that car was standing still when she started to cross street and that car gave no signals.

4. **Negligence ⚷136(10)—Contributory negligence is for jury, where evidence conflicts sharply.**

It is general rule that question of plaintiff's contributory negligence is one of fact for jury, where evidence is in sharp conflict.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for personal injuries by Claudian Bannister against the Los Angeles Railway Corporation. Judgment of nonsuit, and plaintiff appeals. Reversed.

B. J. Bradner and R. C. Gortner, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Philip C. Sterry, and Norman S. Sterry, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by the plaintiff from the judgment of the trial court made and entered after it had granted the motion of the defendant for a nonsuit at the close of all of the evidence in the case. The action was one for damages for injuries sustained by the plaintiff through the alleged negligence of the defendant in the operation of one of its cars on and along Spring street at its intersection with Fifth street, in the city of Los Angeles. The accident occurred on May 17, 1924, at or about the hour of 1:45 p. m., while the plaintiff, with others, was in the act of traversing the crossing at Spring street on the north side of Fifth street, and while so doing was struck by the defendant's car while it was going south on Spring street and was in the act of traversing the intersection of the two streets. At said time there were ordinances in force in the city of Los Angeles regulating travel and traffic at the intersections of its business streets, by the terms of which, generally speaking, street cars and vehicle traffic were required to stop when certain signals indicated that the transverse travel and traffic were to go on.

Upon the trial of the cause before a jury the plaintiff and several of her witnesses testified that she, with several others, started to cross Spring street at the above crossing when the traffic signals indicated that foot passengers and vehicular traffic proceeding in the same direction with herself were to "go"; that when she started she looked to the northward and saw the street car, which presently struck her, standing still and receiving and discharging passengers; that she paid no further attention to it and heard no warning signals from it until she was struck by it in the middle of the street. At the close of the plaintiff's case, wherein the above facts were shown, the defendant made a motion for nonsuit, which the trial court denied; whereupon the defendant produced the motorman of its car and certain passengers thereon and other witnesses, who testified that the car was in motion and in the act of crossing said intersection when the stop signals were shown, and which evidence tended, if believed, to contradict the evidence given by the plaintiff's witnesses in the foregoing regard. Some of these witnesses also testified that warning signals on the car were given as the car entered the intersection and up to the moment of its collision with the plaintiff. It thus clearly appears that, when the evidence on both sides was in and the cause was ready for submission to the jury, the evidence, taken as a whole, was clearly and substantially conflicting upon the main issues in the case. Under these circumstances and at the close of the whole case, the defendant again moved the court to grant a nonsuit upon the ground that the plaintiff had failed to prove a sufficient case for the jury, and also upon the ground that the plaintiff was guilty of contributory negligence as a matter of law. The trial court granted said motion upon both grounds and entered its judgment accordingly in favor of the defendant. The sole question presented for consideration upon this appeal is as to whether or not the trial court was guilty of an abuse of discretion in granting said motion for nonsuit.

[1] The rule governing the power and propriety on the part of the trial judge in the matter of granting a nonsuit at the conclusion of the whole testimony in the case is clearly and correctly stated In the Matter of Estate of Caspar, 172 Cal. 147, 155 P. 631, wherein it is declared to be the rule that the right of the court to direct a verdict and the right of the court to grant a nonsuit at the conclusion of the evidence in the case are absolutely the same, and that the court may grant such a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given. The foregoing rule is fully supported by the authorities which are cited in the foregoing case in support of it. The court, after referring to these authorities, sums up the rule to be the following: That if the plaintiff present evidence of so substantial a character as that, notwithstanding the conflict raised by the defendant's evidence, it would support a verdict in favor of the plaintiff, it would have been error for the court to have granted a motion for nonsuit, and it would have been error on the part of the court to direct a verdict for the defendant.

[2-4] Applying the foregoing rule to the facts of this case, we are led to the inevitable conclusion that the trial court abused its discretion in granting the defendant's motion for nonsuit at the close of the evidence in the case, and this conclusion applies equally to both grounds upon which the motion for nonsuit was made and granted, since as to the latter ground, namely, the contributory negligence of the plaintiff, the evidence was also sharply in conflict, and, this being so, it is the general rule that the question of the plaintiff's contributory negligence is a question of fact for the jury.

It follows from the foregoing conclusions that the judgment rendered and entered in favor of the defendant must be reversed, and it is so ordered.

We concur: LANGDON, J.; SHENK, J.

203 Cal. 430

REED v. PARRA et al. (L. A. 9270.)

Supreme Court of California. Feb. 24, 1928.

1. Pleading 🔑406(4)—Failure to allege that negligent driver was acting within scope of employment held inconsequential, where parties consented to trial on such theory.

Failure of complaint for personal injuries to allege that negligent taxicab driver was acting as agent of defendant within scope of employment at time of accident *held* of no consequence, where plaintiff, in answer to court's question before trial, stated that complaint was intended to allege agency, and defendant, in answer to court's further question, thereupon stated that he was willing to consider his answer as denying agency, and case was tried on such issue.

2. Master and servant 🔑330(3)—Finding that negligent taxicab driver was acting within scope of employment held not without supporting evidence.

Finding that negligent taxicab driver was acting as agent of defendant within scope of employment at time of accident, rather than as independent contractor, *held* not without any supporting evidence, where driver was intrusted with vehicle, with permission to use it at his discretion in business of employer.

3. Master and servant 🔑300—Where employee intrusted with vehicle to use at his discretion in employer's business injures another, injured person need prove only that employee was negligent and acting within general scope of employment to recover from employer.

Where employee intrusted with possession and operation of vehicle, with permission to use it at his discretion in business of employer injures another person, injured person need not prove that employee was engaged in executing any particular business or specific command of principal at time of injuries to recover from employer, but need prove only that employee was negligent and was acting within general scope of employment.

4. Master and servant 🔑332(5)—Findings held sufficiently to show that negligent taxicab driver was acting within scope of employment.

Findings that defendant was conducting taxicab business, that negligent driver was in his employ, and that such driver was operating automobile belonging to defendant, and driving it within scope of employment at time of injury, *held* sufficiently to show that negligent taxicab driver was acting within scope of employment at time of accident.

Department 2.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action for personal injuries by Ella Reed against Joe Parra and another. From a judgment in favor of plaintiff, defendant Parra appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

SHENK, J. This action was commenced against the defendants Joe Parra, as owner, and Frank Fernandez, as driver, of a taxicab, which, on September 4, 1924, backed into the plaintiff, causing the injuries complained of. Judgment was rendered against both defendants. The judgment as against the defendant Fernandez has become final and this is an appeal by the defendant Parra.

The principal contentions of the appellant are that there is (1) no allegation in the complaint, (2) no evidence in the record, and (3) no finding of fact that at the time and place of the accident the defendant Fernandez was acting as the agent of the appellant and within the scope of his employment.

[1] As to the first point: It is true that there is no specific allegation that when the injury to the plaintiff occurred Fernandez was the agent or employee of Parra. It is alleged, however, that at the time in question Fernandez was operating the car, the same being the property of his codefendant Parra, and acting within the scope of his employment. But the omission specifically to allege agency was cured by what took place at the trial. When the case was called and the trial judge had examined the pleadings, he addressed the following question to counsel for the plaintiff:

> "Is it intended to allege in the complaint that one of the defendants is the agent of the other?"

To which counsel for the plaintiff answered in the affirmative. After some discussion counsel for the appellant stated:

> "So that I may not be misunderstood: Our contention is that we made the denial to meet the complaint as it was drawn, and we say—we deny that at the time of the accident the codefendant was engaged in the performance of any duty as agent or that he was acting as agent for the defendant at the time of the accident."

Following this statement the court inquired of counsel for appellant:

> "You are simply treating it as a denial under that theory, but you are willing to consider that it does deny, and we will try that issue?"

To which counsel for appellant answered in the affirmative. The case was then tried as though the question of agency were at issue. The infirmity of the plaintiff's pleading thus became of no consequence on the trial of that issue.

[2] The evidence bearing on the question of agency is disclosed in part by the testimony of the appellant himself on direct examination as follows:

> "In September, 1924, I was engaged in the taxi business. I did employ Frank Fernandez as a driver. I was the legal owner of the car. I did authorize Mr. Fernandez to take it to the garage or to his home, wherever he wanted to take it. I don't care where he went after he got through working. I gave him that authority."

The accident occurred near the home of Fernandez about 8:30 o'clock in the morning, just as he was leaving to engage in the day's business. It further appeared in evidence that Fernandez was employed by Parra on a percentage basis to take passengers and collect fares from them at times and places convenient to Fernandez. While there is evidence in the record from which the court might have concluded that Fernandez was acting as an independent contractor, there is also sufficient evidence upon which to base a finding that the relation of employer and employee existed between the two defendants.

[3] The evidence favorable to the plaintiff's contention, therefore, warranted the application of the "roving commission" rule approved in Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 123 P. 219, wherein it is stated on pages 353 and 354 (123 P. 221):

> "It is the accepted rule in this and other jurisdictions that where an employee is intrusted with the possession and operation of a vehicle, with permission to use it at his discretion in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employee in the use and operation of the vehicle; and in such a case it is not necessary for the person seeking damages to prove that at the time of the injuries the employee was engaged in executing any particular business or specific command of his principal. That the employee, at the time of the commission of the tort, was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury."

See, also, Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 462, 463, 191 P. 894; Grantham v. Ordway, 40 Cal. App. 758, 764, 182 P. 73.

[4] As to the third point: The court found that on and prior to the day of the accident the defendant Parra was conducing an automobile rental and taxicab business as a carrier of passengers for hire; that the defendant Fernandez was on said day in the employ of said Parra as driver of an automobile used in said business; that on the day in question the defendant Fernandez was

operating an automobile belonging to the defendant Parra and was driving the same within the scope of his employment at the time of the injury. These findings were abundantly sufficient on the issue of agency. No other points require discussion.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

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203 Cal. 419

PATTERSON v. JOHN P. MILLS ORGANIZATION, Inc. (L. A. 9251.)

Supreme Court of California. Feb. 23, 1928.

1. Vendor and purchaser ⚷37(2)—Agreement held subject to rescission for vendor's misrepresentation of quantity of land, whether constituting purchase contract or obligation to enter into future purchase contract.

Agreement relative to purchase of real property containing misrepresentations by vendor as to amount of land in parcel to be sold *held* subject to rescission by purchaser, entitling purchaser in such case to recover money paid under contract, irrespective of whether contract was for the purchase of real property or constituted merely an obligation to enter into a future contract to purchase property.

2. Principal and agent ⚷146(3)—Liability of one executing purchase contract as owner held not voided on purchaser's rescission by claimed existence of undisclosed principal.

Where contract relative to purchase of property did not disclose name of principal, defendant, executing contract as owner, could not avoid liability to return payments made thereunder, in purchaser's suit for rescission, on ground that he was merely a selling agent.

Department 2.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Ned R. Patterson against the John P. Mills Organization, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. L. Nichols, of Los Angeles, for appellant.

Newcomb Condee and Vernon P. Spencer, both of Inglewood, for respondent.

LANGDON, J. Defendant appeals from a judgment against it for $393, the amount, together with interest, paid by plaintiff upon a contract involving a purchase of real property, which contract plaintiff sought to have rescinded in the present action. Plaintiff alleged that in April, 1924, defendant represented to plaintiff that a certain piece of ground belonging to defendant in Riverside county, Cal., contained 2½ acres, and plaintiff was thereby induced to purchase the same at a price of $750 per acre, or $1,875 for the parcel; that plaintiff signed an agreement, a copy of which was annexed to the complaint, and no deed for the land had been executed to him; that he paid $356.25 upon the purchase price of said land to the defendant; that in pursuance of said contract defendant thereafter requested plaintiff to sign an agreement to purchase land in Riverside county, which was not the same land which plaintiff had agreed to purchase, and, in fact, contained only 1.92 acres; that plaintiff refused to execute said agreement and notified defendant that he rescinded his former contract and demanded the return of the money paid thereunder; and that defendant refused to return said amount.

The answer of defendant denied that the piece of ground described in the second contract which defendant requested plaintiff to sign was not the same piece of ground that plaintiff had theretofore agreed to purchase and denied that said piece of ground described in said second contract did not contain 2½ acres.

The trial court found that the defendant had represented to plaintiff that the property which he was contracting to purchase contained 2½ acres, and that by said representation plaintiff was induced to purchase said property at a price of $1,875, and that plaintiff paid on account of the purchase price thereof the sum of $356.25; that thereafter defendant requested plaintiff to sign an agreement to purchase land therein described, stating that such land was the same land described in the former agreement, which plaintiff had already agreed to purchase; that the said land was not the same land that plaintiff had agreed to purchase, and that the said piece of ground contained only 1.92 acres, while plaintiff had contracted to purchase a piece of land containing 2½ acres; that plaintiff thereupon rescinded the agreement to purchase said land and demanded the return of his money and tendered to defendant any benefits which he had received under said first agreement.

[1, 2] On the appeal no defense to the action on its merits is urged and the only points made upon the appeal are technical ones, to the effect that the contract sought to be rescinded was not really a contract to purchase and that the defendant acted as a sales agent for the owner of the property and was not the owner. Both objections are without merit. The contract, whether it be for the purchase of real property or an obligation to enter into a future contract for that purpose, was the subject of rescission, under the circumstances found by the court, because of the misrepresentations as to the amount of land in the parcel to be sold. Upon rescission of the contract plaintiff was entitled to have the money returned to him which he had paid thereunder. Appellant concedes this, but contends

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that plaintiff should have brought his action against the owner of the property; that defendant was a mere selling agent. The contract does not disclose the name of the principal, and under such circumstances the plaintiff was entitled to hold the defendant. The rule applicable here is stated in 1 Cal. Jur. p. 819 et seq., § 103 et seq., as follows:

> "The rule has been long and continuously settled that an agent who signs his own name, instead of that of the principal, when he intends to bind the latter, becomes himself liable, the contract being considered his own. This is true when he describes himself as agent or is known to be or avowedly acts as such as well as where the existence or identity of his principal is not disclosed. No person in making a contract is considered to be the agent of another unless he stipulates for his principal by name, stating his agency in the instrument which he signs. To exclude the personal liability of an agent who signs in his own name, an intention to bind the principal must appear upon the face of the instrument."

The authorities cited in support of the foregoing text are abundant and conclusive.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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203 Cal. 417

MOREL v. MOREL. (L. A. 9157.)

Supreme Court of California. Feb. 23, 1928.

1. Pleading ⚿=350(1)—Notice of motion for judgment on pleadings is unnecessary, where motion is made in open court at inception of trial.

Where motion for judgment on pleadings was made on day of trial without previous notice having been given to defendant, contention that failure to give notice was error *held* without merit, since Code of Civil Procedure contains no requirement for giving notice of motion for judgment on pleading when parties are in open court when such motion is made at inception of trial.

2. Pleading ⚿=350(1)—Notice of motion for judgment on pleadings, if necessary, held waived, where motion was made in open court without objection.

Where motion for judgment on pleadings was made in open court without notice previously given, and no objection was made thereto on ground that notice had not been given, *held*, that had such notice been necessary it would have been waived.

3. Pleading ⚿=345(1)—Judgment on pleadings held proper, where complaint to quiet title contained facts on which title rested and answer denied ownership; denial being legal conclusion.

Where plaintiff, in action to quiet title, set out her title in detail and probative facts on which it rested, and defendant, in answer, denied that plaintiff was owner or was entitled to possession of real property described in plaintiff's second amended complaint, *held*, that motion for judgment on pleading was properly granted, since denial was not sufficient to present an issue, being merely a legal conclusion.

Department 2.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Dorcas Lorena Morel against Jules Morel to quiet title. From an order granting a motion for judgment on pleadings, defendant appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Dryer, Castle & Hartke, of Los Angeles, for respondent.

RICHARDS, J. This appeal is from an order of the trial court granting the motion of the plaintiff for judgment on the pleadings in an action to quiet title. The complaint herein was filed on October 11, 1922. The plaintiff therein set forth with much of detail her chain of title to the property and also set forth with like detail the sources of the appellant's claim of an estate or interest therein and that his claims thereto are false, fictitious, and fraudulent. Thereafter and on October 4, 1924, the plaintiff, by leave of court, filed her second amended complaint, wherein she set forth with equal or even greater detail her chain of title and the basis of the defendant's alleged fictitious claims. The defendant, on October 14, 1924, filed his answer to said second amended complaint. The cause, being thus apparently at issue, was set for trial in the superior court and came on regularly for trial therein on December 16, 1925, before the court sitting without a jury, whereupon and at the inception of said trial the plaintiff moved for a judgment in her favor upon the pleadings, and upon the ground that the defendant's answer contained no sufficient denials of said second amended complaint. The trial court granted said motion and accordingly made and entered its judgment in the plaintiff's favor, and it is from such judgment that this appeal has been taken.

[1-3] The cause upon appeal is presented upon the judgment roll. The appellant makes two contentions, the first of which is that the trial court was in error in entertaining said motion for judgment on the pleadings without previous notice having been given to the defendant that such motion would be made on the day of trial. There is no merit in this contention. The Code of Civil Procedure contains no requirement for the giving of notice of a motion for judgment on the pleadings when the parties are in open court when such motion is made at the inception of the trial. The parties were in open court when this motion was made and made

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⚿=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes no objection thereto upon the ground that notice thereof had not been given. Such notice, even if it had been necessary, would thereby have been waived. The appellant's second contention is that the answer of the defendant raised a sufficient issue to require a denial of said motion. It is true that the answer contains the following clause: "Denies that plaintiff is the owner or is entitled to the possession of the real property described in plaintiff's second amended complaint." This denial, however, cannot be held sufficient to present an issue, in view of the fact that the plaintiff's second amended complaint sets forth in detail the probative facts upon which the plaintiff's title to the ownership of the property in question is based, and, the defendant having failed to deny these in his answer, his denial of such ownership in the plaintiff must be held to be merely the denial of a legal conclusion. Davies v. Ramsdell, 40 Cal. App. 427, 181 P. 94. It follows that the trial court was not in error in granting the plaintiff's motion for judgment on the pleadings, nor in entering judgment thereon in plaintiff's favor.

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.

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203 Cal. 441

CLARK v. CLARK. (L. A. 9167.)

Supreme Court of California. Feb. 25, 1928.

1. Husband and wife 🔑4—Husband's duty to support wife held to continue, notwithstanding they were separated and wife earned some money and received voluntary help from father.

Husband's duty to support wife *held* to continue, notwithstanding they had maintained separate homes for some time and wife earned some money and received voluntary help from her father.

2. Divorce 🔑131—Evidence held sufficient to support trial court's findings that wife was entitled to divorce for willful neglect and failure to provide.

Evidence *held* sufficient to support trial court's findings, entitling plaintiff to divorce, that defendant had for more than 6 years willfully neglected to provide plaintiff with common necessaries of life, having the ability to do so.

Department 1.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action for divorce by Lilian Trask Clark against Samuel Boyd Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward H. Miller and Arch G. McLay, both of Huntington Park, for appellant.

Luce & Swing, of San Diego, for respondent.

PRESTON, J. [1, 2] Action for divorce upon the ground, first, of desertion, and second, willful neglect and failure to provide. Nonsuit was granted as to the first cause of action, but as to the second cause the court found that defendant had, for a period of more than 6 years, willfully neglected to provide plaintiff with the common necessaries of life, having the ability so to do, and accordingly entered in her favor an interlocutory judgment of divorce, from which defendant now appeals. The only real question presented is the sufficiency of the testimony of the parties, and the sufficiency of the evidence given in corroboration thereof, to justify the findings in favor of plaintiff.

The evidence in brief fairly tends to show the following: The parties were married in 1895. In 1914 or 1915 plaintiff left their home in New Mexico, with the consent and approval of defendant, to take care of their daughter, who was seriously ill in Brooklyn, N. Y. Upon arrival there she took a position as teacher and also took roomers in order to maintain herself and two daughters. Defendant followed some six months or so later. There was no room for him at the apartment of plaintiff, and he did not provide any home for her to come to. Although his friendship with her was continuous, he lived separate and apart from her, and they never thereafter resumed marital relations. Defendant was unemployed and contributed nothing to her support at this time. Some 2 years thereafter he started sending her monthly payments of $50, which she used for the children. He continued this contribution for several years; then reduced it to $35 a month, which amount he sent her at intervals until about 1924, when payments ceased entirely. Friendly relations between plaintiff and defendant were unceasing, and apparently she was living apart from him at all times with his consent, express or implied, upon the understanding that she would come to him whenever he should supply a home and support for her. Upon more than one occasion she permitted him to stop at her house upon payment to her of a nominal amount to cover his own expenses. Under these circumstances, his duty to support her existed, notwithstanding the voluntary help of her father and the fruits of her own efforts, and there appears to be no valid excuse for his failure to do so. "Until defendant, in good faith, had offered a new abode, suitable to the family station, it was not incumbent on the wife to rejoin her husband, and though living away from him she retained all her conjugal rights, one of which was the right to continuing support." Winslow v. Winslow (Cal. App.) 255 P. 880.

Defendant was trained as a bookkeeper and there is no showing that the ill health of which he complains was of such a nature as to deprive him of this means of livelihood. In other words, under the evidence, the court could have properly concluded that he lacked neither ability nor opportunity to do better, and that his failure to provide for his family and neglect of them were, therefore, willful. "The support of his wife is a continuing obligation on the part of the husband, and his failure to meet this obligation is a continuing cause for a divorce. * * * The law does not fix the amount of income which the husband must receive in order to impose upon him the obligation of supporting his wife, nor does it attempt to designate what are the common necessaries of life. These matters vary with the varying circumstances of the parties to the marriage, and it is left to the discretion of the judge in each case to determine whether the husband's income, as well as the relation between him and his wife, are such as to impose upon him the obligation of providing for her wants. * * *" Wagner v. Wagner, 104 Cal. 293, 296, 297, 37 P. 935, 936.

In short, we hold that although the evidence in this case, both in chief and as to corroboration thereof, is meager, nevertheless it cannot be said that it is insufficient to support the findings attacked, and the judgment is therefore affirmed.

We concur: SEAWELL, J.; CURTIS, J.

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203 Cal. 457

MUNCHIANDO v. BACH. (L. A. 9161.)

Supreme Court of California. Feb. 27, 1928.

1. Abatement and revival ⚷58(1)—Personal injury action held not to survive death of plaintiff.

Action for personal injuries alleged to have been caused by defendant's negligence *held* not to survive death of plaintiff; common-law rule that such action does not survive death of either party being effective unless modified by statute.

2. Appeal and error ⚷333—On death of plaintiff in personal injury action, defendant's appeal should be dismissed and appropriate proceedings taken to dismiss action in trial court.

Where plaintiff in personal injury action died, appeal by defendant *held* to have become moot and should be dismissed and appropriate proceedings should be taken in trial court to dismiss action on account of abatement, since such action does not survive death of plaintiff.

Department 2.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Domenica Munchiando against Hollis Bach and another for damages for personal injuries. Judgment for plaintiff, and defendant Bach appeals. Appeal dismissed.

Jennings & Belcher, of Los Angeles, and Hollis Bach, for appellant.

J. M. Fursee, of Los Angeles, for respondent.

SHENK, J. This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendants. A motion for a nonsuit was granted as to the defendant Four-Wheel Hydraulic Brake Sales Corporation. At the close of the trial a judgment was entered in favor of the defendant Bach on an instructed verdict. The plaintiff moved for a new trial as to both defendants. The motion was denied as to the defendant corporation and granted as to defendant Bach, the latter of whom prosecutes this appeal from that order. The alleged injuries were suffered by the plaintiff on the 1st day of January, 1925. Upon a showing made by the defendant Bach, it appears that the plaintiff died on the 13th day of May, 1927. From this showing it is urged that the action is abated.

[1, 2] The common-law rule is that an action for personal injuries alleged to have been caused by the negligence of the defendant, except under certain conditions which do not exist here, does not survive the death of either the person to or the person by whom the wrong was done. See Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L. R. A. 1916A, 1142; 1 Cal. Jur. p. 71. This rule is in effect in this state except where modified by statute, and there seems to be no statute which would affect the situation here presented. The appeal has become moot and should be dismissed for that reason. Appropriate proceedings should be taken in the trial court to dismiss the action on account of the abatement thereof.

The appeal is dismissed.

We concur: RICHARDS, J.; LANGDON, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

203 Cal. 444

BEHANNESEY v. PATON et al. (L. A. 9206.)

Supreme Court of California. Feb. 25, 1928.

Frauds, statute of 🔑33(1)—One financing motion picture producer inducing plaintiff to complete contract by promise of payment after taking over venture held liable to plaintiff (Civ. Code, § 2794, subd. 3).

Company financing motion picture producer under agreement permitting it to take over entire venture on happening of certain contingencies *held* liable, after taking over production on its promise, to pay plaintiff for certain dressings for sets and properties contracted for by original producer and also used by it after taking over venture, since statement to plaintiff that money would be paid, inducing plaintiff to complete contract, may be deemed promise, under Civ. Code, § 2794, subd. 3, to answer for obligation of another.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action for materials furnished, by P. A. Behannesey, doing business under the firm name and style of the Behannesey Art Studio, against Stuart Paton and others, copartners doing business under the firm name and style of the Stuart Paton Pictures Company, and another. Judgment for plaintiff, and defendant Cinema Finance Corporation appeals. Affirmed.

Farrand & Slosson, of Los Angeles, for appellant.

David E. Fulwider and Harold A. Fendler, both of Los Angeles, for respondent.

SEAWELL, J. This appeal is taken from a judgment entered against appellant on account of its obligations arising from the production of a motion picture. Judgment by default went against H. C. Maynard and Stuart Paton Pictures Company of Los Angeles. The appeal is prosecuted alone by Cinema Finance Corporation.

Stuart Paton Pictures Company of Los Angeles was an association of individuals consisting of Stuart Paton, H. C. Maynard, and W. G. Taylor. Cinema Finance Corporation was incorporated under the laws of the state of Delaware, engaged, apparently, in the business of distributing motion pictures to the trade. Prior to the execution of any of the contracts herein mentioned, Stuart Paton Pictures Company had entered into a contract with the Associated Exhibitors, Inc., the terms of which are not important, by which said Stuart Paton Company agreed to manufacture and deliver said motion picture for distribution. This contract, however, was reckoned with by the Stuart Paton Pictures Company and Cinema Finance Corporation in the contract entered into by them on May 14, 1925, which contract is of paramount importance in determining the rights of the parties to this appeal. All of the parties herein were engaged one way or another in the motion picture industry. Cinema Finance Corporation seems not to have been limited merely to furnishing financial assistance to producers of pictures and promoters of enterprises, but, according to a term selected by itself and inserted in its contract, it lent its "co-operation" as well as its financial assistance to the producers and manufacturers of motion pictures to whom it furnished money to accomplish or complete picture enterprises. The contract made by it indicates very clearly that it was more than a mere financial concern and that it entered into joint enterprises or ventures with producers, reserving unto itself almost absolute power in directing, supervising, and controlling the production and manufacture of pictures which it undertook to finance.

The estimate cost of producing the picture which forms the basis of this controversy was $60,000. Of this sum the Cinema Finance Corporation was "willing to advance $26,500" and the Stuart Paton Pictures Company was "willing to furnish the sum of $33,500," said sums to be advanced by both parties during the course of production as the ratio of each party's total advance bore to the total cost of production. As security for the repayment of all sums advanced by said Cinema Finance Corporation, together with interest thereon, it was agreed that said Stuart Paton Pictures Company assigned, transferred, mortgaged, and pledged unto said Cinema Picture Corporation all right, title, and interest in and to all negatives and positive prints of every kind that might be made of said motion pictures, together with the right of possession. Every possible right or privilege that may have accrued to Stuart Paton Pictures Company by reason of its part in the production of said picture or its interest therein was covered by said assignment and mortgage. It was also provided in said contract that all contracts made or which might be made thereafter by said Stuart Paton Pictures Company "with actors, actresses, and members of their staff in the production of said picture, shall be in form assignable to second party (Cinema Finance Corporation) and provide that the said persons in said contracts mentioned or referred to shall be obliged, when requested to do so by said second party, in case first party (Stuart Paton Pictures Company) shall fail, refuse, neglect, or be unable to personally carry on the production of said pictures, to perform the services thereunder in the making of said pictures for said Cinema Finance Corporation and under the direction of such directors as second party shall designate. First party shall, upon execution hereof, deliver to second party copies of such contracts as first party may have entered into with any persons for services to be performed in the course of said production; it being understood that as to such contracts second party shall be subrogated to the rights of first party." The contract contains a provision that, in the event that the director Stuart Paton, placed in charge by Stuart Paton Pictures Company, shall become incapacitated for a period of more than five successive days, or in the event of his neglect or refusal to personally supervise and direct said production, said Cinema Finance Company may, under certain contingencies, assume the direction, supervision, control, and completion of the said picture and for such purposes employ such director or directors as may be acceptable to said Associated Exhibitors, Inc., and may employ such persons and means as to it (Cinema Finance Company) may seem best, and in the event it shall undertake the completion of said picture it shall have access to and full use of the studio where the same is being produced and full use of the services of all actors, actresses, directing staff and employees of said Stuart Paton Pictures Company and all costumes, sets, scenes, properties, paraphernalia, apparatus, and equipment, and immediate and continuous access and use of all contracts, records, books, stories, scenarios, etc., and other materials belonging to or under the control of or available to said Stuart Paton Pictures Company for use in said production. It is expressly provided that said Cinema Finance Corporation "shall not be obligated to advance for any and all purposes a sum in excess of $26,500 in the production of said picture," but it may do so if it sees fit.

Said contract is very full in detail and gives to the Cinema Finance Corporation, for its protection, absolute power to take over the entire venture, substituting itself in the place of Stuart Paton Pictures Company, at its option, upon the happening of the contingencies named therein and complete the production of the picture. This contract was made and recorded some time before the contract upon which the judgment herein rests was made by Stuart Paton Pictures Company with respondent, P. A. Behannesey, doing business under the firm name and style of Behannesey Art Studio, by the terms of which said Behannesey was to furnish certain dressings for sets and properties to be used in the production of said picture at the agreed price of $1,500. Appellant admits and urges as an argument in support of its appeal the fact that Behannesey had knowledge of the contract existing between the Stuart Paton Pictures Company and the Cinema Finance Corporation at the time he entered into his contract with the Paton Pictures Company, and for that reason was bound by all the terms of the appellant's contract. There can be no doubt that Behannesey had full knowledge of said Cinema Finance Corporation's contract, as asserted by appellant, nor is there any doubt that appellant had full knowledge of the Behannesey contract long prior to the day it took over the completion of the picture. Behannesey's knowledge of the powers expressly reserved by Cinema Finance Corporation to take over all contracts made by Stuart Paton Pictures Company with third parties and its right to be subrogated in the place of said Picture Company in outstanding contracts if it should elect to complete the picture, which it actually did, is a fact in support of respondent's case rather than against it. Behannesey's knowledge of the Cinema Finance Corporation's contractual rights no doubt had some influence upon his action. The fact that a financial concern was interested in the project to the extent that it reserved to itself the right to complete the picture in the event the original promoters failed therein was a circumstance calculated to inspire in the minds of those who engaged to furnish skill, labor or materials in and for the production of the picture an assurance that the financial sponsor, in the event it should elect to complete the picture, would compensate those whose skill, labor, and materials contributed to its production.

Respondent's contract was made with Stuart Paton Pictures Company on May 30, 1925. Appellant, on June 9th, paid the full amount it unconditionally obligated itself to pay by its contract, to wit, $26,500, but the picture was not completed. It thereupon, on said June 9th, assumed full charge of the production and completion of said motion picture, discharged the production manager placed in charge by Stuart Paton Pictures Company, and placed in his stead a Mr. Travers, a manager of its own selection. Other officers of appellant became active in the production of said picture. On June 16th Stuart Paton, Maynard and Taylor executed a bill of sale conveying all of their right, title, and interest in and to said moving picture production to appellant. Respondent's property, including sets and props, remained in the studio. The greater portion of it had been used in the production of the picture under the Stuart Paton Pictures Company régime. Some of it, however, was reused by appellant, and other property not before brought into the picture was furnished by respondent to appellant.

We think there is no ground upon which the appeal can be sustained by virtue of the provisions of subdivision 2 of section 1624, Civil Code, or on the theory that Douglas Travers exceeded his authority in acknowledging the past indebtedness due under respondent's contract.

The positive testimony of John Hauerwaas, assistant secretary and assistant manager of appellant, Cinema Finance Corporation, and Douglas Travers, specially appointed by appellant production manager for the completion of said motion picture, is that said production manager was authorized by Maurice Barber, manager of appellant, to do all things necessary to keep the picture in production, which included the hiring and assembling of sets and props and the doing of everything necessary to complete the production of said picture. Upon assuming his duties, Travers told respondent and other creditors that he had been placed in charge of the production of the picture by the Cinema Finance Corporation and was engaged in checking up the indebtedness of the Stuart Paton Pictures Company. The only possible inference that may be reasonably drawn from the testimony of Travers, Gatzert, L'Estrange, Agard, Essey, and Hartley is that Travers gave respondent's representative and various other creditors to understand that the indebtedness incurred by the Stuart Paton Picture Company was assumed by the appellant and that it had subrogated itself in place of Stuart Paton Pictures Company, as in its contract with said company it had expressly reserved the right to do, and that a continuance of the performance of the contracts made by said creditors with Stuart Paton Pictures was the condition upon which and thereby furnished a consideration—if indeed appellant was not obligated for other reasons—for the assumption by appellant of all obligations arising from partially performed contracts in the production of said picture. That the statements made by Mr. Travers immediately upon assuming the position of manager of production of the picture, to wit, on June 11th, as to the money due respondent upon his incompleted contract to the effect, "You needn't worry about your money; it will be paid," would, if there were no other question involved, be deemed a promise under subdivision 3, § 2794, Civil Code, to answer for the obligation of another, made upon a consideration beneficial to the appellant, there seems no room for doubt. Respondent had furnished under its original contract dressings and props for a number of settings and agreed to furnish a draper to hang all drapes, and did, after appellant had taken over the completion of the picture, furnish to appellant properties in accordance with its original contract with Stuart Paton Pictures Company, and supplied the services of a draper, set dresser, and assistant set dresser. The property and services furnished by respondent formed a substantial part of the picture when completed, and some of the property which was furnished under the original contract was "shot" over again by appellant, and the scene as thus revised was used in the production of the picture.

Appellant has cited a number of appellate court decisions of this state, as well as certain sections of the Civil Code, to the effect that a special promise to answer for the debt or default of another is invalid unless in writing and subscribed by the party to be charged or his agent, except in the cases provided for in section 2794, Civil Code. We have been cited to no case where the court applied appellant's contentions to facts similar to the facts of the instant case. The respondent in this case was induced to complete his indivisible contract upon the promise of appellant that he would be treated as an original contractor, based upon a consideration that was beneficial to the promisor. It is not probable that respondent would have otherwise agreed to complete the contract, but for the promise on the part of appellant that it would place itself in the place of the original promisor. All of the inferences support respondent's claim.

Judgment affirmed.

We concur: PRESTON, J.; CURTIS, J.

203 Cal. 424

In re SPENCER'S ESTATE.★

SPENCER v. WEMOTT et al.

(L. A. 9985.)

Supreme Court of California. Feb. 24, 1928.

Rehearing Denied March 22, 1928.

1. Executors and administrators 🔑14—Whether language used in will impliedly appoints executors depends on particular circumstances of case and testator's intent (Civ. Code, §§ 1317, 1318, 1321, 1324, 1327).

Determination whether language used in will constitutes appointment of executors by implication depends on particular facts of case and testator's intent, to be determined with reference to language of will under Civ. Code, §§ 1317, 1318, 1321, 1324, 1327.

2. Executors and administrators 🔑14—Appointment as executors of persons directed by will to act as custodians of property for testatrix's children and as guardians held not abuse of discretion (Civ. Code, §§ 1317, 1318, 1321, 1324, 1327, 1371).

Provision in holographic will, "I desire my two friends * * * to act without bonds as custodians of property for both children and guardians for L. R. S.," *held* sufficient indication of testatrix's intent to appoint friends named as executors under Civ. Code, §§ 1317, 1318, 1321, 1324, 1327, so that order of trial court appointing them as executors of her will was not abuse of discretion under section 1371, permitting issuance of letters testamentary to persons intended by testator to be given administration of estate, though not actually named as executors.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Application by C. E. Spencer for letters of administration of the estate of Marguerite I. Spencer, deceased, opposed by Wallace W. Wemott and another, who applied for appointment as executors. From the portion of an order appointing opponents as executors

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★Rehearing denied.

and denying petitioner's application, petitioner appeals. Affirmed.

Spencer & Dennis, of Los Angeles, for appellant.

Cantillon & Hamilton and Frank A. Sievers, all of Los Angeles, for respondents.

LANGDON, J. Appeal by C. E. Spencer, petitioner for letters of administration with the will annexed in the above-entitled matter, from that portion of an order of the superior court of the state of California, in and for the county of Los Angeles, whereby Wallace W. Wemott and Robert R. Curry were appointed executors of the last will of deceased, and whereby the petition of said appellant was denied.

The question presented upon the appeal is whether or not the trial court erred in holding that the will of decedent named Messrs. Wemott and Curry executors, by implication, if not directly. The will was written in its entirety by testatrix in her own handwriting and is as follows:

> "I hereby do give and bequeath to my daughter Lois Roberta Spencer all my personal property and furnishings at the home at 1601 Country Club Dr. Glendale.
>
> "Out of my share of the community property I leave to my mother Alice V. Anable the sum of one thousand dollars ($1,000) the same to be used at least in part to put her in some home.
>
> "Of the remainder of my share of community property I leave two-thirds (⅔) to my daughter Lois Roberta and one-third (⅓) to my son William Edward Spencer.
>
> "I desire my two friends Wallace W. Wemott and Robert R. Curry to act without bond as custodians of property for both children and guardians for Lois Roberta Spencer.
>
> "Marguerite I. Spencer.
>
> "April 14, 1927."

[1, 2] The problem of the trial court was to find the intention of the testatrix from the language used. In seeking for such intent, there are certain well-settled principles of interpretation and construction enumerated by this court in Estate of Peabody, 154 Cal. 173, 97 P. 184, as follows:

> "The important thing is the intention of the testator. Section 1317. This is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Section 1318. All parts of the will are to be considered in relation to each other so as to form, if possible, a consistent whole. Section 1321. Words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent and that sense can be ascertained. Section 1324. Technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by the testator and that he was unacquainted with such technical sense. Section 1327. 'A technical construction of words and phrases, although prima facie the one which should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas.' [Citing numerous authorities.]"

In the instant case, also, section 1371 of our Civil Code is applicable. That section provides that, when it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named as executor, is entitled to letters testamentary in like manner as if he had been so named.

It is apparent that there is some ambiguity and a lack of precision in the language of the testatrix, which is not unusual in holographic wills. In solving a problem such as is presented here, each case must depend upon its own peculiar facts, as was pointed out in Estate of Henderson, 161 Cal. 357, 119 P. 496.

We do not think the court abused its discretion in making the order appealed from, and that order is affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

89 Cal. App. 55

WAYLAND v. LATHAM. (Civ. 5986.)★

District Court of Appeal, First District, Division 2, California. Feb. 7, 1928.

Rehearing Denied March 7, 1928. Hearing Denied by Supreme Court April 5, 1928.

1. Judgment 🔑199(1)—Court, after improperly denying verdict and return of verdict, may enter judgment contrary thereto for same reason that motion should originally have been granted (Code Civ. Proc. § 629, as added by St. 1923, p. 749, § 1).

Where a motion for a directed verdict has been made and improperly denied, and the verdict has been returned, the court notwithstanding the verdict may, under Code Civ. Proc. § 629, as added by St. 1923, p. 749, § 1, enter a judgment contrary thereto under the same rule and for the same reason that court should have granted motion for directed verdict, and is not precluded from entering such judgment because motion was properly denied for any reason whatsoever.

2. Trial 🔑139(1)—Court may direct verdict unless there is substantial evidence tending to prove all controverted facts.

Trial court has power to direct jury to render a verdict in absence of substantial evidence tending to prove all controverted facts necessary to contestant's case, and it is not necessary that there should have been an utter absence of conflict in evidence.

3. Landlord and tenant 🔑291(16)—Evidence in unlawful detainer action as to modification of lease for reduction of monthly rent held insufficient for jury.

In action of unlawful detainer after default in payment of rent and three days' notice to pay rent or quit, evidence as to modification of

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★Rehearing denied. Hearing denied by Supreme Court.

lease by reducing monthly rent *held* insufficient for jury.

4. Trial 🔑139(1)—Directed verdict is proper whenever judge would be compelled to set contrary verdict aside.

A directed verdict is proper whenever, under the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by evidence.

5. Landlord and tenant 🔑33—Alleged oral modification of lease without consideration held void (Civ. Code, § 1698, and § 1624, subd. 5).

An alleged oral modification of lease providing for reduction of monthly rent without any consideration therefor *held* void, under Civ. Code, § 1698, and § 1624, subd. 5.

6. Landlord and tenant 🔑33—Tenant's threat of removing from premises unless rent was reduced held not consideration placing agreement within category of executed oral agreement (Civ. Code, § 1698).

Tenant's threat of removal from premises unless rent was reduced *held* not to constitute consideration for oral modification of lease contract within category of an executed oral agreement as required by Civ. Code, § 1698, for modification of written contracts.

7. Landlord and tenant 🔑33—Purchaser of interest in property under oral agreement did not have sufficient interest therein to modify lease.

Purchaser of interest in leased premises under oral agreement giving him no control or enforceable interest in property *held* not to have had a sufficient interest in property so as to authorize modification of lease irrespective of agency.

8. Landlord and tenant 🔑291(1)—Notice to pay rent or quit by agent of owner to whom lease was assigned without lessee's knowledge held sufficient (Code Civ. Proc. § 1161; Civ. Code, §§ 821, 1111).

Three days' notice to pay rent or quit by owner's agent after assignment of lease without notice to lessee of change of ownership *held* sufficient under Code Civ. Proc. § 1161, and Civ. Code, §§ 821, 1111, particularly where lessee had knowledge that agent signing notice was agent of property and to whom she had paid rent for more than two years previous.

9. Jury 🔑37—Granting motion for judgment notwithstanding verdict in accordance with uncontradicted evidence did not deprive defendant of constitutional right to jury trial.

Where evidence in action of unlawful detainer in favor of plaintiff's cause of action was without conflict, and no other different judgment could have been entered thereon, and judgment entered was for specific relief prayed for and that supported by uncontradicted evidence, granting of motion for judgment notwithstanding verdict did not deprive defendant of constitutional right of trial by jury.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Charles A. Wayland against Sadie Carr Latham, doing business under the name and style of Sade Carr. Judgment for plaintiff notwithstanding the verdict, and defendant appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Theodore M. Monell, of San Francisco, for respondent.

BURROUGHS, Presiding Justice pro tem. This is an action of unlawful detainer after default in payment of rent and three days' notice to pay rent or quit. The cause was tried by a jury and a verdict returned in favor of the defendant. Before the entry of judgment thereon, the court, notwithstanding the verdict, on motion of plaintiff, rendered judgment in favor of the plaintiff declaring a forfeiture of the lease, a restitution of the premises, $2,650 rent due, and an attorney fee in the sum of $500, together with his costs of suit.

It is the contention of the appellant that the court erred in setting aside the verdict of the jury and substituting its own judgment therefor, in that it is claimed the verdict finds substantial support in the evidence.

Before reviewing the evidence we will consider and analyze the law governing the subject of the power of the court to enter a judgment contrary to the verdict of the jury. Section 629, Code of Civil Procedure, added to said Code in 1923 (Stats. 1923, p. 750), so far as pertinent to this decision, provides:

> "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict."

This section of the Code has been before the courts for interpretation and construction in several cases. In Estate of Fleming, 199 Cal. 750, 251 P. 637, it is said:

> "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct * * * a verdict. Estate of Sharon, 179 Cal. 447, 459, 177 P. 283. When a motion for a directed verdict, which should have been granted, has been denied, and a verdict rendered against the moving party, it is the duty of the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, to render judgment in favor of the party aggrieved, notwithstanding the verdict. Code Civ. Proc. § 629. Appellant is here contending that the power of the trial court in these matters is limited, by the provision of the section, supra, to granting a motion for judgment notwithstanding a verdict in those cases in which the antecedent motion for a directed verdict 'should

have been granted,' and that, therefore, *if for any reason* the motion for a direction by the court was properly denied, the court is without power to grant the motion for judgment notwithstanding the verdict. Her first contention is that the motion for a directed verdict was properly denied, for the reason that the grounds on which it was based were not sufficiently stated, from which it follows, she argues, the court had no authority to grant the motion for judgment notwithstanding the verdict. * * *

"We are of the view that section 629 of the Code of Civil Procedure relates to the granting of a motion for judgment notwithstanding the verdict in a case in which the motion for a directed verdict 'should have been granted' on the evidence, and does not lend itself to the narrow construction appellant attempts to put upon it."

[1] The foregoing decision definitely settles the rule that, where a motion for a directed verdict has been made and improperly denied, and a verdict has been returned, the court, notwithstanding the verdict, may enter a judgment contrary thereto, under the same rule, and for the same reason that the court should have granted the motion for a directed verdict.

[2] This calls for a consideration of the law relative to the conditions under which a court may direct the verdict of the jury. In the case last cited it is said:

> "Appellant's second contention is that the motion for a directed verdict in this case was properly denied, for the reason that the evidence was sufficient to take the case to the jury. The trial court had power to direct the jury to render a verdict in favor of the respondents, unless there was substantial evidence tending to prove all the controverted facts necessary to establish the contestant's case. It was not necessary that there should have been an utter absence of conflict in the evidence. To deprive the court of the right to exercise its power, if there was a conflict, it must have been a substantial one. Estate of Sharon, supra, p. 459 [177 P. 283]; Estate of Baldwin, 162 Cal. 471, 123 P. 267."

In Estate of Sharon, 179 Cal. 447, 177 P. 283, it is said:

> "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. There are numerous decisions to this effect. We cite the following: Estate of Baldwin, 162 Cal. 473, 123 P. 267; Sill v. Ceschi, 167 Cal. 704, 706, 140 P. 949; Estate of Caspar, 172 Cal. 150, 155 P. 631; Jacobson v. Northwestern, etc., Co., 175 Cal. 468, 473, 166 P. 3; Perera v. Panama-P. I. E. Co., ante, 179 Cal. 63, 175 P. 454."

The cases cited by counsel for appellant are not in conflict with this rule. In Re Ross, 173 Cal. 178, 159 P. 603, it is held that:

> "It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true."

It was held in the Estate of Caspar, 172 Cal. 147, 155 P. 631, also cited by appellant, that the right of the court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. In the latter case it is further held that the court may grant a nonsuit only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. We have no doubt that, in using the expression "disregarding conflicting evidence," the court refers to a substantial conflict, one that would be sufficient to support a verdict.

In the light of the foregoing well-established principles of law, and which are controlling in this case, we will examine the evidence.

September 12, 1922, one A. F. Rousseau, as lessor, and the defendant, as lessee, entered into a written lease of certain real property on Geary street in San Francisco, for a term of five years, commencing December 1, 1922, and ending November 30, 1927. This lease was, on October 5, 1922, assigned to the plaintiff in this action. By its terms the lease provided that the rent for the first year should be $400 per month, with an increase of $25 per month each year thereafter during the term of the lease, the rent to be paid on the first day of each and every month, in advance, during the life of the lease. The lease further provided:

> "If default be made in the payment of any rent, * * * the lessor may re-enter said premises and remove all persons therefrom, and, if any rent shall remain unpaid for ten days after the same becomes due, then this lease, at the option of the lessor, may be canceled and terminated."

The defendant went into possession under said lease and continued to occupy said premises until dispossessed by virtue of the judgment in this action. It is alleged in the complaint that defendant had failed to pay the rent due under said lease for the months of May, June, July, August, September, and October, 1926, the amount due and unpaid being $3,150, and that the three days' notice to pay or quit had been duly served and payment thereof had not been made.

The answer denies notice of the assignment of the lease to the plaintiff; denies the forfeiture of the lease; alleges that the rent was paid to October 1, 1926, and an offer made to pay rent for October, which offer was refused, demand being made for $3,150, the amount claimed to be due. As a special defense, it is alleged that on or about the 1st day of June, 1924, it was agreed that the rentals thereafter should be the sum of $350 per month. As to this last defense the defendant testified:

> "Sometime in June, 1924, I told Mr. Rucker, I could not afford to pay the rental which was at that time, I think, $425 a month. He listened to my story, and after all I told him he said, 'Well, what could you afford to pay?' and I told him $350 a month; and he said, 'Very well, we will let it go until further notice,' and I have been waiting ever since."

On cross-examination she testified:

> "He asked me how much I could afford to pay, and I said $350 a month. Q. What did he say then? A. And he said, 'Very well.' * * * Q. That was the final climax? A. Yes. Q. 'I cannot pay more than $350,' and he said, 'We will see what we can do about it'? A. Yes."

Joseph H. Rucker, president of Joseph H. Rucker Company, testified:

> "I had a conversation in the summer of 1924 with Mrs. Latham at my office. She had been asking regarding a reduction in the rent. * * * Joseph H. Rucker Company, of which I am president, were the agents for Dr. Wayland. Miss Carr had called me on the phone before that, some time in May, and complained about the rent, about business being bad, and I told Miss Carr that I had taken up the matter with the owner of the property, Dr. Wayland, at San José, and that she was asking for more than a temporary reduction for two or three months, and I told her the very best he was willing to do was to give her a reduction in her rent for the summer months to get her past the dull season, June, July, and August, and during that time he would allow her a rebate of $75 a month for those three months only, I mean June, July, and August, 1924. Such a rebate was given."

From June, 1924, to October 2, 1926, the defendant paid $350 per month rent, and the letter of October 2, 1926, was the first demand made upon her for the full amount of rent provided by the lease. It further appears in the record that during the months of June, July, and August, 1924, upon the payment of the rent of $350, the defendant signed a receipt for $75 rebate of the rent for those months, but she disclaims knowledge of the contents of the receipts. It is further in evidence that from the month of September, 1924, the payments of rent were entered on the books of the agent as payments on account, but without the knowledge of defendant. Dr. Wayland, the owner of the premises, testified that he knew of the reduction of the rent for the three summer months of 1924, and told Mr. Rucker he could give such a reduction. He further testified that he accepted $350 each month thereafter for twenty-four months on account, and that he never wrote Mrs. Latham to pay up the balance. Anna Hughes, an employee of the Rucker Company, testified she was present in the office of Rucker Company when the conversation took place between Rucker and the defendant, that Rucker said he had taken the matter up with the owner and the best they could do was to allow her a rebate of $75 per month for the three summer months, and that she (the witness) heard nothing about a further reduction for an additional period, and that she was present during the entire conversation; also this witness testified she called the defendant several times on the telephone, in regard to her rent, and told her that the rent payment was late, she was only paying on account, to which she replied that she would pay whenever she got the money. September 15, 1925, this witness mailed a letter to defendant, in which she said:

> "As your rent is now considerably increased and as you have paid nothing since the 12th of last month, we are compelled to ask that you give our collector a check for at least $350 tomorrow morning when he calls."

The testimony of Harry L. Nelson, a collector for the Rucker Company, was: That he presented numerous bills to the defendant during her tenancy and that all bills were marked, "Do not give receipt. $350 on account." All receipts presented to her read for $425. "November 19, 1925, she paid me $350. I gave her no receipt. All bills I presented to her she looked at." This witness called on defendant after he had read a copy of the letter of September 15, testified to by Miss Hughes. Defendant had received a letter from Rucker, and she said Rucker could go ahead and do what he wanted. In addition to all this, the defendant, on her cross-examination, stated that, in the conversation in which she claims Joseph H. Rucker reduced the rent to $350 per month until further notice, his reply to her request was, "We will see what we can do about it."

[3, 4] From the foregoing résumé of the evidence we are satisfied that the verdict of the jury finds no substantial support in the evidence, and as said in the Estate of Caspar, supra:

> "A directed verdict is proper unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence."

In Field v. Shorb, 99 Cal. 661, 34 P. 504, it is said:

> "We are adverse to holding that a finding by a jury or trial court on an issue of fact is not warranted by the evidence, whatever we might think as to its preponderance, where there is presented a fair, reasonable ground for a difference of opinion, and where a conclusion either way could not be considered as the necessary result of the exercise of an unsound judgment. But where the great current of the evidence is against the verdict, and we cannot escape the conviction that it is wrong, we should not be deterred from setting it aside by the contention that one or two general statements or assertions of one or two witnesses bring the case within the rule which governs in cases where there is a *material* conflict of evidence.'"

In the case at bar, as we view the evidence, the verdict of the jury could find support only in the contradictory evidence of the defendant, where on her direct examination she stated that the agent of plaintiff said that the rent would be reduced to $350 per month until further notice, but, on cross-examination, she testified that this statement was he would see what could be done. The fact the owner accepted $350 per month for twenty-four months might have raised an inference to support the claimed modification but for the uncontradicted evidence that these were payments on account. This is all the evidence we find in the record to support the alleged modification. Such evidence is too inherently weak to sustain a finding that the lease was modified either by an executed oral agreement or otherwise; especially is this true, when viewed in the light of the overwhelming evidence that the only reduction in rent was a rebate of $75 per month for the three summer months of 1924. We are satisfied that the court's action in entering judgment in favor of the plaintiff, notwithstanding the verdict for defendant, was correct.

[5] It is the claim of respondent that, even giving to the evidence offered in behalf of the appellant the dignity of a "substantial conflict," the alleged modification of the lease being oral was void, as falling within the inhibition of the statute of frauds, and that the agent of the plaintiff was without authority to modify or change the terms of the lease. These claims are met by the appellant with the assertion that the modification was a reduction of the rent for a period of time until further notice, and plaintiff, having accepted the rent for each month for a period of twenty-four months without notice or demand for the full amount provided in the lease, it became an executed oral agreement for the twenty-four months, and her tender of the amount provided for in the lease for the month of October, 1926, saved the lease from forfeiture.

Subdivision 5 of section 1624, Civil Code, provides:

> "An agreement for the leasing for a longer period than one year of real property is invalid unless it is in writing, subscribed by the party to be charged or his agent, and unless the authority of the agent is in writing and subscribed by the party to be charged it is also invalid."

Section 1698, Civil Code provides:

A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.

Sinnige v. Oswald, 170 Cal. 55, 148 P. 203, is a case of somewhat similar import to the case at bar. In that case there was a written lease for ten years commencing May 1, 1912, the rent reserved being at the rate of $347 per month, payable monthly. The defendant entered into possession of the leased premises and paid the rental reserved for the months of May, June, and July, 1912, and thereafter at the rate of $317 per month to and including April, 1913. Defendants claimed that the lease was changed by a reduction of the rent for the entire term, bringing it down to $317 per month. There was no written modification of the terms, but the smaller amount was accepted from time to time and receipts in full given for the installments paid. The complaint was filed June 11, 1913, for the rent of May, 1913, in the sum of $347, and for a like sum for the June, 1913, rent. The trial court found that there was no change in the term of the lease in the alleged particular of reducing the rent. The Supreme Court held that concessions of the kind shown, *when supported by a sufficient consideration*, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the installments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms had been in writing. In the case at bar it is clear that, unless the reduced payments by defendant were supported by a sufficient consideration to bring the case within that portion of section 1698, Civil Code, as constituting an executed oral agreement, it was void because not in writing. There is no evidence in the record of a consideration therefor; its nearest approach is the following evidence given by the defendant:

> "Q. Did you at any time have a conversation with Mr. Rucker wherein you or he stated or spoke with reference to your moving in the event that the rent was not reduced? A. Yes sir. Q. When? A. Let me see, I don't know whether it was the first time I saw him or the second. Q. When was that conversation when you made that statement? A. Well, it was the first time I saw Mr. Rucker; that was really our longest conversation. Q. Was that in the summer of 1924? A. Yes sir."

[6] But the defendant had already obligated herself to pay the full amount of rent, and her removal from the premises would not have relieved her of that obligation. There was therefore no consideration that

would place the agreement within the category of an executed oral agreement, even conceding there was such an agreement. As said in Dodge v. Chapman, 42 Cal. App. 612, 183 P. 966:

> "The agreement, then, to receive for a limited time a reduced monthly rental was not in writing, and was supported by no consideration. * * * There was no period of time under the lease, when any instalment of rent was due and unpaid, that the terms of the lease could not have been enforced for the full amount."

In the case at bar, the alleged modification not being in writing, and there being no consideration therefor, the same was void under the provisions of section 1698, Civil Code. The alleged modification of the lease was made through Joseph H. Rucker; his authority to make such modification having been questioned, and his authority not being in writing, appellant contends that she was entitled to the benefit of the verdict of the jury upon that question. It was admitted that the Joseph H. Rucker Company, of which said Joseph H. Rucker was president, was the agent of the plaintiff in this transaction. The only testimony appearing in the record as to agency or the agent's authority was that of the plaintiff and Joseph H. Rucker. The former testified that the only authority of his agent was to have general care and supervision over the property, secure tenants, and collect the rents; the latter testified to the same state of facts, both testified that the agent had no power to change the terms of the lease or make any reduction in the rent; therefore there was no disputed fact upon which the jury could pass judgment. However, if we are correct in our conclusion that the oral modification claimed by the defendant is unsupported by the evidence and that no consideration passed therefor, the question of agency becomes immaterial.

[7] It is also claimed that said Rucker had a sufficient interest in the property to modify the lease irrespective of any question of agency. This claim rests upon the evidence that said Rucker had an oral agreement with the owner, that upon payment of a certain sum of money the owner would deed to him a one-third interest in the property. A portion of said sum had already been paid. But the agreement rests entirely in parol and the undisputed evidence shows that Rucker had no control or enforceable interest in the property and that no interest of any kind had vested in him. It follows that this contention is unsound.

[8] It is further claimed by appellant that the three days' notice to pay rent or quit was insufficient, and the court should have granted defendant's motion for a nonsuit. The notice is signed, "Charles A. Wayland, Owner, by Joseph H. Rucker & Co., Agent, by A. M. Hughes, Cashier." The lease was made between Arthur F. Rousseau, as lessor, and the defendant as lessee, and no notice was given the lessee of the transfer of the lease to the plaintiff, nor of his ownership of the property. It is claimed that, in the absence of such notice to her, appellant was justified in disregarding the notice given.

In support of this claim, appellant cites the case of O'Connor v. Kelly, 41 Cal. 432, but that was an action of ejectment and not unlawful detainer. In the former action the denial of title constituted the basis of the action and is a fundamental requisite of ejectment, while in the latter the foundation of the action is the failure to pay rent after the notice required by statute. We are of the opinion that the notice given was sufficient. Section 1161, Code of Civil Procedure, so far as material to a decision of this question, reads as follows:

> "A tenant of real property, for a term less than life, is guilty of unlawful detainer: When he continues in possession, * * * without the permission of his landlord, or the successor in estate of his landlord, if any there be * * * after default in the payment of rent, * * * and three days' notice, in writing. * * *"

It is also provided by section 821, Civil Code:

> "A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had."

It is further provided by section 1111, Civil Code:

> "Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenant; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby."

It is apparent from the provisions of the section of the Code last cited that the only object of a notice to the lessee is the protection of the tenant who pays rent to his landlord before notice of the grant. No such condition exists here. Further, in the case at bar the notice to quit was signed by the owner through his agent and this agent was known by the defendant to be the agent of the property and to whom she had paid her rent for more than two years previous to the notice to pay rent or quit.

The case of Plummer v. Agoure, 20 Cal. App. 319, 128 P. 1014, is, we believe, in point. In that case the complaint shows that on August 31, 1907, plaintiffs and several other persons owning the tract of land in question, executed to defendant a lease thereof upon certain covenants and reservations of rent contained therein; that thereafter the plaintiffs acquired from their colessors title to the whole property. The defendant made default in the payment of an installment of rent, and the plaintiffs, pursuant to the provisions of section 1161, Code of Civil Procedure, caused to be served upon defendant a written notice, signed by them, requiring defendant to pay said installments of rent or surrender possession of the premises. Appellant contends that, in the absence of an allegation showing an attornment by defendant as tenant, none but the original lessors named in the lease could give the notice or maintain the action. Upon this claim the following language was used by the court in its opinion:

> "Appellant contends that, in the absence of an allegation showing an attornment by defendant as tenant, none but the original lessors named in the lease could give the notice or maintain the action. The right to maintain an action by 'the successor in estate of his landlord' is expressly conferred by section 1161 of the Code of Civil Procedure. Moreover, section 821 of the Civil Code, provides: 'A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had.' Nor was any attornment of the tenant necessary to enable plaintiffs as vendees of the leased lands to maintain the action. Civ. Code, § 1111; McDonald v. Hanlon, 79 Cal. 442, 21 P. 861. The case of Reay v. Cotter, 29 Cal. 168, relied upon by appellant, is not applicable to the existing statute. Martel v. Meehan, 63 Cal. 47. Appellant's contention upon this point is without merit."

In the case of Felton v. Millard, 81 Cal. 540, 21 P. 533, 22 P. 750, it is said:

> "Appellant objects to the validity of the notice to quit because it was not signed by respondent personally, the signature being, 'C. W. Felton, by H. G. Platt, Atty.' But the notice purported to come from respondent. It was proven at the trial that Platt had authority to sign it; no written authorization was necessary (Civ. Code, § 2309); and appellant questioned the authority (if he did question it) at his own risk."

We are satisfied that under the foregoing authorities the notice given to the appellant was sufficient. In addition to this, the record shows that the appellant at all times during the ownership of the property by the plaintiff paid the rent to his agent Joseph H. Rucker Company.

[9] One further reason has been advanced by appellant in support of her claim for a reversal of the judgment—that the granting of the motion for judgment deprived her of her constitutional right to trial by jury. We do not understand that appellant attacks the constitutionality of section 629, Code of Civil Procedure, but that, where a jury has been called, and a motion for judgment, notwithstanding a verdict for the defendant, has been granted, the court in assessing damages and passing on the issues, is depriving a party litigant of his right to a jury trial. In a proper case no doubt counsel's contention would be sound. In the instant case, however, as we have pointed out, there is no substantial evidence from which the verdict of the jury in favor of the defendant could find support. The evidence in favor of plaintiff's cause of action is without conflict, and no other or different judgment could have been entered thereon. The trial court did not undertake to assess damages, but entered a judgment for the specific relief prayed for and which, under the contract between the parties, was supported by the uncontradicted evidence.

This disposes of the several points presented for a reversal of the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

PERELLI-MINETTI et al. v. LAWSON et al. (Civ. 3149.)★

District Court of Appeal, Third District, California. Feb. 8, 1928.

Hearing Granted by Supreme Court April 6, 1928.

1. Frauds, statute of 🔑56(9)—Parol agreement for partnership in lands is valid and enforceable between parties.

Partnership in lands may be formed by parol agreement, and such agreement is valid and enforceable between the parties.

2. Partnership 🔑70—Partners bear confidential relations and are trustees for each other in partnership transactions.

Partners sustain confidential relations towards each other, and each is a trustee for the other in all partnership transactions.

3. Partnership 🔑67—Whether property owned by partner before formation of partnership and used for partnership purposes became partnership property is determined by agreement and conduct.

Whether property which was owned by one of partners before formation of partnership and thereafter used for partnership purposes has become part of partnership property or remains property of the one partner is determined by partnership agreement and conduct of partners.

4. Partnership 🔑68(1)—Partnership property need not be purchased with partnership funds and, as between partners, whether land standing in names of partners as individuals is partnership property is determined by understanding and intention.

Partnership property need not be purchased with partnership funds, and true method of determining, as between partners, whether land standing in names of partners as individuals is partnership property is to ascertain understanding and intention of partners themselves from their conduct and course of dealing.

★Opinion of Court of Appeal adopted by Supreme Court, 272 P. 573.

5. Partnership 🔑68(1)—Facts held to show that land in which partners had interests before formation of partnership became partnership property.

Where partners each had undivided one-third interest in land before formation of partnership and thereafter purchased remaining one-third interest, facts *held* to show that land became partnership property.

6. Husband and wife 🔑264—Evidence held not to show that partnership land was community property of one partner.

Evidence *held* not to show that partnership real estate was community property of one partner, in view of Civ. Code, § 163.

7. Husband and wife 🔑267(1)—Statute requiring wife to join in instruments conveying or incumbering community realty is inapplicable to land acquired by husband prior to year 1917 (Civ. Code, § 172a, as added by St. 1917, p. 829).

Civ. Code, § 172a, as added by St. 1917, p. 829, providing that husband has management and control of community real property, but that wife must join with him in executing instruments leasing it for longer period than one year, or selling, conveying, or incumbering it, is inapplicable to land acquired by husband prior to year 1917.

8. Appeal and error 🔑1052(5)—Excluding evidence that lands were owned by tenants in common, if error, held harmless, where court so found.

Exclusion of evidence to show that individuals owned lands as tenants in common during existence of partnership, if error, *held* harmless, where court found that they in fact did hold lands as tenants in common.

9. Partition 🔑63(3)—In partition suit by beneficiaries and executors under deceased partner's will, evidence held to sustain findings that lands constituted partnership assets to which surviving partner was entitled for liquidation purposes.

In suit for partition by beneficiaries and executors under will of deceased partner against surviving partner and others, evidence *held* sufficient to sustain findings of trial court that lands were partnership assets to which surviving partner was entitled for liquidation purposes.

10. Quieting title 🔑44(3)—In suit to quiet title by beneficiaries and executors under deceased partner's will against surviving partner and others, evidence held to sustain findings for defendants.

In suit to quiet title by beneficiaries and executors under will of deceased partner against surviving partner and others, evidence *held* sufficient to sustain findings of trial court in favor of defendants.

11. Partnership 🔑258(8)—In suit by beneficiaries and executors under deceased partner's will against surviving partner and others to enjoin selling or mortgaging growing crops, evidence held to sustain findings for defendants.

In suit by beneficiaries and executors under will of deceased partner against surviving partner and others to enjoin surviving partner from selling or mortgaging growing crops, evidence *held* sufficient to sustain findings of trial court in favor of defendants.

12. Partnership 🔑258(8)—In suit by beneficiaries and executors under deceased partner's will against surviving partner and others to cancel mortgage upon growing crops, evidence held to sustain findings for defendants.

In suit by beneficiaries and executors under will of deceased partner against surviving partner and others to cancel mortgage given by surviving partner upon growing crops, evidence *held* sufficient to sustain findings of trial court in favor of defendants, in view of Civ. Code, § 2450, subd. 3, and § 2461.

13. Partnership 🔑244—Surviving partner had right, on death of partner, to continue in possession of partnership and to settle its business (Civ. Code, § 2450, subd. 3, and § 2461; Code Civ. Proc. § 1585).

Since death of partner dissolves general partnership (Civ. Code, § 2450, subd. 3), surviving partner, by express terms of Code Civ. Proc. § 1585, and Civ. Code, § 2461, had right to continue in possession of partnership and to settle its business.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action for partition of real property and other relief by Joseph V. Perelli-Minetti and others against W. H. Lawson and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

See, also, 199 Cal. 446, 249 P. 857.

Harry A. McKenzie and E. V. McKenzie, both of San Francisco, and W. F. Cowan, of Santa Rosa, for appellants.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondents.

FINCH, P. J. The plaintiffs, who are beneficiaries under the will of A. J. Perelli-Minetti, deceased, brought this action for the partition of two tracts of land, to quiet their alleged title to an undivided half interest therein, to enjoin the defendant Lawson from selling or mortgaging the crops growing on the land, and to cancel a mortgage given by him upon such crops. Judgment was entered in favor of the defendants, and the plaintiffs have appealed.

Prior to June 9, 1921, Lawson, S. Scatena and Perelli-Minetti were the owners of the lands in suit, the legal title standing in the names of those persons, without further designation. They had operated the lands as partners, growing grapes thereon and manufacturing wine and grape juice. It is uncertain whether or not the real estate was partnership property, but the court found that, at the time stated, Lawson and Perelli-Minetti each owned an undivided one-third interest in the land, and therefore it will be assumed, for the purposes of this opinion, that the lands were not then partnership property. The court found:

"In the latter part of May, and prior to June 9, 1921, A. J. Perelli-Minetti and W. H. Lawson entered into an agreement for the formation of a partnership concerning the above-described lands, and did form a partnership for the purpose of buying and selling said lands and other lands and the growing, cultivating, harvesting, and selling of the crops therefrom, and for such other purposes incident thereto and necessary therein as might be deemed proper by said copartners * * * [and] agreed that said partnership should be operated under the firm name and style of Lawson & Perelli, and that the profits and losses arising out of the operation of said lands should be divided equally between them. Pursuant to said partnership agreement, and for the purposes of said partnership, on or about June 9, 1921, A. J. Perelli-Minetti and W. H. Lawson purchased from S. Scatena the remaining one-third interest of S. Scatena in the lands. * * *

"Pursuant to said partnership agreement and partnership, A. J. Perelli-Minetti and W. H. Lawson forthwith took possession of said lands and did business thereon under the firm name and style of Lawson & Perelli, incurred obligations, offered for sale, cultivated and maintained said lands, raised crops thereon, and harvested the same therefrom, for the joint benefit of each of them, and each of them shared equally in the cost of maintenance and operation of said lands, and in the cost of operating the same, and the planting and harvesting of the crops produced on said lands, and shared equally in all profits and losses arising or accruing out of the acquisition of said lands, or the cultivating, planting, harvesting, or marketing of the crops produced on said lands.

"Pursuant to said partnership agreement, and pursuant to said partnership, and on the 9th day of June, 1921, partnership books were opened and kept under the name of Lawson & Perelli. Said lands * * * were carried on said books as assets of the partnership of Lawson & Perelli. For the years 1921, 1922, and 1923 written income tax reports were returned to the United States government on partnership form, signed 'Lawson & Perelli, by A. J. Perelli-Minetti,' listing said lands as an asset of the partnership of Lawson & Perelli, and, among other things, indicating the amount of profits and losses concerning said partnership of Lawson & Perelli arising from the operation of said lands.

"From the time of said agreement of partnership until the death of A. J. Perelli-Minetti on or about December 12, 1924, A. J. Perelli-Minetti and W. H. Lawson did business as partners, and pursuant to said partnership agreement, under the firm name and style of Lawson & Perelli, and cultivated said lands in the manner provided in said agreement of partnership.

"Upon the death of A. J. Perelli-Minetti on or about December 12, 1924, W. H. Lawson, as surviving partner of the partnership of Lawson & Perelli, took control of, and at all times thereafter remained in control of, and now is in control and possession and entitled to the possession of said lands and the crops growing thereon and the appurtenances and the whole thereof.

"A. J. Perelli-Minetti and W. H. Lawson during said partnership executed on behalf of the partnership of Lawson & Perelli a mortgage upon the lands described in parcel 1, Exhibit A, to the California Joint-Stock Land Bank, a corporation organized and existing under the laws of the state of California, as security for a promissory note in the sum of $35,000. Said mortgage is an outstanding obligation of the partnership of Lawson & Perelli.

"During said partnership A. J. Perelli-Minetti and W. H. Lawson, in behalf of said partnership of Lawson & Perelli, made and executed a mortgage to S. Scatena on the lands described in parcel 2, Exhibit A, as security for the payment of the sum of $41,000. Said mortgage is an outstanding obligation of said partnership.

"Said mortgages were carried on the partnership books of Lawson & Perelli as a liability against said partnership. For the years 1921, 1922, and 1923, written income tax reports were filed with the United States government on partnership forms. Said income tax reports were signed 'Lawson & Perelli, by A. J. Perelli-Minetti,' and said mortgages were listed on said reports as a liability against said partnership.

"W. H. Lawson, as surviving partner of said partnership of Lawson & Perelli, has, since the death of said A. J. Perelli-Minetti, at all times been and now is in the exclusive and entire control of said lands hereinbefore described, and the crops grown thereon, and all of the assets of said partnership. Said W. H. Lawson claims no interest in the assets of said partnership other than an interest as surviving partner of said partnership of Lawson & Perelli, and, as such surviving partner, the right to liquidate the affairs thereof.

"On or about the 11th day of April, 1925, W. H. Lawson, as surviving partner of Lawson & Perelli, and pursuant to his duties as such, made a chattel mortgage on growing crops on the lands described in Exhibit A to the Pacific Fruit Exchange, a corporation, duly authorized and existing under the laws of the state of California, as security for a sum of money not to exceed $15,000 advanced to said W. H. Lawson as surviving partner. Said W. H. Lawson borrowed said money in pursuance of his duties as said surviving partner and may be used only in liquidating the affairs of said partnership, and said mortgage was made, and the proceeds thereof may be used and are intended by him to be used only pursuant to his duties as such surviving partner.

"Upon the death of A. J. Perelli-Minetti, and immediately thereafter and ever since, W. H. Lawson, as such surviving partner, took possession and has maintained possession of the assets of said partnership, and has proceeded to liquidate the affairs of the same, paying bills of said partnership, collecting income accruing to said partnership, and caring for the lands, crops, and appurtenances thereto. Said W. H. Lawson has been diligent and faithful in the performance of said duty as surviving partner and in the liquidation of the affairs of said partnership.

"The assets of said partnership consist of the lands described in Exhibit A and the growing crops and personal property located on said lands, wine, machinery, trays, cooperage, and miscellaneous incidental property connected therewith.

"It is necessary for W. H. Lawson, as surviving partner of said partnership of Lawson & Perelli, to have exclusive control and possession of all of the assets of said partnership for the purpose of liquidating the affairs of said partnership.

"At the time of the death of said A. J. Perelli-Minetti on or about the 12th day of December, 1924, there were outstanding obligations existing against said partnership and bills receivable uncollected by said partnership. There are now outstanding obligations existing against said partnership and accounts receivable still uncollected. No accounting has ever been had as against any parties concerned or interested in said partnership. The affairs of said partnership are not yet wound up or liquidated."

In appellant's opening brief it is said:

> "There is only one primary issue in the case: Were the two ranches held as partnership land, or were the two owners tenants in common thereof? * * * Even if the land be deemed partnership property, still unless partnership creditors' rights intervened the land would descend to the heirs or be subject to testamentary disposition. * * * Therefore, we contend two propositions, that we are tenants in common; and if we are not tenants in common, there is no reason for any administration or handling of partnership affairs by the partner."

[1-4] The partnership agreement was not in writing. "A partnership in lands may be formed by an agreement in parol. Such parol agreement is valid and may be enforced between the parties." Musick Cons. Oil Co. v. Chandler, 158 Cal. 7, 12, 109 P. 613, 614; Koyer v. Willmon, 150 Cal. 785, 787, 90 P. 135; Scott v. Junquist, 179 Cal. 7, 9, 175 P. 412. The relations between the partners were confidential and each was a trustee for the other in all partnership transactions. Koyer v. Willmon, supra. "If property owned by one of the partners before the organization of the firm has been used for partnership purposes, it must be determined from the partnership agreement and the conduct of the parties whether it has become a part of the firm property or remains the property of the one partner. Thus a lease of premises occupied by the firm business, procured by one partner before formation of the partnership, may become firm property without formal assignment, if it is so understood and the partners regard it as such." Rowley's Modern Law of Partnership, § 277. "It is not necessary to show that the partnership property was purchased with partnership funds. Land standing in the name of an individual partner may have been contributed by him as his portion to the firm assets. The true method of determining, as between the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control." Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889. In McNab v. Mills, 199 Cal. 231, 248 P. 657, while they were the owners of a tract of land as tenants in common, the plaintiff and the defendant entered into an oral agreement of partnership, one of the terms of which was that the land "was to become the capital of the partnership and was to become partnership property." The land was thereafter operated by the partners as partnership property in accordance with the terms of the oral agreement. The court said:

> "While no written agreement expressing the terms and conditions of the partnership alleged to exist * * * was entered into, we are satisfied from a careful reading of the evidence that the actions, transactions, conduct, and understanding of the parties amply support the finding of the trial court that they entered into a partnership, which continued to exist. * * * In the language of the trial court: ' * * * Even though the ranch property in question may have originally come to the parties in the character of tenants in common, this character was destroyed by the parties having farmed and operated it upon joint account and as partnership property and by their acts thereby made it partnership assets.' "

[5] Appellants discuss the subject of trusts at considerable length, but the facts found by the court bring the case so clearly within the principles of law announced in the foregoing decisions that it is deemed unnecessary to pursue the subject further.

[6] Appellants contend that the interest of Perelli-Minetti in the land was community property, and that in such a case "no partnership lien can be created in land unless a wife joins in the conveyance." At the time of the organization of the partnership, section 172a of the Civil Code, enacted in the year 1917 (St. 1917, p. 829), provided:

> "The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed or incumbered."

[7] It need not be determined whether that section is applicable in partnership matters. The evidence does not show that the property in question was community property. Mrs. Perelli-Minetti testified that she was married 22 years ago; that at the time of their marriage Mr. Perelli-Minetti had no property; and that thereafter he acquired no property "by virtue of some one dying, any wills bequesting anything of that kind." Property acquired by gift after marriage is separate property. Civ. Code, § 163. The evidence does not show when the money with which Perelli-Minetti purchased the property was acquired. If acquired prior to the year 1917, section 172a is not applicable. Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; Staton v. Buster (Cal. App.) 249 P. 878.

[8] It is contended that the court erred in

excluding evidence tending to prove that Scatena, Lawson, and Perelli-Minetti owned the lands in question as tenants in common during the existence of their partnership. In their closing brief appellants say that the court found "each of the individuals [Scatena, Lawson and Perelli-Minetti] owned a one-third interest in both ranches as tenants in common." This last statement is correct. Since the issue was found in appellants' favor, the exclusion of evidence tending to prove that issue was of no possible effect against them.

[9-12] Appellants specify many particulars in which they contend that "the evidence is insufficient to justify the decision and judgment." It is unnecessary to follow these specifications in detail. The tracts of land referred to in the findings were known as the Geyserville ranch and the Santa Rosa ranch. There was a winery on the Geyserville ranch. Lawson testified:

> "We agreed like this—If we buy, * * * we will then go into a partnership * * * and make wine for ourselves, or grape juice, in the Geyersville ranch. * * * We agreed to take over * * * the Santa Rosa ranch, work it on up into condition and sell it in the next year at all the profit we could get out of it. * * * We would buy the Santa Rosa ranch, * * * Perelli-Minetti and I, and sell it. We would hold on to the Geyserville ranch, where the grape juice plant was, and manufacture grape juice, and our business would be under the name of Lawson and Perelli, * * * as partners. * * * We went to Mr. Norton's office, and drew up a contract, taking over all of the property of Scatena, Lawson, and Perelli, except the wine, and we went from then on, we were under the name of Lawson & Perelli, the firm name of Lawson & Perelli, and partners."

The lands were thereafter carried as partnership property on the firm's books, entered as such in the income tax statements, and treated by the partners as partnership property in all respects as stated in the findings. The partners maintained joint bank accounts. Up to April 26, 1923, moneys deposited therein were made payable "to either, or the survivor." After that time both their signatures were required. It was stipulated that:

> "All of the checks prior to that time * * * were in the name of Lawson and Perelli-Minetti, were signed * * * by either Mr. Lawson or Mr. Perelli-Minetti, the great vast majority of them all being signed by Mr. Perelli-Minetti."

It was also stipulated that:

> "Subsequent to July, 1923, * * * it was agreed between them that all bills, as far as possible, should be paid, one half by each, and that all the receipts coming in should be divided at the time, one half going to Mr. Lawson and the other half going to Mr. Perelli, and that as far as they could consistently, they followed that out up until the time of the death of Mr. Perelli."

Other than as appears from this stipulation, the business of the partnership was conducted in the same manner after July, 1923, as before that time. Nothing was done to dissolve the partnership, and there was no accounting between the partners. Most of the objections to the sufficiency of the evidence are covered by what has already been said, and the others are deemed to be without merit. The material findings are amply supported by the evidence.

[13] A general partnership is dissolved by the death of a partner. Civ. Code, § 2450, subd. 3. Lawson, as the surviving partner, had "the right to continue in possession of the partnership, and to settle its business." Code Civ. Proc. § 1585. "A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property." Civ. Code, § 2461; Cooley v. Miller & Lux, 168 Cal. 120, 138, 142 P. 83. "The surviving partner must settle the affairs of the partnership without delay." Code Civ. Proc. § 1585. Since more than three years have elapsed since the death of Perelli-Minetti, it is probable that the affairs of the partnership in question here have been settled, but, if they have not, then the plaintiffs may compel a settlement in an appropriate proceeding for that purpose.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

89 Cal. App. 107

COLLINS v. SARGENT et al. (Civ. 4700.)

District Court of Appeal, Second District, Division 2, California. Feb. 8, 1928.

1. Pleading 🔑277—Events subsequent to time of commencement of action should be introduced by "supplemental complaint" (Code Civ. Proc. § 464).

Generally, rights of parties are to be determined as they were at the commencement of the action, unless subsequent events affect matters in issue, and subsequent matters should be presented by supplemental pleading and not by an amendment to the complaint; office of "supplemental complaint" being to notify court and opposite party of matters occurring after action has been commenced, under Code Civ. Proc. § 464.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supplemental Complaint.]

2. Pleading 🔑277—Right to equitable relief depends on facts existing at close of litigation, and supplemental complaint is not required in equity (Code Civ. Proc. § 464).

While right to judgment in actions at law depends on facts existing at commencement of action, relief administered in equity is such as the nature of the case and facts existing at the close of the litigation demand; and supplemental complaints, under Code Civ. Proc. § 464, are not required in equitable actions to bring before the court facts and circumstances which bear on facts in issue occurring since filing of original complaint, since such pleading would be surplusage and equity does not require a useless thing.

3. Damages 🔑225—Proof of actual damages may extend to facts occurring between commencement of action and date of trial without supplemental complaint (Civ. Code, § 3283).

Proof of actual damages may extend to all facts which occur and grow out of injury after commencement of the action and up to the day of the trial, under Civ. Code, § 3283, and no supplemental complaint is necessary in order that evidence may be received showing such damages.

4. Action 🔑65—Issues and relief in injunction suit are determined on basis of situation existing at time of trial.

In action for injunction, the issues are to be determined on basis of the situation as it exists at the time of the trial, not at time of bringing the action, and relief is administered as exigencies of the case demand at the close of the trial.

5. Nuisance 🔑32—Proof of defendants' continued use of explosives adjacent to plaintiff's residence and of resulting injury occurring after commencement of action held admissible, in injunction suit, without supplemental complaint (Civ. Code, § 3283; Code Civ. Proc. § 464).

In suit to enjoin use of explosives in gravel pit near or adjacent to plaintiff's residence, evidence of acts of defendants in use of explosives, and of result of those acts occurring after complaint and amended complaint were filed, where merely cumulative and corroborative of allegations of amended complaint, *held* admissible, under Civ. Code, § 3283, though no supplemental complaint was filed under Code Civ. Proc. § 464.

6. Nuisance 🔑35—Defendants who continued use of explosives near plaintiff's residence after filing of complaint could not complain that they were enjoined from use thereof.

Where defendants, using explosives in operating gravel pit, did not heed the warning given in plaintiff's pleadings in injunction suit, but continued use of explosives and caused increased damage to plaintiff's residence and greater danger and menace to life, they were in no position to complain because they were enjoined from using explosives.

7. Nuisance 🔑16—Right to maintain private nuisance accrues only by uninterrupted use under claim of right with consent of property owner injured.

No easement or prescriptive right to maintain a private nuisance may be obtained unless nuisance continues uninterruptedly for 5 years under claim of right, and the property owner injured has knowledge of such use and consents to it, though consent may be presumed from open, notorious, and adverse use.

8. Nuisance 🔑12—Limitation in favor of maintenance of private nuisance does not run against adjoining property owner until he has been actually injured.

Statute of limitations in favor of one maintaining private nuisance does not commence to run against adjoining property owner until actual injury has been occasioned to adjoining property.

9. Nuisance 🔑15—Defendants had no prescriptive right to continue blasting operations, as against nearby resident, where owner of adjacent lands had not consented and injury had not extended over 5-year period.

Defendants' use of explosives for over 20-year period in operating gravel pit *held* not to give them prescriptive right to continue their use, as against person having residence, in vicinity, where there was no showing that owner of lands adjacent to pit knew of use of explosives, or ever consented thereto, and where injury was first suffered within period of less than 5 years.

10. Nuisance 🔑33—Finding that injuries to plaintiff's residence and menace to safety due to blasting in gravel pit were caused by activities of defendants held proper under evidence in injunction suit.

Finding that injuries to plaintiff's residence and danger to him and his family were due to blasting operations by defendants leasing pit, and not to activities of third party operating at greater distance, *held* sustained by evidence and admissions in defendants' pleadings relative to operating pit.

11. Appeal and error 🔑1058(2)—Action of court in sustaining objection was not error, where ruling was immediately reversed and witness permitted to testify fully.

Where court had first sustained objection to question and immediately after reversed his ruling and permitted witness to testify fully, error could not be predicated on court's original ruling.

12. Nuisance 🔑33—Terms of lease to third party held immaterial in action against lessees of gravel pit to enjoin blasting operations.

In action to enjoin blasting in gravel pit adjacent to plaintiff's residence, refusal to permit testimony as to terms of lease of pit to third party, except as showing that rights of defendants as lessees were subject to those of such third party, *held* not error, where terms of third party's lease were not in issue.

13. Nuisance 🔑33—Where plaintiff whose house was damaged by blasting sought injunction without damages, defendants' evidence offered to show that cracks in house were result of settling of insecure foundation, was inadmissible.

Where plaintiff sought merely injunction against continued operation of gravel pit by use of explosives, and did not seek damages, refusal to permit defendants to show that plaintiff's house, claimed to have been damaged, was built on filled ground, and that cracks were result of settling of its insecure foundation, *held* not error.

14. Trial ⚷397(3)—Findings need not cover matters admitted in pleadings.

It is not necessary for trial court to make findings of fact on matters admitted in the pleadings.

15. Nuisance ⚷25(1)—Alleged disclaimer by one sued to enjoin continued blasting operations in gravel pit held no defense, where answer subsequently filed alleged his possession and control of pit.

In action to enjoin continued blasting operations in gravel pit adjacent to plaintiff's residence, alleged filing of disclaimer by one of defendants *held* not to prevent judgment against him, where answer to amended complaint was subsequently filed, joined in by all defendants, in which he was alleged to have been in possession and control of gravel pit, and where nuisance continued after alleged disclaimer.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by C. R. Collins against George H. Sargent, Guy E. Bailey, H. G. Bailey, and H. G. Cauldwell and C. F. Horton, copartners doing business under the firm name and style of Whittier Gravel Company, for an injunction. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Walters & Mauk, of Los Angeles, for appellants.

Dorland & Sewell and H. F. Sewell, all of Whittier, for respondent.

HAZLETT, Justice pro tem. This is an action for injunction to restrain defendants (appellants) from using explosives and blasting in a gravel pit adjacent to plaintiff's home. The record does not show that any temporary restraining order was issued. On the trial plaintiff was given judgment perpetually restraining defendants from using explosives in or about the gravel pit, and defendants appeal.

The issues were joined by plaintiff's amended complaint, and defendants' answer thereto filed April 20, 1923. As affirmative matters of defense defendants allege: That since September 28, 1922, defendant Bailey held the gravel pit under a contract of purchase, and had possession and control of it ever since; that about that date he leased the pit to defendant Cauldwell, and that, ever since, defendants Cauldwell and Horton have operated the pit, and still are operating it and removing gravel therefrom; that for more than 20 years last past the gravel pit has been continuously operated and powder exploded in it; that the dwelling houses now in the vicinity were erected within the last 3 years and with the knowledge on the part of the owners and builders of the location and operation of the gravel pit; that plaintiff's lot was an old arroyo filled with cans and rubbish; that his house is on filled ground; and that whatever damage has been suffered to the house was the result of the settling of its insecure foundations and not because of any blasting or explosions by defendants. Defendants Bailey and Sargent filed so-called disclaimers.

There was little dispute in the testimony in relation to the principal matters at issue. The allegations of the amended complaint are supported by very substantial proof. In fact, the testimony given by defendants Cauldwell and Bailey admits almost daily use of explosives within 300 feet of plaintiff's home, as alleged by plaintiff, except for a period between the fore part of July and the latter part of October, 1923, but they deny any detriment or damage resulting to plaintiff, his home, or his family, and deny that the persons or lives of plaintiff's family have been or are endangered.

The testimony also shows that the territory in the vicinity was open land until the year 1920, when it was rather closely built up and occupied for residential purposes; that the gravel pit had been operated to some extent since 1892; that plaintiff bought his lot and built his house in 1920, and that the gravel pit complained of was not then being operated; that defendant Bailey bought the gravel pit in September, 1922, and had control of it until August 21, 1923, when he sold it; that defendant Cauldwell leased the pit from him, and that a Mr. Keene had the right to operate in the pit and did operate in that part of the pit more distant from plaintiff's home and used explosives; that the explosions caused by defendant Cauldwell, and by defendants Cauldwell and Horton, as copartners, before the action was commenced, occurred nearly every day and sometimes three or more in a day; that the blasts jerked and shook plaintiff's house, made the windows rattle, and cracks appeared in the house; and that in the fall of 1922 a severe blast occurred, which threw gravel and rocks, varying in size from very small to the size of an egg, into plaintiff's yard, where his children were playing, one of which rocks was embedded in a floor on plaintiff's premises.

The testimony also shows that, after this action was commenced, the explosions caused by defendants Cauldwell and Horton continued as before; that rock was thrown on plaintiff's property in the latter part of May and the fore part of June, 1923, and that two very severe explosions occurred, one on June 21, 1923, and another a short time thereafter, each of which threw gravel and rocks upon plaintiff's property and other home properties in the vicinity, one breaking the glass in the bathroom of plaintiff's house, throwing gravel and rocks into the bathroom, breaking a hole in the wall of the house the size of two fists, and loosening beams of his pergola, knocking one beam to the ground; that heavy explosions were of common occurrence; and that defendants Cauldwell and Horton, with an intermission in the summer of 1923, continued the explosions up to the time of trial.

The admissions in the answer and the testimony satisfactorily show that the right of plaintiff to the quiet enjoyment of his home was invaded by defendants Bailey, Cauldwell, and Horton, and that the use of explosives in the gravel pit by defendants Cauldwell and Horton were with the knowledge and consent of defendant Bailey, very seriously endangered the lives of plaintiff's children at his home, and resulted in injury to his house, and that those defendants threatened to and did continue the acts complained of.

As one ground of their appeal, defendants complain that the trial court erred in admitting, over their objections, testimony in relation to explosions and the results of explosions occurring after the complaint and the amended complaint were filed, no supplemental complaint having been filed.

Section 464, Code of Civil Procedure, provides that:

> "The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer."

[1] The office of a supplemental complaint is to bring to the notice of the court and the opposite party matters which occurred after the commencement of the action and which do or may affect the rights asserted and the rule asked in the action originally instituted. Conlin v. Southern Pac. R. Co., 40 Cal. App. 733, 182 P. 67; California, etc., Co. v. Schiappa-Pietra, 151 Cal. 742, 91 P. 593. Generally, the rights are to be determined as they were at the commencement of an action, unless some event happens subsequently which affects the matters in issue, such as a change of the title to the property involved in the litigation after the action was commenced, and the court cannot consider such subsequent matter unless it is presented by a supplemental pleading. Metropolis, etc., Sav. Bank v. Barnet, 165 Cal. 449, 453, 132 P. 833. Such facts, which change the liabilities of the defendants and the character of the relief sought, cannot be presented by an amendment to the complaint. Van Maren v. Johnson, 15 Cal. 308, 311, 312.

[2] The general rule, to which there are exceptions, is that in actions at law the right to judgment depends upon the facts as they exist at the commencement of the action, but such is not the rule in quity. The relief administered in equity is such as the nature of the case, and the facts as they exist at the close of the litigation, demand; and supplemental complaints are not required in actions in equity in order to bring before the court those facts and circumstances occurring since the filing of the original complaint, which bear as evidence upon the facts in issue in the original cause. It would be surplusage if they were set up in a supplemental pleading, and equity does not require a useless thing. Pennsylvania Co. v. Bond, 99 Ill. App. 535, 544, affirmed 202 Ill. 95, 66 N. E. 941.

[3] In actions at law for damages, the rule is definitely established that proof of actual damages may entend to all facts which occur and grow out of the injury after the commencement of the action and up to the day of the trial, and supplemental complaint is not necessary to permit evidence thereof to be received. Section 3283 of the Civil Code provides that:

> "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

Therefore our courts have uniformly held that no supplemental complaint is necessary in order that evidence may be received showing damages resulting after the complaint was filed, germane to the issue of damage. Berry v. Bank of Bakersfield, 177 Cal. 206, 210, 211, 170 P. 415, and cases therein cited; Saylor v. Taylor, 42 Cal. App. 474, 477, 183 P. 843. The same principles are announced in actions for injunction and damages. See Robinson v. Smith, 7 N. Y. S. 38, 42;[1] Barrick v. Schifferdecker, 48 Hun, 355, 1 N. Y. S. 21; Cauthen v. Lancaster Cotton Oil Mills, 96 S. C. 342, 80 S. E. 615, 616, and cases therein cited.

In an action for injunction, where the defendant, by his own acts committed subsequently to the commencement of the action, entitled plaintiff to different or additional relief, related, however, to the subject of the action, it was held proper to allow plaintiff to plead those acts by supplemental complaint. Jacob v. Lorenz, 98 Cal. 332, 33 P. 119.

In an action for injunctive relief and as an incident thereto for damages suffered, defendant voluntarily abated the nuisance complained of subsequently to the commencement of the action. The court held that the action is still for injunction, although the writ is not necessary and is denied, and that the judgment may go for damages and costs. McCarthy v. Gaston Ridge Mill, etc., Co., 144 Cal. 542, 547, 78 P. 7. In that action defendant pleaded by supplemental answer that he had voluntarily abated the nuisance.

[4] In an action for injunction the issues are to be determined on the basis of the situation as it exists at the time of the trial, not at the time of bringing the action (City of

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[1] Reported in full in the New York Supplement; not reported in full in 53 Hun, 638.

Jamestown v. Aiken, 211 App. Div. 577, 206 N. Y. S. 681); and "equity will administer such relief as the exigencies of the case demand at the close of the trial." Bloomquist v. Farson, 222 N. Y. 375, 380, 118 N. E. 855, 856.

Justice Story, in Jenkins v. Eldredge, 3 Story, 299, 13 Fed. Cas. 508, 509, No. 7,267, said:

> "New evidence, upon which a supplemental bill should be allowed to be filed, should not be of a mere cumulative or corroborative nature. * * * New oral evidence, merely corroborative or cumulative, is not a sufficient foundation for a supplemental bill."

To the same effect see Ledwith v. Jacksonville, 32 Fla. 1, 13 So. 454, 458, and Barriclo v. Trenton Life, etc., Co., 13 N. J. Eq. 154.

In the action of Hayden v. Albee, 20 Minn. 159, 163 (Gil. 143), for injunction to restrain the maintenance of a dam which caused plaintiff's land to be flooded, plaintiff was permitted to show, without supplemental complaint, that the dam was raised after the action was commenced, and the court held that "this was entirely proper with reference to the prayer for the abatement of the dam, for the purpose of showing that the nuisance complained of still continued to exist to plaintiff's prejudice."

In the action of Gavigan v. Atlantic Refining Co., 186 Pa. 604, 40 A. 834, for damages, it appeared that the defendant permitted noxious odors from gasoline and oils to go from its tanks and carbon oil to percolate through the ground to plaintiff's property. The court held that evidence of matters transpiring after the suit was brought was proper, not as ground of recovery, but to show the character of the nuisance, which was precisely the same as it was before the action was brought.

It was held in the case of Waterman v. Buck, 63 Vt. 544, 22 A. 15, for injunction and damages, that, by reason of the continuous depositing of sawdust in a river to the injury of plaintiff's meadow, plaintiff might show the continued depositing of the sawdust after the action was commenced, without filing a supplemental bill, as the whole matter was covered by the original bill, and that the scope of the preventive measures under the bill included the subsequent continuance of the nuisance. See, also, Balkum v. Harper's Adm'r, 50 Ala. 372.

[5] The proof of the acts of defendants in using explosives in the gravel pit and of the results of those acts, occurring after the complaint and amended complaint were filed, was merely cumulative and corroborative of the allegations of the amended complaint. Therefore the trial court committed no error in admitting the testimony showing those subsequent acts and their results.

[6-9] Defendants assert that, because the gravel pit had been operated and explosives used therein since 1892, a prescriptive right was created authorizing them to continue using the explosives. The proof showed that, prior to the operations in the gravel pit by defendants in 1922, explosives had been used in operating it, but there was no showing that before defendants commenced their operations the use of explosives caused gravel or rock to be thrown upon the adjacent lands. Those lands were subdivided and laid out into residence lots in 1919, and residences, including plaintiff's residence, were built in 1920 and were thereafter occupied. It appears that beginning in 1922 the use of explosives by defendants was and continued to be a menace to plaintiff and his family and property both before and after this action was commenced. Defendants did not heed the complaints and warning given them in plaintiff's pleadings herein, but, disregarding them, defendants continued their use of explosives and caused the greater damage to plaintiff's property and the greater menace to the persons and lives of plaintiff's family some months after this action was commenced. They had ample opportunity to show whether they could make proper use of the explosives and were found wanting; therefore they are in no position to complain, because they were enjoined from using explosives in the gravel pit.

No easement or prescriptive right to maintain a private nuisance may be obtained unless the use continues uninterruptedly for 5 years under a claim of right and the owner has knowledge of such use and consents to it. Such consent, however, need not be express, but may be presumed by reason of open, notorious, and adverse use. Grigsby v. Clear Lake Water Co., 40 Cal. 396, 406; Galbreath v. Hopkins, 159 Cal. 297, 304, 113 P. 174; Silva v. Hawn, 10 Cal. App. 544, 551, 102 P. 952. The statute of limitations in favor of the use does not commence to run until actual injury has been occasioned to the adjoining proprietor. Galbreath v. Hopkins, page 304, supra (113 P. 174).

This division of the District Court of Appeal recently announced in the case of Williams v. Blue Bird Laundry Co. (Cal. App.) 259 P. 484, petition for rehearing in the Supreme Court denied, that:

> "It has repeatedly been held that in suits for injunction by a private person to enjoin an offense amounting to a public nuisance, no lapse of time will justify the special injury;" and that "while laches or the statute of limitations may in proper cases be pleaded in bar of the original act which created the conditions sought to be enjoined, neither one is a ground of defense to a continuing nuisance, since the character of such offense gives rise to successive rights of action."

These rules have direct application to the case at bar.

There is no evidence which tends to support defendants' contention that a prescriptive right was created to use explosives. The evidence fails to show that the owner of the adjacent lands upon which plaintiff's home is situated knew of the use of the explosives prior to 1920 or that the owner ever consented to such use. No prescriptive or adverse right to use explosives in the gravel pit was shown.

[10] Defendants contend that the testimony shows that one Keene, who also had a lease on the pit, operated there during the time when the explosions occurred of which plaintiff complains, and, inferentially, that he and not defendants may have caused the explosions.

Mr. Keene testified for defendants that during that time he had a verbal lease on the pit authorizing him to operate anywhere in it; that he then operated in the front part of the pit which was more distant from plaintiff's home, and Mr. Cauldwell in the back part, closer to plaintiff's home, and that Mr. Cauldwell was operating there then; that he (Keene) did not operate in the back part during that time; that the two parts were separated by an embankment; that he fired about four shots in the back part in June or July, 1923; and that sometimes the blasts threw gravel and rock all over the pit and no man could tell what the blasts would do.

Defendant Cauldwell testified that he operated in the portion of the pit nearer plaintiff's home from some time in September, 1922, to the time of trial, except that he did not operate there between the fore part of June and some time in October, 1923, but later in his examination he said he shot there in July, 1923. This testimony by Keene and Cauldwell apparently is an attempt to becloud the issue as to the responsibility of defendants for the two heavy explosions which occurred, one on June 21, 1923, and the other a short time thereafter.

In their answer to the amended complaint defendants allege that ever since September 28, 1922, defendants Cauldwell and Horton "have been and now are operating said gravel pit and removing gravel therefrom." They did not allege that Keene had a lease on the gravel pit or any right to operate in it or that he did operate in the pit. In the light of the evidence narrated in the beginning of this opinion the admissions of the defendants, and the character of the testimony of Keene and Cauldwell above recited, it appears that the responsibility for the explosions complained of is upon the defendants, who are the appellants herein. Therefore their contention that the court should have found that Keene or some one else, not the defendants, caused the explosions complained of, has no satisfactory support, and the findings of the trial court in relation to the operations by those defendants are sustained by the evidence.

[11, 12] Defendants contend that the court erred in sustaining plaintiff's objections to offered testimony of Keene and defendant Bailey in relation to the operations by Keene in the gravel pit and in relation to the terms of the lease to Keene. When Keene was first interrogated in relation to the extent of his operations subsequent to August, 1922, the court sustained an objection to the question, but immediately afterwards reversed his ruling and permitted him to testify fully in the matter. His testimony in substance is as above recited.

Upon plaintiff's objections the court refused to permit Keene and Bailey to testify as to the terms of the lease to Keene, except to the effect that the right of defendants Cauldwell and Horton to take out gravel was subject to the rights of Keene under his lease. The ground stated by the court for the refusal was that Keene was not a party to the case, and the terms of his lease were not in issue and were immaterial. This ruling was correct.

[13] Defendants complain that the court erred in refusing to permit them to show that plaintiff's house was built on filled ground and that the cracks which damaged the house were the result of settling of its insecure foundation. The trial court ruled correctly in that regard. If plaintiff had sought redress in damages, defendants' position might have been well taken, but the only relief prayed for by plaintiff is a judgment restraining defendants' unlawful acts. Plaintiff was entitled to injunctive relief without evidence showing the appearance of the cracks, and the trial court so found.

[14] Defendants complain that certain of the other findings of facts are not supported by the evidence. Those findings, in effect, cover and find the facts to which they relate as alleged and admitted by the pleadings and as shown by the evidence, recitals of the substance of which evidence are hereinbefore set out. Each of those findings has substantial support either by the admissions in the pleadings or by the proof or by both. In fact, matters admitted in the pleadings need not have been found upon. Therefore it is unnecessary for us to recite those findings and the facts supporting them.

[15] Defendant Bailey contends that no judgment should have been entered against him herein for the reason that he filed a disclaimer. His alleged disclaimer was filed before the answer to the amended complaint was filed. In that answer, which was joined in by all the defendants, it is alleged that ever since September 28, 1922, he was and "is now in the possession of and control of" the gravel pit, and the nuisance continued after he filed his alleged disclaimer.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

89 Cal. App. 435

HARLOW v. FEDER. (Civ. 4890.)

District Court of Appeal, Second District, Division 2, California. Feb. 24, 1928.

1. Injunction 🔑59(1)—Equity will grant restraining decree where complaint alleges and court finds that breach of contract results in injury, redress of which requires several actions (Code Civ. Proc. § 526, subd. 6).

Equity will afford relief by restraining decree where complaint alleges and court finds that, as result of breach of contract, plaintiff has suffered substantial injury in number of different ways, redress of which would require several actions, in view of Code Civ. Proc. § 526, subd. 6.

2. Patents 🔑182—Restraining decree held warranted where complaint alleged and court found that defendant's breach of contract would result in irreparable injury.

In action for injunction and for damages for breach of contract for development of an invention, where complaint alleged that defendant failed to conform to requirements of contract and proceeded to use and dispose of apparatus and ideas received from plaintiff for own use, and allegations were found to be true, supported by ample testimony, *held*, that there was an irreparable injury, warranting grant of restraining decree.

3. Injunction 🔑14—Injunction may be granted where irreparable damage is threatened, irrespective of defendant's insolvency.

Where effect of act complained of is or may be to largely impair or destroy subject-matter by taking from it something which cannot be replaced, thereby causing irreparable damage, it may be enjoined, irrespective of ability of defendant to respond in damages.

4. Appeal and error 🔑1048(5)—Error in permitting cross-examination of defendant on immaterial matter held not prejudicial, in view of answer.

In action for injunction and for damages for breach of contract to develop an invention, error in failing to sustain objection to question asked defendant on cross-examination about conversation as to whether or not plaintiff would accept installment payment on $10,000, mentioned in contract, for development of invention *held* not prejudicial, where answer shed no light on any issue in case.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by John Harlow against Milton Feder for an injunction and for damages. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

E. E. Kirk, of Burbank, and Wally A. Kirk, of San Fernando, for respondent.

STEPHENS, Justice pro tem. This cause relates to certain alleged violations of a contract which we here recite in full:

"Agreement.

"Made and entered this 7th day of November, 1922, by and between John Harlow, of Ocean Park, county of Los Angeles, state of California, hereinafter called the 'first party,' and Milton Feder, of Los Angeles, county of Los Angeles, state of California, hereinafter called the 'second party,' witnesseth:

"Whereas the first party is the inventor of improvements in apparatus for making moving portraits, for which he has applied for United States letters patent, Ser. 424,404, filed November 16, 1920; and

"Whereas, both parties are desirous of exploiting said invention and placing the same on the market:

"Now, therefore, in consideration of the mutual covenants hereinafter expressed, they agree as follows:

"The second party agrees to secure a location in Los Angeles, Cal., and engage the first party at a salary of $200 per month, for a term of 3 months, and furthermore agrees to have manufactured apparatus containing said invention within the next 6 months to a number of not less than 25.

"The first party agrees to serve as demonstrator and instructor to purchasers and prospective purchasers how to operate said machines.

"The second party agrees to pay to the first party 10 per cent. of the retail selling price of said machines up to the amount of $10,000, and as soon as the $10,000 are paid to the first party, the first party agrees to execute a legal assignment conveying the entire right, title, and interest in and to said invention, and the patent to be obtained therefor, to the second party, provided, however, that the said $10,000 be paid to the first party within 6 months as hereinafter provided.

"The first party also agrees to furnish to the second party all blueprints, models, drawings, etc., that may be helpful in the manufacture of said machines and also to furnish said location with all his equipment now in his Ocean Park studio.

"It is distinctly understood that the second party has the option to revoke this contract at any time, provided, however, that he pay to the first party a salary of $200 per month for 3 months and at the time of the cancellation of this contract he turn over to the first party any and all machines, and parts thereof, that may be in the process of manufacture at the time of the cancellation of this contract, and the first party is to have these machines, and parts thereof, so turned over, without cost.

"In case the second party pays to the first party the $10,000 above referred to, he shall have the option to engage the services of the first party for the term of another year at $300 per month, and the first party agrees to act as demonstrator as above set forth for said term, and furthermore, the first party agrees in the event that the $10,000 is paid as above set forth, he will not engage in making portraits or pictures, or engage in similar work and demonstrating similar apparatus, throughout the United States and its territories, for the space of 10 years from the date hereof.

"It is understood by the parties hereto that the first party's salary of $200 per month shall not start until said location is secured, but not later than January 1, 1923, and the 6 months within which the $10,000 are to be paid, are to be computed from the date at which the salary starts.

"The first party further agrees to execute all necessary papers, documents, and assignments for foreign patents that the second party may desire to apply for, and assign them to the second party, the second party agreeing to pay all the costs therefor, and the second party agrees to pay to the first party $1,000 in addition to the amount mentioned above, when the last foreign patent is issued.

"Signed at Los Angeles, Cal., this 7th day of November, 1922. John Harlow.
"Milton Feder.

"In case the second party revokes this contract as provided hereinbefore, he agrees not to engage in making moving portraits or pictures or engage in similar work, and demonstrating similar apparatus throughout the United States and its territories for the space of 10 years from the date hereof.
"John Harlow.
"Milton Feder."

The trial court caused an interlocutory and a final judgment to be entered which restrains and enjoins defendant, appellant herein, his agents, employees, partners, or servants from acting under the name of the defendant or in the name of the Animated Photofilm System—a name assumed by defendant and his associates—and from making, using, and operating certain apparatus, machines, and parts thereof, and from selling or otherwise disposing of the same; orders an accounting and decree that appellant holds all funds shown by such accounting as trustee in behalf of respondent; allows damages in the sum of $600 occasioned by reason of the alleged breach of the contract; decrees that plaintiff have and recover of and from the defendant the sum of $300 per month, or $10 per day for each day defendant remains in possession of the machines and apparatus described in the complaint; determined the value of three machines alleged to have been delivered to J. H. Hunt under the terms of a contract between appellant and Hunt as of the value of $200 each; fixes the reasonable value of the territorial rights sold by defendant to Hunt in the sum of $5,000, and damages in the sum of $1,020; orders the return of certain personal property; and requires appellant to deliver to respondent all sums received from certain contracts entered into between defendant and third parties, amounting to a total sum of $550, that respondent have and recover of and from appellant the sum of $2,122.50 received by appellant as trustee for respondent from the sales of machines, etc., and that appellant deliver to respondent said personal property or in lieu thereof to have and recover of and from appellant the sum of $1,835.30 and costs.

[1, 2] Appellant attacks the judgment, first, upon the ground that the respondent, plaintiff below, "has a plain, speedy, and adequate remedy at law: First, an action for money had and received; second, an action for damages, and third, in an action for claim and delivery." But the complaint alleges and the court finds that as a result of appellant's breach of the contract respondent has suffered substantial injury in a number of different ways, the redress of which would require several actions. This alone is justification for the issuance of the restraining decree. Subdivision 6, § 526, Code Civ. Proc. The complaint in effect alleges that appellant failed to conform to the requirements of the contract, but this notwithstanding, he was proceeding to use and dispose of the apparatus and the ideas received from respondent as his own. The findings are that this allegation is true, and there is ample testimony supporting such findings. Considering the nature of the apparatus and ideas in question, it is apparent, and so elementary that no authorities need be cited, that there was an irreparable injury. The action is more than an action in damages based upon a contract. It is to prevent further wrongful use of property and information which was the subject of a contract and might well be far greater than accrued damages.

[3] Appellant seeks a reversal on the further ground that insolvency of appellant is not pleaded nor proved. We quote from the case of Kellogg v. King, 114 Cal. 385, 46 P. 168, 55 Am. St. Rep. 74:

> "It is well settled that the remedy by injunction may be invoked to restrain acts or threatened acts of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved. And in such case the question of the solvency or insolvency of the wrongdoer is an immaterial factor. It is the nature of the injury, and not the incapacity of the party to respond in damages, which determines the right. Where the effect of the act complained of is or may be to largely impair or destroy the substance of the estate, by taking from it something which cannot be replaced, it may be enjoined, irrespective of the ability of the defendant to respond in damages."

Appellant contends that the injunction is sought and granted, as he puts it in his brief, "upon the question of an inventor being entitled to an injunction before he has received a patent upon his product"; but we think a reading of the contract with the injunctive relief prayed for in the complaint and granted by the trial court justifies respondent's statement in his brief that:

> "Respondent's injunction is asked to prevent defendant from unlawfully exploiting the rights he secured from plaintiff [respondent] under the contract, and has nothing to do with infringement."

We do not agree with appellant in his claim that the allegations of the complaint show exact figures and do not support a prayer for accounting. While there are not extensive accounts involved, the complaint does allege unliquidated financial transactions and, taken in consideration with the cause of action as a whole, justify the prayer for this relief.

A motion for nonsuit was made by appellant in the trial court and was denied. Appellant assigns this ruling as error. The foregoing effectively answers this claim as being without merit.

Appellant complains of Exhibit No. 17, but this exhibit was introduced with consent of counsel for appellant and we cannot speculate upon the use made of it by the court, if any.

[4] Appellant was asked, on cross-examination, about a conversation as to whether or not plaintiff would accept installment payments on the $10,000 mentioned in the contract. Counsel for appellant objected on the ground that the question was incompetent, irrelevant, and immaterial. We are inclined to agree that the objection should have been sustained on the ground of immateriality, but the answer as given, sheds no light on any issue in the case and could not have prejudiced any one.

As to appellant's exception No. 34, while the objection to appellant's counsel's question was sustained, the witness proceeded to and did answer elaborately.

Exceptions 29, 30, 31, and 33: The questions related mainly to what the contract was between the parties. The contract was in writing, and the court properly sustained the objections made.

There are numerous claims on behalf of appellant as to the insufficiency of the evidence to support the findings. Suffice it to say that there is competent evidence tending to support each and every finding made.

Appellant assigns several rulings of the trial court as error. We have examined them all and find no error.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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89 Cal. App. 167

CRAIG v. SAN FERNANDO FURNITURE CO. et al. (Civ. 5644.)

District Court of Appeal, Second District, Division 1, California. Feb. 9, 1928.

1. Appeal and error 🔑102, 103—No right of appeal lies from orders granting motion to strike from complaint or orders sustaining demurrers thereto.

No right of appeal lies from orders granting motion to strike from amended complaint and orders sustaining defendant's demurrer thereto.

2. Corporations 🔑514(2)—Allegation in complaint of corporate existence is not essential to jurisdiction over person of defendant or subject-matter.

Designation of "a corporation" after name of defendant or allegation in complaint declaring the corporate existence of named defendant is not necessary to jurisdiction of court over defendant or subject-matter of action.

3. Associations 🔑1—Law recognizes group conducting business under common name as legal entity, whether they form a corporation or conduct business under common name without incorporation.

Where group of people conduct business under common name, law recognizes that group in its entity as a legal entity, and, whether they form a corporation or whether they conduct business under common name without incorporation, legal entity still exists and is designated by the common name adopted or used.

4. Parties 🔑95(5)—Changing designation of defendant after period of limitations from that of corporation to copartnership held not to change entity of copartnership.

Where complaint in personal injury action originally designated defendant as furniture company, a corporation, changing the designation of defendant furniture company after period of limitations had run from that of a corporation to that of a copartnership was not a change in entity so that a new legal entity was brought into action.

5. Limitation of actions 🔑124—Adding names of individual partners originally sued as an entity held to bring in new defendants against whom limitations had run.

Where complaint in personal injury action originally designated defendant as furniture company, a corporation, while changing designation of defendant furniture company to that of a copartnership did not change defendant's entity as a copartnership, adding names of the individual members of the copartnership was attempt to bring in new defendants after limitations had run and action could not be maintained against them as individuals.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Mary J. Craig against the San Fernando Furniture Company and others. From a judgment for defendants, plaintiff appeals. Reversed in part and affirmed in part.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondents.

HAHN, Justice pro tem. [1] The plaintiff appeals from a judgment of dismissal of the action made after an order of court sustaining defendants' demurrer to the amended complaint. The notice of appeal also includes the order of court granting defendants' motion to strike from the amended complaint and the order of court sustaining defendants' demurrer to the amended complaint. As there is no right of appeal from the orders indicated, we will consider alone the appeal from the judgment.

This is one of five separate actions which were filed in the superior court of Los Angeles county as a result of an automobile accident occurring in the county of Los Angeles on July 7, 1925. Each of the five persons riding in one of the automobiles involved in the collision, and who were injured, filed a separate suit wherein the driver, one Ira E. Stewart, and the San Fernando Furniture Company, alleged to be his employer, were named as defendants.

The attorneys for the plaintiff in this case appear also as attorneys for the plaintiffs in each of the other four cases, while the attorneys representing the defendants in the court below and on this appeal likewise appeared as attorneys for the defendants in the other cases in the court below and on the appeals to this court. Judgments of dismissal were entered after similar rulings on demurrer were made by the same trial judge in all of the cases, and appeals were taken from such judgments and involve the identical questions which are under consideration in the instant case. By stipulation of all of the parties in the five actions, the determination of the appeal in the instant case shall be determinative of the appeals in the other four cases.

Within one year after the happening of the accident, namely, on June 18, 1926, the complaint in this action was filed in the superior court. In the title of the original complaint, the defendants were designated as "San Fernando Furniture Company, a Corporation, and Ira E. Stewart." In the first paragraph of the original complaint the pleader alleged that the San Fernando Furniture Company was and is a corporation organized under the laws of the state of California, and that at all times, mentioned in the complaint the defendant Ira E. Stewart was an employee of the San Fernando Furniture Company.

On December 17, 1926, prior to the filing of any pleadings by the defendants, the plaintiff filed an amended complaint and served a copy of the same on Bailie, Turner & Lake, attorneys at law, who receipted for the same in the following form:

> "Received copy of the within first amended complaint the 17th day of December, 1926. Bailie, Turner & Lake, Attorneys for Defendants."

The title in the amended complaint reads as follows:

> "Mary J. Craig, Plaintiff, v. San Fernando Furniture Company, Alex Cohen, Louis Cohen, and Morris Cohen, Copartners Doing Business under the Firm Name and Style of San Fernando Furniture Company, and Ira E. Stewart, Defendants."

The first paragraph of the amended complaint was changed to read as follows:

> "That at all times mentioned herein the defendant San Fernando Furniture Company was and now is a copartnership; that Alex Cohen, Louis Cohen, and Morris Cohen are the names of the persons comprising said copartnership, and that said Alex Cohen, Louis Cohen, and Morris Cohen now are and at all times mentioned herein were associated together in the retail furniture business in the city of Los Angeles, Cal., transacting such business under the firm name and style of San Fernando Furniture Company; that said associates Alex Cohen, Louis Cohen, and Morris Cohen are sued herein under said firm name and style of San Fernando Furniture Company pursuant to section 388 of the Code of Civil Procedure of the state of California.
>
> "That at all times mentioned herein the defendant Ira E. Stewart was the employee of said San Fernando Furniture Company, a copartnership, and of Alex Cohen, Louis Cohen, and Morris Cohen, doing business under the firm name of San Fernando Furniture Company, and that said Ira E. Stewart at all times mentioned herein was acting as a driver of the automobile truck belonging to said San Fernando Furniture Company and to said Alex Cohen, Louis Cohen, and Morris Cohen, doing business under said common name."

On December 27, 1926, attorneys Bailie, Turner & Lake, designating themselves as "Attorneys for defendant San Fernando Furniture Company," filed a notice of motion to dismiss the action; also a notice of motion to strike out certain portions of the amended complaint; and also a general and special demurrer to the amended complaint. The same firm of attorneys filed similar motions to dismiss and to strike; also a general and special demurrer on behalf of the defendants Alex Cohen, Louis Cohen, and Morris Cohen. In due course the demurrer and motions came on for hearing, counsel appearing for the respective parties as hereinbefore designated. The motion to dismiss was granted, also the motion to strike; and the demurrer was sustained. There seems to be but one question involved in this appeal; namely, Did the plaintiff in amending her complaint in fact change the parties defendant?

It is conceded by counsel for appellant that inasmuch as the statute of limitations had run prior to the filing of the amended complaint, she would not have had the legal right as against the demurrer to bring in new legal entities in her amended complaint and proceed to trial on the merits as against such new entities. If, therefore, when in the amended complaint, the characterization of the defendant "San Fernando Furniture Company" was changed from that of "a corporation," as designated in the original complaint, to that of "a copartnership," as designated in the amended complaint, a new legal entity was brought in, then it would be conceded that the rulings of the lower court were correct. And furthermore, if in adding to the named defendants the names of Alex Cohen, Louis Cohen, and Morris Cohen, designated as "copartners and doing business under the firm name of San Fernando Furniture Company," the pleader brought new legal entities in as defendants, the rulings of the lower court were correct. Appellant, however, urges first, that changing the designation of defendant San Fernando Furniture Company from that of a corporation to a copartnership did not serve to change in any respect the legal entity of defendant, and, second, that inasmuch as under the provisions of section 388 of the Code of Civil Procedure, where persons associated together in business conduct such business under a common name, such group may be sued under such common name, the amended complaint, in adding the names Alex Cohen, Louis Cohen, and Morris Cohen, did not bring in any new defendants, but simply enlarged, by being more specific, the designation of the defendant originally named, to wit, the San Fernando Furniture Company.

[2, 3] It is well settled, at least in California, that the designation "a corporation" after the name of the defendant, or an allegation in the complaint declaring the corporate existence of the named defendant, is not necessary to the jurisdiction of the court over the defendant or over the subject-matter of the action. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Los Angeles Railway Co. v. Davis, 146 Cal. 179, 79 P. 865, 106 Am. St. Rep. 20. The determination of the question does not turn necessarily upon the name given to the intended defendant, but rather upon its identity in fact. Where a group of people are conducting a business under a common name, the law recognizes that group in its entity as a legal entity, and whether the group of persons see fit to avail themselves of the provisions of the law and form a corporation, or whether they see fit to conduct that business under a common name without incorporating, the legal entity still exists and is designated by the common name adopted or used. Hence appellant urges that from the outset she was pursuing for the purpose of satisfying her claim of damages, a certain concern doing business under the fictitious name of the San Fernando Furniture Company, and when for the purposes of perchance aiding in furnishing the proof necessary to support her claim, or to enable her more certainly to satisfy her judgment if she obtained one, she changes the designation of the entity she is pursuing, there is no real change in the party defendant.

[4] We are satisfied that appellant's contention must be sustained on the point that, in changing the designation of the San Fernando Furniture Company from that of a corporation to that of a copartnership, there was no change in the defendant entity "San Fernando Furniture Company." Respondents urge that because the original complaint designated the San Fernando Furniture Company as a corporation, and in the verification the allegation as to the corporate character of the defendant is asserted to be true, the court must assume for the purposes of considering this question that there actually did exist at the time the suit was filed a corporation by the name of the "San Fernando Furniture Company," and by reason of the amended complaint, likewise alleging the existence of a copartnership doing business under the same name there were two separate entities in existence, and that it must be presumed that the plaintiff in her original complaint undertook to make as defendant a very different entity from that which was made defendant in her amended complaint. We cannot agree with respondents in their contention on this point. It clearly appears from a reading of the original and amended complaints that the plaintiff at all times was urging her claim of damages against a business concern operating under the name of the San Fernando Furniture Company and which had in its employ, as a truck driver, one Ira E. Stewart.

While there is some conflict in the conclusion arrived at in the different states where this question has been under consideration, the California authorities unquestionably support appellant's contention. A line of demarcation is drawn in the California decisions between a situation where the error is clearly one of misnomer and one where the plaintiff has erroneously pursued a defendant to find out later that his claim in law was against an entirely different person or concern. The case of Altpeter v. Postal Telegraph Cable Co., 26 Cal. App. 705, 148 P. 241, cited by respondent, is illustrative of the latter class of cases.

In the case of Thompson v. Southern Pacific Co., 180 Cal. 730, 183 P. 153, the original complaint named the defendant as the Southern Pacific Railroad Company, a corporation. Five years after the accident out of which the action arose, the pleader discovered that the defendant against whom he had his cause of action was really a corporation by the name of "Southern Pacific Company." Two separate corporations existed, one incorporated under the laws of California, and the other incorporated under the laws of Kentucky. From the outset, the plaintiff was pursuing the concern that operated the train with which he collided, and when he discovered that he had designated the defendant by a misnomer and the court granted him permission to amend so as to correctly state the name of the defendant he urged his claim against, there was in fact no new defendant brought in.

The same question was involved in the case of Walsh v. Decoto, 49 Cal. App. 740, 194 P. 298. In the original complaint, the Blue Taxicab Corporation was named as the defendant and was described in the caption of the complaint as a corporation, and in the body of the complaint appeared the usual allegation that the defendant was a corporation. Two years after the accident, out of which the action arose, and after an answer had been filed on behalf of the Blue Taxicab Corporation as defendant, the plaintiff discovered that he was in error in designating the concern against whom he was asserting his claim as a corporation. In fact, it appears that the Blue Taxicab corporation was not a corporation, but was merely a fictitious name under which one Ezra W. Decoto conducted his business. The court permitted the plaintiff to amend his complaint, so that the defendant was designated as "Ezra W. Decoto, doing business under the name and style of Blue Taxicab Corporation." The Court of Appeal sustained the lower court in permitting the amendment. In that case, the change or departure was much more marked than in the instant case. The theory that it is the entity named as defendant that is determinative of the question is given recognition in the opinions in Artana v. San Jose Scavenger Co., 181 Cal. 627, 185 P. 850, and in John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 590, 117 P. 690, 122 P. 835.

Respondents in their briefs have cited numerous authorities and have quoted freely from cases which they urge support their contention. Space will not permit of a detailed consideration of these cases. In most of them it clearly appears that the plaintiff had mistaken the person or concern against whom he had his cause of action, as was the case in Altpeter v. Postal Telegraph Cable Co., supra. As to those cases which involve a state of facts similar to those in the instant case, where the courts hold to a different rule, we are satisfied that the better reason supports the California cases cited.

[5] Coming now to the question as to whether or not new and additional defendants were named in the amended complaint by the adding of the names, "Alex Cohen, Louis Cohen, and Morris Cohen, as copartners, doing business under the firm name and style of San Fernando Furniture Company," a somewhat different situation arises. There seems some logic in appellant's contention that, having sued the group of men in their common name under which they did business, there were in fact no new defendants added in her amended complaint when she set forth specifically the names of the individuals constituting the group, and in support of this contention appellant particularly urges a consideration of section 388 of the Code of Civil Procedure, which reads as follows:

> "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

However, the theory of appellant was given full consideration by the Court of Appeal in the case of John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 P. 690, 122 P. 835. While it is true that case arose prior to the adoption of section 388, Code of Civil Procedure, in its present form, the consideration of the principle involved would seem to lead to the same conclusion if the case had arisen subsequent to the amendment of 1907 (St. 1907, p. 704). There is considerable authority to support the proposition that where a firm is doing business under a common name, whether it be a partnership or other association of persons, the group relation as designated by the common name constitutes a separate legal entity from that of the individuals who form the group. This view is supported in the case of Billings v. Finn, 55 Cal. App. 134, 202 P. 938, where the court, in discussing the nature of a judgment rendered in a case wherein the defendants were sued in their individual names, but characterized as "copartners and doing business under" a firm name, says:

> "In such a case the action is against the persons or individuals named and not against the business, although such names are followed by the description 'partners doing business under' a designated firm name; and conversely, where the declaration or complaint is in terms against the firm, the addition of the averment that such firm consists of certain named persons does not render such persons parties individually, but the action is against the firm, such additional averments being considered mere descriptio personæ."

In the case of Artana v. San Jose Scavenger Co., 181 Cal. 627, 185 P. 850, the court gave support to the same view. There the action was brought against the "San Jose Scavenger Company" as defendant. One Peter Devincenzi appeared and filed a demurrer designating himself as the defendant and as sued under the name of "San Jose Scavenger Company." The demurrer appeared to be on behalf of himself as an individual. In discussing the questions arising on appeal from the judgment, Chief Justice Angellotti makes this statement:

> "It did not purport to be the demurrer of any party to the action, for the only party defendant was the San Jose Scavenger Company, a partnership, which, for the purposes of the statute (Code Civ. Proc. § 388) is regarded as a legal entity distinct from its members. Although, by virtue of the amendment of the section in 1907, the judgment in an action so brought binds not only the joint property of the associates, but also the individual property of the party or par-

ties served with process, it is still true that the action contemplated by the section is one against the associates as such to enforce a claim existing against the association, and is not an action against the individual members of the association; that is, unless they are, as individuals, made parties thereto. The association, whether it be a copartnership or other association of individuals transacting business under a common name, is, for the purposes of the section, a legal entity distinct from its members, and it is this legal entity which is in this action the sole party defendant."

The trend of authority seems to support this view, although there are cases, particularly from other jurisdictions, that would justify a contrary line of reason.

We are therefore led to the conclusion that the adding of the names Alex Cohen, Louis Cohen, and Morris Cohen in the amended complaint was an attempt to bring in new defendants, and, inasmuch as the statute of limitations had run, plaintiff could not maintain an action against them as individuals. Hence the judgment of dismissal as against the defendants Alex Cohen, Louis Cohen, and Morris Cohen, and the orders of the court in sustaining the demurrer and granting the motion to strike, of said individual defendants, were properly made.

For the foregoing reasons, it is ordered that the judgment of dismissal as against the defendant San Fernando Furniture Company be and the same is reversed and set aside; that the judgment of dismissal as against the defendants Alex Cohen, Louis Cohen, and Morris Cohen is affirmed.

It is further ordered that the appeals from the order of court sustaining defendants' demurrers and from the order of court granting the motions of defendants to strike from the amended complaint be dismissed.

We concur: CONREY, P. J.; YORK, J.

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89 Cal. App. 793

Nellie C. CRAIG, Plaintiff and Appellant, v. SAN FERNANDO FURNITURE CO., Alex Cohen, Louis Cohen, and Morris Cohen, Copartners, Doing Business under the Firm Name and Style of San Fernando Furniture Company, Defendants and Respondents; Ira E. Stewart, Defendant. (Civ. 5645.)

District Court of Appeal, Second District, Division 1, California. Feb. 9, 1928.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondents.

HAHN, Justice pro tem. In conformity with the stipulation entered into by counsel for the respective parties in the above-entitled cause, and in accordance with the opinion this day rendered in the case of Mary J. Craig, Plaintiff and Appellant, v. San Fernando Furniture Co. et al., Defendants and Respondents, being Civil No. 5644 (Cal. App.) 264 P. 784, it is hereby ordered that the judgment of dismissal as against defendant San Fernando Furniture Company be and it is reversed and set aside, and that the judgment of dismissal of the action as against defendants Alex Cohen, Louis Cohen, and Morris Cohen be and it is affirmed.

It is further ordered that the appeals from the order of court sustaining defendants' demurrers and from the order of court granting the motions of the defendants to strike from the amended complaint be dismissed.

We concur: CONREY, P. J.; YORK, J.

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89 Cal. App. 794

Charles E. CRAIG, Plaintiff and Appellant, v. SAN FERNANDO FURNITURE CO., Alex Cohen, Louis Cohen, and Morris Cohen, Copartners, Doing Business under the Firm Name and Style of San Fernando Furniture Company, Defendants and Respondents; Ira E. Stewart, Defendant. (Civ. 5612.)

District Court of Appeal, Second District, Division 1, California. Feb. 9, 1928.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondents.

HAHN, Justice pro tem. In conformity with the stipulation entered into by counsel for the respective parties in the above-entitled cause, and in accordance with the opinion this day rendered in the case of Mary J. Craig, Plaintiff and Appellant, v. San Fernando Furniture Co. et al., Defendants and Respondents, being Civil No. No. 5644 (Cal. App.) 264 P. 784, it is hereby ordered that the judgment of dismissal as against defendant San Fernando Furniture Company be and it is reversed and set aside, and that the judgment of dismissal of the action as against defendants Alex Cohen, Louis Cohen, and Morris Cohen be and it is affirmed.

It is further ordered that the appeals from the order of court sustaining defendants' demurrers and from the order of court granting the motions of the defendants to strike from the amended complaint be dismissed.

We concur: CONREY, P. J.; YORK, J.

89 Cal. App. 795

Dorothy D. CRAIG, Plaintiff and Appellant, v. SAN FERNANDO FURNITURE CO., Alex Cohen, Louis Cohen, and Morris Cohen, Copartners, Doing Business under the Firm Name and Style of San Fernando Furniture Company, Defendants and Respondents; Ira E. Stewart, Defendant. (Civ. 5613.)

District Court of Appeal, Second District, Division 1, California. Feb. 9, 1928.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondents.

HAHN, Justice pro tem. In conformity with the stipulation entered into by counsel for the respective parties in the above-entitled cause and in accordance with the opinion this day rendered in the case of Mary J. Craig, Plaintiff and Appellant, v. San Fernando Furniture Co. et al., Defendants and Respondents, being Civil No. 5644 (Cal. App.) 264 P. 784, it is hereby ordered that the judgment of dismissal as against defendant San Fernando Furniture Company be and it is reversed and set aside, and that the judgment of dismissal of the action as against defendants Alex Cohen, Louis Cohen, and Morris Cohen be and it is affirmed.

It is further ordered that the appeals from the order of court sustaining defendants' demurrers and from the order of court granting the motions of the defendants to strike from the amended complaint be dismissed.

We concur: CONREY, P. J.; YORK, J.

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89 Cal. App. 796

W. F. ALGUIRE, Plaintiff and Appellant, v. SAN FERNANDO FURNITURE COMPANY, Alex Cohen, Louis Cohen, and Morris Cohen, Copartners, Doing Business under the Firm Name and Style of San Fernando Furniture Company, Defendants and Respondents; Ira E. Stewart, Defendant. (Civ. 5614.)

District Court of Appeal, Second District, Division 1, California. Feb. 9, 1928.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondents.

HAHN, Justice, pro tem. In conformity with the stipulation entered into by counsel for the respective parties in the above-entitled cause, and in accordance with the opinion this day rendered in the case of Mary J. Craig, Plaintiff and Appellant, v. San Fernando Furniture Co. et al., Defendants and Respondents, being Civil No. 5644 (Cal. App.) 264 P. 784, it is hereby ordered that the judgment of dismissal as against defendant San Fernando Furniture Company be and it is reversed and set aside, and that the judgment of dismissal of the action as against defendants Alex Cohen, Louis Cohen, and Morris Cohen be and it is affirmed.

It is further ordered that the appeals from the order of court sustaining defendants' demurrers and from the order of court granting the motions of the defendants to strike from the amended complaint be dismissed.

We concur: CONREY, P. J.; YORK, J.

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89 Cal. App. 345

WOODRUFF v. GANN et al. (Civ. 5105.)★

District Court of Appeal, Second District, Division 1, California. Feb. 20, 1928.

Hearing Denied by Supreme Court April 19, 1928.

1. Vendor and purchaser 🔑95(2)—Vendor's acceptance of payment from defaulting vendee is waiver of default, suspending right of forfeiture.

Where time is made of essence of contract to purchase real property, and vendee is in default, acceptance by vendor of a payment with knowledge of the facts will operate as a waiver of the default and suspend the right of forfeiture.

2. Vendor and purchaser 🔑101—Vendor's statement that defaulting vendee would lose part payment unless balance was paid within day or two held to revive vendor's right to forfeiture.

Where vendor notified vendee that he must pay $500 or $600 in two months, and make monthly payments in order to avoid foreclosure, and after end of two months' time accepted part payment, with statement that vendee would lose the payment "unless the balance was paid within the next day or two," definite and specific notice was given vendee that terms of contract must be complied with, sufficient to revive vendor's right of forfeiture claimed to have been waived by acquiescence in vendee's default.

3. Vendor and purchaser 🔑169—Vendor may demand that vendee pay him all arrearages under purchase contract.

Vendor has right to demand of vendee payment of all sums due under contract in which vendee is in arrears.

4. Appeal and error 🔑842(1)—What constitutes reasonable time which vendor must allow vendee for performance of contract is question for trial court in specific performance suit.

In suit for specific performance, question of what constitutes a reasonable time which vendor must allow vendee for performance of contract is one for determination of trial court.

5. Specific performance 🔑121(11)—Finding that vendor's conduct was fair, and that reasonable time to perform was allowed defaulting vendee, was justified under evidence, where vendee seeking specific performance was warned eight days before forfeiture.

Where vendor gave notice to vendee, seeking specific performance, that arrearages in purchase price must be paid up in two months, and, after expiration of the two months' period,

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★Hearing denied by Supreme Court.

gave vendee warning on accepting part payment that balance must be paid within a day or two, finding of trial court that reasonable time for payment was allowed before service of notice of forfeiture eight days after time when part payment was made was justified under evidence, and under such circumstances conduct of vendor was not subject to attack as inequitable.

6. **Vendor and purchaser ⇨170—Defaulting vendee cannot put vendor in default by mere tender.**

Vendee who is himself in default cannot by mere tender put vendor in default.

7. **Vendor and purchaser ⇨170—Tender made by vendee seeking specific performance 30 days after demand for payment, and 3 weeks after service of notice of forfeiture, held ineffectual.**

Where notice of forfeiture was served by vendor after reasonable time for performance had been given vendee, vendee's tender of performance made more than 30 days after demand for payment, and 3 weeks after service of notice of forfeiture, was ineffectual, and vendee could not have specific performance on strength of tender so made.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by F. E. Woodruff against B. A. Gann and others, in which the defendant B. A. Gann filed a cross-complaint. Judgment for plaintiff, and said defendant appeals. Affirmed.

James L. Giffin, of Long Beach, for appellant.

E. E. Noon, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff seeks to quiet title to a certain tract of land by complaint in the usual form. One of several defendants, named B. A. Gann, appellant herein, filed an answer and cross-complaint in which he set forth that plaintiff had agreed by contract in writing to sell to him the land in dispute and accept the purchase price in installments. He prayed for specific performance of the agreement to convey. The contract was executed on August 19, 1921. The total purchase price was stated as $5,656.45, of which $15 was paid in cash and the balance to be paid in monthly payments of $50 on the 19th day of each succeeding month, said payments to include interest. The contract contained this provision:

> "It is further agreed that time is of the essence of this contract, and, in event of a failure to comply with the terms and provisions hereof by the said buyer, the seller shall be released from all obligations in law or equity to convey said property, and at the option of said seller the buyer shall forfeit all rights thereto and to all payments theretofore paid hereunder, and all interest of the buyer in and to said lands by reason of this agreement shall thereupon cease and terminate, and no tender or offer of performance by the seller shall be necessary or prerequisite to his right to exercise any privilege or option hereby declared, and that such right may be exercised upon default of the buyer without such or any tender or offer of performance."

It is admitted that appellant was far in arrears in his payments on April 2, 1924. On that date he made a payment of $50 to plaintiff, who then told him that the balance in arrears must be paid "in a day or two." On April 10, 1924, respondent served notice of forfeiture upon appellant, who now contends that his defaults were waived by the acceptance of the payment on April 2d. To properly pass upon this contention it is necessary to examine the evidence in some detail. During the entire time between August 19, 1921, the date of the contract, and April 10, 1924, the date of the notice of forfeiture, appellant had not paid a sufficient amount to pay interest on the principal sum due. The few payments he had made had been at irregular intervals. On January 17, 1923, a payment of $20 was made and thereafter nothing was paid until January, 1924. Respondent plainly told appellant in a conversation held on January 1, 1924, that the payments must be made or the contract foreclosed. Concerning this conversation Mr. Woodruff testified:

> "I told him I was going away, taking a trip to Florida, and when I came back if this money was paid in, this five or six hundred, and these monthly payments had been made, it would be all right; if not, I was going to foreclose the contract.
>
> "Q. Did you tell him when you were coming back from Florida? A. Along about the 1st of March."

The witness further testified:

> "I said, 'Now, Billy, if you will pay this five or six hundred dollars, and you will transfer this lease (appellant had leased the property tc a third party), the payment of the lease to our bank, and this money is paid in here, and we can credit you with $50 on each—the bank's note and my contract—why all right;' but I told him that we absolutely could not carry him any longer, that he had run—that he had promised us along in the spring when he borrowed the $1,200 from the bank, he came in and asked for that money that he could pay up the Commercial Bank a note he owed them, and he says, 'I can't take that lease out of the Commercial Bank until I pay them up, but if you will loan me $1,200 I will get that lease and bring it down here and all the payments will be made here;' now that was along in the spring of 1923, and, as I say, he never brought the lease in, never paid us a dollar."

The cashier of the bank referred to as "plaintiff's bank," had admonished appellant on several occasions prior to January, 1924, to keep up his payments. Respondent went to Florida, returning about March 1st. On January 30, 1924, appellant paid on the contract the sum of $500, of which $200 was ap-

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes plied on interest and the balance was for taxes. On April 2, 1924, appellant paid the sum of $50 to apply on the contract, but at that time respondent notified him that he was in arrears something over $800, and that "the balance must be paid in a day or two." Mr. Woodruff testified:

> "I then told him I would not carry him longer; that he must pay up at once or I would cancel his contract; he said how much would it require to bring his payments to date, up to date; I looked at his account and found it was over $800 in arrears; he said he wanted to give me the $100 check (one-half of which to be applied on this transaction); I again told him he would lose it unless the balance was paid within the next day or two; he said he would get busy and pay the balance right away; I told him that if he cared to have it I would pay him back all the money he had paid in on the contract, that I had no desire to keep the money he had paid in, but if he wanted to keep the property he must make the delinquent payments in the next day or two."

[1-3] It is argued by appellant that, in the case of a contract where time is made of the essence and a vendee is in default, the acceptance by the vendor of a payment with knowledge of the facts will operate as a waiver of the default and will suspend the right of forfeiture. This is undoubtedly the general rule. Appellant goes further and contends that before the vendor can revive the right of forfeiture a definite and specific notice of his intention so to do must be given to the vendee. He cites as authority the cases of Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126, and Stevinson v. Joy, 164 Cal. 285, 128 P. 751, in both of which cases language giving some support to his contention can be found. Both of these cases were, however, referred to and construed in the later case of Hoppin v. Munsey, 185 Cal. 678, at page 688, 198 P. 398, 402, where it is said:

> "These cases do not hold that such stipulation for forfeiture may not be restored and enforced by the vendor in any other manner than by giving a definite and specific notice of the intent to do so."

[4, 5] The rule is there laid down that it may be inferred from the conduct of the vendor and vendee in their dealings with each other that both parties understood that the conditions regarding forfeiture were to be treated as restored and that the vendee understood that he was in default. The same position was taken by the court in Adams & McKee Land Co. v. Dugan, 68 Cal. App. 226, 228 P. 681. Although it seems from the two decisions last mentioned that it is not always necessary to make the notice of restoration "definite and specific," it can be well said that in the case before us Mr. Woodruff did in fact give definite and specific notice to Mr. Gann that the terms of the contract must be complied with. On January 1, 1924, Mr. Gann was told that he would have to pay $500 or $600 by the return of Mr. Woodruff on March 1st and also make the monthly payments, otherwise the contract would be foreclosed. The sum of $500 was in fact paid on January 30th, but the monthly payments were not made. The payment of April 2d must be considered in the light of the conversation held at that time as well as that of January 1st. At the time the payment was accepted on April 2d appellant was informed of the amount of his arrears and was told that he would lose the payment he was then making "unless the balance was paid within the next day or two," to which appellant replied that he would "pay the balance right away." Mr. Woodruff went so far at that time as to offer to return to Mr. Gann all the money he had paid on the contract. He had the right to demand the payment of all sums in which the vendee was in arrears. Weatherbee v. Sinn, 73 Cal. App. 98, 238 P. 134. It cannot be contended that the conduct of Mr. Woodruff was not fair and equitable in the premises. It is well settled that the question of what is a reasonable time which the vendor must allow for performance is one for the determination of the trial court. Hoppin v. Munsey, supra; Adams & McKee Land Co. v. Dugan, supra; Weatherbee v. Sinn, supra. It cannot be said that the trial court was not justified in holding that the time allowed in the case before us was reasonable.

[6, 7] Appellant further contends that his prayer for specific performance should be granted, since he made tender of the total amount due after April 10, 1924. Since notice of forfeiture was served on April 10th, after reasonable time for performance had been given, the appellant was not in position to make a tender. A vendee who is himself in default cannot by a mere tender put the vendor in default. See Glock v. Howard, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where it is said:

> "It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor."

Moreover, the record discloses that no tender was made by appellant until May 3, 1924, more than 30 days after the conversation of April 2d. In view of all the circumstances, the trial court was justified in holding that a tender made more than 30 days after the demand of April 2d came too late.

Complaint is made that the trial court erred in sustaining a demurrer to the cross-complaint. The record before us does not show that a demurrer was filed by the party appealing. On the other hand, the record does show that findings were made by the trial court on the issues presented by the cross-complaint.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

89 Cal. App. 384

LUMAS FILM CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. (Civ. 5868.)

District Court of Appeal, Second District, Division 1, California. Feb. 21, 1928.

1. Prohibition ⚷28—Finding on substantial evidence that corporation was within jurisdiction held conclusive on appeal on application for prohibition (Code Civ. Proc. § 411, subd. 2).

Finding of trial court, on substantial evidence, that corporation was doing business in state, and hence that it was within jurisdiction of court, and that service of summons, under Code Civ. Proc. § 411, subd. 2, was valid, *held* conclusive on Court of Appeal on application for writ of prohibition.

2. Prohibition ⚷3(2)—Prohibition held not to lie, where disputed jurisdiction was based on finding resolving contested fact issue whether corporation was doing business in state; there being adequate remedy by appeal (Code Civ. Proc. § 411, subd. 2, and § 1103).

Writ of prohibition *held* not to lie, where disputed jurisdiction over foreign corporation was based on finding resolving contested issue of fact as to whether corporation was doing business in state, and hence whether service of summons, under Code Civ. Proc. § 411, subd. 2, was valid; there being plain, speedy, and adequate remedy by appeal, so that case fell within section 1103.

Application by the Lumas Film Corporation for writ of prohibition to be directed to the Superior Court in and for the County of Los Angeles, Charles S. Burnell, Judge, to restrain further proceedings in a certain action. Demurrer to petition sustained, and alternative writ discharged.

Mitchell, Silberberg & Davis, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, C. B. Penn and Melvin T. Dunlavy, all of Los Angeles, for respondent.

HOUSER, J. [1] The facts in this matter appear to be that the petitioner herein is a foreign corporation; that in an action brought against it in this state an alleged service of summons was made in accordance with the provisions of subdivision 2 of section 411 of the Code of Civil Procedure; that thereupon the defendant made a motion to quash the service of summons, which resulted in the denial of said motion. Thereafter petitioner presented to this court its petition for a writ of prohibition to be directed to the lower court, restraining it from taking further proceedings in the action. An alternative writ was issued. On the principal ground that the petition does not state facts sufficient to entitle petitioner to the writ for which it prays, respondent has demurred to the petition.

In the lower court, the motion to quash service of summons was heard on affidavits introduced by the respective parties appearing before the court. The gist of the question presented to such court was whether jurisdiction of the person of the defendant had been acquired. On the part of the moving party, the facts as set forth in the affidavits upon which it relied tended to establish that the corporation was not "doing business" in this state at the time it was served with the summons in the action, nor was the person upon whom the alleged service was had the or any officer denominated in the statute as the proper person upon whom to serve such process. On the other hand, by affidavits introduced in its behalf, the respondent to such motion presented facts which showed to the contrary of the conclusions sought to be established by the moving party in the matter before the court. It thus becomes evident that, in deciding the ultimate question of jurisdiction, the lower court was basing its conclusion upon its implied finding of facts, to wit, that at the time the action was commenced the defendant was "doing business" in this state, and that the service of process was properly had upon a person designated by the statute. In such circumstances it is also manifest that the granting by this court of the peremptory writ of prohibition necessarily would involve on its part an examination of the evidence adduced in the lower court solely with a view to a determination by this court of the correctness of the conclusion as to matters of fact reached by the lower court on evidence properly before it. No direct authority for such procedure has been produced by petitioner; nor is this court aware of the existence of any authority which would indicate that such a course would be in accordance with settled procedure or correct in principle. On the other hand, the law is thoroughly settled that, on appeal, findings of fact made by the trial court on substantial evidence in support thereof are conclusive so far as the appellate tribunals are concerned. This court is advised of no reason why a similar rule should not obtain in a proceeding of the nature of that here involved. To hold otherwise, and to reach a conclusion different in any respect from that reached by the trial court, would amount to nothing less than a new trial by this court on the facts, and a substitution of the conclusion by this court thereon for the

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conclusion with reference to such facts as found by the trial court.

In Beaulieu Vineyard Co. v. Superior Court, 6 Cal. App. 242, 91 P. 1015, it is held that the writ of prohibition lies to prevent a proceeding without or in excess of jurisdiction only; that it is a preventive, and not a corrective, remedy; and that it will not lie to review the regularity of the proceedings of a court within its jurisdiction, nor to determine the sufficiency of evidence to support its findings, nor any question of mere error in the exercise of jurisdiction. To the same effect in principle is the case of Murphy v. Superior Court, 84 Cal. 592, 24 P. 310, where it is ruled that, where a court has power to determine a jurisdictional fact, its determination cannot be collaterally attacked upon an application for the writ of prohibition. With the exception that the case of Dickinson v. Zubiate Mining Co., 11 Cal. App. 656, 106 P. 123, was heard on appeal, in its material facts it closely resembles the instant case. It was there held that, where, on a motion to quash the service of summons, the court acted on conflicting evidence, its conclusion could not be disturbed by the appellate court.

In the case of Mines D'Or de Quartz Mountain Société, etc., v. Superior Court, 91 Cal. 101, 27 P. 532, in principle the rule is laid down that the question of whether a court has acquired jurisdiction of the person of a defendant is primarily for the determination of such court, and that its decision thereon cannot be reviewed through the medium of the writ of prohibition. The syllabus therein is as follows:

> "Where a court has jurisdiction of the subject-matter of an action, and has ordered that the summons be served upon the defendants by publication, the question as to whether it acquires jurisdiction over the defendants so served is one which the court has authority to pass upon, and a writ of prohibition will not lie to restrain the court from further proceeding in the action until the defendants should appear or be personally served with the summons, on the alleged ground that the case is not a proper one for the publication of summons."

In Lange v. Superior Court, 11 Cal. App. 1, 103 P. 908, a writ of prohibition was prayed for the purpose of restraining the execution of a judgment for contempt for the violation of an injunction. The ground upon which the writ was asked was that jurisdiction in the lower court was lacking, in that the complaint in the action was defective and because of failure of proof of the violation of the injunction. In denying the peremptory writ, in part the court said:

> "Jurisdiction is 'authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it does not depend upon the regularity of the exercise of that power or upon the rightfulness of the decisions there made.' 17 Am. & Eng. Ency. of Law, p. 1041. * * *
>
> "It is equally well settled that a wrong decision by a court as to the sufficiency of the evidence to support a finding cannot be questioned in this proceeding. Beaulieu Vineyard Co. v. Superior Court, 6 Cal. App. 250 [91 P. 1015]; Wreden v. Superior Court, 55 Cal. 504."

The rule that prohibition will not lie where the determination of the question of jurisdiction of the lower court properly depends on a finding of fact by such court is aptly stated in 22 Ruling Case Law, p. 12, as follows:

> "* * * If the court has jurisdiction of the subject-matter, and the determination of the question as to jurisdiction of the person depends on contested facts which the inferior tribunal is competent to inquire into and determine, prohibition will not be granted though the court should be of the opinion that the questions of fact have been wrongly determined by the court below, and, if rightly determined, would have ousted the jurisdiction. In re Alix, 166 U. S. 136, 17 S. Ct. 522, 41 L. Ed. 948; Ex parte Oklahoma, 220 U. S. 191, 31 S. Ct. 426, 55 L. Ed. 431; Finley v. Moose, 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 79; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178."

The following statement of the law occurs in 21 California Jurisprudence, p. 580:

> "The writ is never employed as a means of correcting errors of inferior tribunals, even though objection thereto is based upon jurisdictional grounds."

In the case of County of Sutter v. Superior Court, 188 Cal. 292, 296, 204 P. 849, 851, it is said:

> "If an order made as an incident in the progress of a case involves the question of jurisdiction, prohibition cannot be invoked to annul the order or stop proceedings under it. 'If that were so, then in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could by prohibition stop the ordinary progress of the action toward a judgment until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a nisi prius court.' Agassiz v. Superior Court, 90 Cal. 103 [27 P. 50]."

[2] Section 1103 of the Code of Civil Procedure provides, in effect, that the writ of prohibition may properly issue in those cases only where the aggrieved party has no plain, speedy, and adequate remedy in the ordinary course of law.

In the case of Mines D'Or de Quartz Mountain Société, etc., v. Superior Court, 91 Cal. 101, 27 P. 532, supra, it appears that the trial court made an order in an action directing that the summons therein be served on the defendants by publication thereof. Thereafter the defendants appeared specially, and moved to vacate such order on the ground that the action was "in personam," and therefore not one in which summons by publication was authorized. The motion was denied. The defendants again entered a special appearance in the action, and moved for an order staying all proceedings therein until such time as they should enter their general appearance. Such motion also having been denied, the defendants petitioned the Supreme Court for a writ of prohibition commanding the superior court to desist from further proceeding in the action until petitioners should either enter a general appearance therein, or were personally served with summons in the action. In denying the writ, the Supreme Court declared that it was neither necessary nor proper for it to determine whether the action in the superior court was one in which summons might be legally served by publication, and added the following:

> "* * * That court has jurisdiction of the subject-matter of the action, and whether it has obtained jurisdiction over the persons of petitioners is a question which (it) must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress; and if, in the decision, error shall be committed to the prejudice of petitioners, the law affords them a plain, speedy, and adequate remedy by an appeal from any judgment which may be entered against them. Agassiz v. Superior Court, 90 Cal. 101 [27 P. 49], and cases cited."

In the case of Germain Seed, etc., Co. v. Justice's Court, 41 Cal. App. 397, 182 P. 784, it is held, in effect, that the right of appeal given by the law on the denial of a motion to quash the service of summons affords a plain, speedy, and adequate remedy, and consequently that prohibition will not lie; citing Burge v. Justice's Court, 11 Cal. App. 213, 104 P. 581; Simpson v. Police Court, 160 Cal. 530, 117 P. 553; Hamberger v. Police Court, 12 Cal. App. 153, 106 P. 894, 107 P. 614. To the same effect is McDonald v. Agnew, 122 Cal. 448, 55 P. 125.

From all the authorities hereinbefore cited, it follows that the demurrer to the petition should be sustained, and that the alternative writ issued herein should be discharged. So ordered.

We concur: CONREY, P. J.; YORK, J.

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89 Cal. App. 423

CLINCH et al. v. SHAFER. (Civ. 5093.)

District Court of Appeal, Second District, Division 1, California. Feb. 24, 1928.

Appeal and error ⚷1170(3)—Judgment for brokers' commission in procuring loan should be affirmed, notwithstanding deficiencies in complaint, where evidence showed plaintiffs entitled to recover (Const. art. 6, § 4½).

Judgment in brokers' action for commission for procuring loan for defendant under express written contract therefor should, under Const. art. 6, § 4½, be affirmed, notwithstanding defects in complaint which did not allege that services were performed at defendant's request or were performed or rendered for defendant, where defendant was not misled, and did not demur, and trial court found for plaintiffs on all issues, and evidence, without contradiction, showed loan was secured for defendant, and reversal would be followed by amendment to complaint and eventually same result.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by Mostyn C. H. Clinch and another, copartners doing business under the firm name of Clinch & Thurtle, against H. N. Shafer. From judgment for plaintiffs, defendant appeals. Affirmed.

Thomas L. Clay, of Los Angeles, for appellant.

Jones, Wilson & Stephenson, of Los Angeles, for respondents.

WOOD, Justice pro tem. This is an appeal by defendant from a judgment in plaintiffs' favor for the sum of $1,410. The action is based upon the following proposal in writing made by defendant to plaintiffs under date of January 15, 1924:

> "In consideration of your efforts to obtain a loan for me enabling me to construct a store and apartment building at the northwest corner of Moneta and Forty-Third street, Los Angeles, I agree to and will make this loan, if agreeable to your princip*les*, upon the following basis:
>
> "The building to be constructed by the Vaughn Construction Company or such other contractor of your nomination as may be acceptable to me and to be built in accordance with plans and specifications heretofore submitted to you by Mr. H. F. Withey, architect.
>
> "The maximum cost of the building completed, in accordance with said specifications, not to be in excess of $47,000. The contractor having the privilege of using foundations already in but not to have the right of using certain brick and lumber now stored on this property unless by separate arrangements for purchase of same from me.
>
> "The aforesaid loan of $47,000 shall bear interest at the rate of, not to exceed 8 per cent. per annum payable quarterly and will be in the form of a first mortgage of from 40 to 50 per cent. of the value of the completed property which shall mature in some three to five years. Balance of the loan to be in the form of a trust deed payable monthly or annually and to be retired within three years from date.
>
> "I am willing to assign and use the major portion of the income from this property for the purpose of paying interest on the loan and for the reduction of princip*le* amount of same. Interest on this loan is to be computed from the date or dates these funds are advanced.
>
> "The $47,000 to include any commission which may be required to be paid to you or any one else for services in the securing of the said loan.
>
> "If these terms are in general acceptable to your princip*les*, I will immediately furnish you

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with a copy of my last financial statement; also submit for your consideration the certificate of title to said property, and will co-operate with you and your principles in every reasonable way, especially as to details, to facilitate a prompt conclusion of this loan and the erection of the proposed building.

"This proposal is subject to the acceptance of your principles within five (5) days from date."

Upon the receipt of this proposal plaintiffs promptly arranged with the National Bond & Mortgage Company to make a loan to defendant in accordance with the terms thereof. On January 17, 1924, plaintiffs informed defendant that the loan had been obtained. Defendant on the same day furnished plaintiffs a copy of his last financial statement. This was approved by the party making the loan, who was then ready, able, and willing to proceed. On January 18, 1924, plaintiffs, after notifying defendant of these facts, demanded the certificate of title covering the property on which the loan was to be made, but the certificate was not forthcoming. A demand for the certificate was made three times during the following week, but it was not delivered either to plaintiffs or to the National Bond & Mortgage Company. Finally, on January 28, 1924, plaintiffs demanded of defendant that he proceed with the loan or pay their commission. Defendant refused saying he had decided not to build. It was shown by the evidence that the commission sued for was reasonable for this kind of a loan.

At the commencement of the trial defendant objected to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action. In some particulars the complaint is undoubtedly defective. It is alleged in the first count that plaintiffs notified defendant that a loan had been secured from the National Bond & Mortgage Company, but there is no specific allegation that the loan was actually secured. Again, plaintiffs allege that defendant agreed to pay them "any commission required by said plaintiffs for their services in the securing of the said loan." This is followed by certain allegations concerning the making of the loan and by the statement "that plaintiffs are entitled to a compensation in the sum of three per cent.," etc. There is no allegation that the sum of $1,410 is reasonable compensation for the services rendered or that plaintiffs have been damaged in any sum by the refusal of the defendant to perform his part of the agreement. Just criticism is also directed to the second count, in which it is alleged that defendant "has become indebted to the plaintiffs in the sum of $1,410 for services performed by said plaintiffs in connection with the securing of a loan for said defendant." There is no allegation that the services were performed at the instance and request of defendant; nor is there an allegation that the services were performed or rendered for the defendant. One or the other of these allegations should have been made.

Notwithstanding the deficiencies of the complaint above pointed out, we are of the opinion that the judgment should be affirmed under the salutary provisions of section 4½ of article 6 of the Constitution, wherein it is provided that:

> "No judgment shall be set aside * * * in any case * * * for any error, as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The findings of the trial court are in favor of the plaintiffs on all of the issues presented and are amply sustained by the evidence. The evidence shows without contradiction that the loan was in fact secured, the services were rendered for the defendant, and the amount of the judgment was reasonable compensation. Defendant did not file a demurrer, but chose to stand upon his objection to the evidence made on the day of the trial. The complaint was sufficient to fully inform him of the issues he would be called upon to meet. He was not misled or prejudiced in any way. The facts were simple and his defense was fully presented to the court. A reversal of the judgment now would be followed by a simple amendment to the complaint, a long delay, and inevitably the same final result. The section of the Constitution above referred to has often been applied by reviewing courts with great propriety to criminal actions. It can be applied with equal propriety to civil actions when, as in the case before us, there has been no miscarriage of justice.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

89 Cal. App. 416

LEVINSON v. SILVERMAN. (Civ. 6181.)

District Court of Appeal, First District, Division 1, California. Feb. 24, 1928.

1. Sales 🔑371—Seller, not having tendered rubles with intent to pass title, was not entitled to recover contract price as damages for buyer's breach (Civ. Code, § 3310).

Where seller had never tendered rubles to buyer with intent to pass title, he was not entitled, under Civ. Code, § 3310, to recover contract price as damages for buyer's breach.

2. Sales 🔑202(1)—Where contract provides for payment on delivery, tender implies fulfillment of such condition before title passes.

Where a sales contract provides that payment is to be made on delivery, a tender implies that fulfillment of such concurrent condition must be complied with before title passes from seller to buyer.

3. Sales 🔑199—Generally, question of when title passes is one of intention.

Generally, the question of when title to goods sold passes is one of intention between parties.

4. Sales 🔑384(1)—Remedy of seller demanding payment for rubles as condition to delivery held under statute fixing damages where title remains in seller (Civ. Code, § 3311).

Where allegations in complaint for balance of purchase price of rubles showed that seller at all times demanded purchase price as condition to delivery, since defendant's defective denial could not be construed as an admission that rubles were tendered in other manner than to pass title on payment, trial court erred in applying measure of damages provided by Civ. Code, § 3310, as for buyer's breach of agreement after title has vested in him, but seller's remedy was controlled by section 3311 establishing measure of damages where title to goods remains in seller.

5. Sales 🔑153—As respects damages for buyer's breach, seller's deposit of rubles in court did not change character of conditional tender, but merely preserved tender alleged (Civ. Code, §§ 3310, 3311).

In suit for balance of purchase price of rubles, where complaint showed that seller at all times demanded purchase price as condition to delivery, fact that rubles were deposited in court at beginning of suit did not change character of tender from conditional tender under which title did not pass, governed, as respects damages, by Civ. Code, § 3311, to tender with intent to pass title, governed by section 3310, since such deposit served only to keep good the character of tender alleged.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by M. Levinson against Herman Silverman. From a judgment for plaintiff, defendant appeals. Reversed.

James, Pace, Smith & Younkin, of Los Angeles, for appellant.

Henry O. Wackerbarth, of Los Angeles, for respondent.

TYLER, P. J. Action to recover the balance of the purchase price of certain Russian rubles which the plaintiff's assignor sold to the defendant. The complaint alleged the entering into of a written agreement between the defendant and the plaintiff's assignor on the 14th day of February, 1918, wherein the plaintiff's assignor agreed to sell and the defendant agreed to purchase 40,000 Russian rubles at the sum of 15 cents per ruble, payable in installments of $100 or more until the entire amount of the $6,000 was paid, the agreement providing that payment should not cover a period in excess of two years; that the defendant then and there paid a deposit of $250 on account of the purchase price, said sum to apply on the last installment; that plaintiff's assignor had delivered 4,000 rubles under the contract between the dates of February and June, 1918, and received therefor the sum of $600. It is then charged that defendant thereafter refused to accept and pay for the remaining 36,000 rubles at the rate stipulated, less the deposit of $250; that plaintiff's assignor had upon various occasions offered and tendered to defendant the 36,000 rubles and demanded the balance of the purchase price less the deposit, but defendant failed and refused to pay for the same. Plaintiff further alleged that his assignor had kept and performed all the conditions incumbent upon him to be performed. He also alleged tender by a deposit of the rubles with the clerk of the court. Defendant denied that plaintiff's assignor had kept or performed all the conditions or provisions of the contract incumbent upon him to be performed. By a second defense misrepresentation and undue influence on the part of plaintiff's assignor were alleged. By a third and fourth defense lack of consideration and an accord and satisfaction were pleaded. Under the second, third, and fourth defenses testimony was introduced to show that plaintiff's assignor, one A. L. Greenberg, claimed to be a friend of defendant's and had induced him to purchase the rubles.

It also appeared that Greenberg had made statements to defendant that the rubles were better than United States Liberty bonds which defendant was desirous of purchasing. There was evidence to the effect that about the time the contract was entered into defendant was weak mentally and shortly thereafter was committed to the Southern California state hospital as an insane person; that upon his release, the following year, the parties had entered into a written agreement, for a consideration, whereby Greenberg had released defendant from all claims of every kind and character. The trial court, however, found against defendant on his affirmative defenses. It also found that plaintiff's assignor, Greenberg, had tendered and offered the 36,000 rubles with the intent to pass title, but that defendant had failed and refused to accept or pay for the same. Judgment followed in favor of plaintiff in the sum of $6,768.92. Motion for a new trial was made and denied. This is an appeal from the judgment. No claim is made upon the question of the sufficiency of the evidence to support the findings upon defendant's affirmative defenses, but it is claimed that the findings of a tender with intent to pass title of the rubles finds no support in the evidence.

[1] Under plaintiff's pleading and the proof adduced in support thereof it is clear that the judgment fixing the damage rests on the theory that there was a tender of the rubles to defendant with the intent to pass title, for which reason plaintiff was entitled to recover the full contract price. If the title to the rubles has passed under the tender the trial court adopted the proper measure of damage, for our Civil Code provides that, upon the breach of an agreement to pay for personal property sold, the detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price. Section 3310.

Here, however, as appellant claims, there is absolutely no evidence to show that a tender was made with intent to pass title. We have read the entire record carefully and we fail to find evidence of a tender of any kind, much less one made with intent to pass title. It is perfectly apparent from a reading of the record relating to the question of "tender" that the attorney for the plaintiff was of the opinion that his act in depositing the rubles with the clerk of the court at the time of the filing of the complaint constituted a tender with intent to pass title. Greenberg's testimony relating to the tender is as follows:

> "Q. Did you ever ask him (defendant) to take delivery of them? A. Yes, sir.
>
> "Mr. Wackerbarth: No question is made about the tendering of the rubles, is there Mr. Gerecht?
>
> "Mr. Gerecht: I wish you would bring it up, because I don't know.
>
> "Mr. Wackerbarth: I mean tendering of the rubles to the clerk of the court?
>
> "Mr. Gerecht: It is in the pleadings.
>
> "Mr. Wackerbarth: I deposited them myself.
>
> "Q. Mr. Greenberg: Have you any knowledge as to whether or not the rubles, 36,000 rubles, were deposited with the clerk of the court? A. Yes, sir."

The record then shows that the rubles were deposited with the clerk at the time of the filing of the complaint. Further on Greenberg testified that he told defendant he wanted his money, but that he did not tender him the rubles, but made a claim for some $12,000. Conceding that plaintiff was at all times demanding that defendant perform his contract by paying for the rubles as his pleading alleges, he not having tendered them with intent to pass title, he was not entitled to the measure of damage set forth in section 3310 of the Code.

[2, 3] Every tender does not transfer title; and where, as here, the contract provides that payment is to be made upon delivery, the tender implies that the fulfillment of this concurrent condition must be complied with before title will pass from the seller to the buyer. As a general rule the question of when title to goods sold passes is one of intention between the parties. Had plaintiff tendered the property and demanded payment as a condition to delivery his remedy would be controlled by section 3311 of the Civil Code, which establishes the measure of damages where title to goods sold remain in the seller. That section provides that, upon the breach of an agreement to buy personal property, the detriment caused by a breach of a buyer's agreement to accept and pay for such property, the title to which is not vested in him, is deemed to be (1) if the property has been resold pursuant to section 3049, the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or (2) if the property has not been resold in the manner prescribed by section 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred, in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it. The principle here involved is elementary. It is fully considered and discussed in Gopcevic v. California Packing Corp., 64 Cal. App. 140, 220 P. 1078.

[4] Respondent makes the claim that, even conceding that no tender was made with intent to pass title, defendant is in no position to raise the question as his pleadings admit, by reason of a defective denial, that such a tender was made. We do not so construe them. Plaintiff pleaded his tender in the following language:

> "That the said A. L. Greenberg has upon various and divers occasions offered and tendered to defendant the remaining 36,000 rubles and demanded of and from said defendant the balance of the purchase price therefor, less the deposit of $250 paid on account of such purchase price, but the defendant has failed and neglected and refused to pay the same or any part thereof."

[5] These allegations show that plaintiff was at all times demanding the purchase price as a condition to delivery. Assuming the denial to be imperfect, it cannot be construed as an admission that the rubles were tendered in any other manner than to pass title upon payment, for there is no allegation of an unconditional tender or of any tender other than with intent to pass title upon payment, and,

as above indicated, the evidence shows that plaintiff's assignor was at all times demanding payment, but it does not show that any tender was made either with or without the intent to pass title. Under such circumstances, and even conceding that the frequent demands for the purchase price might be construed as a conditional tender, still, the title to the property being at all times in the vendor, plaintiff's remedy was controlled by section 3311 of the Civil Code and the trial court committed error in applying the measure of damage as set forth in section 3310 of the same Code. Nor does the fact that the rubles were deposited in court alter or change the situation. The act may have served the purpose of keeping good the character of tender alleged, but it could accomplish no other purpose. A proper tender should have been made before suit, and here, as above pointed out, there was no tender, and Greenberg himself so testified. Even conceding that the testimony of Greenberg that he had conversations with defendant regarding the taking of delivery of additional rubles and the defendant's failure to do so could be construed into an offer of delivery, they could not be construed as an offer to pass title to the property to the defendant, for plaintiff was, as his pleading and the evidence shows, at all times demanding payment as a condition to such delivery. This being so, the trial court committed error in applying section 3310 in the admeasurement of damage.

The judgment is reversed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

89 Cal. App. 442

ARMSTRONG v. CHERRY et al. (Civ. 5990.)

District Court of Appeal, First District, Division 1, California. Feb. 25, 1928.

1. Master and servant ⚷23—While employer closing out business is liable to one employed for specific term, immaterial change leaving employer real owner imposes no liability.

While employer who closes out his business is liable in damages to one employed for a specific term, still, an immaterial change leaving employer in a way as real owner gives rise to no cause of action.

2. Master and servant ⚷80(9)—Evidence held to sustain finding that if employer transferred business to sons, expressman made new employment contract, precluding recovery under old one.

Evidence *held* sufficient to sustain finding of trial court that if employer transferred express business to sons, expressman continued in the service under new contract of employment, and hence to preclude recovery for alleged breach of old contract.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for money under contract of employment by Charles Armstrong against Max Cherry, doing business as the Cherry Motor Express Company, and others. From a judgment denying recovery as to a portion of the sum claimed, plaintiff appeals. Affirmed.

George F. Sharp, of Oakland, for appellant.

Glickman & Glickman, of Oakland, for respondent.

TYLER, P. J. Action to recover under a contract of employment. The complaint sets forth: That on the 1st day of August, 1925, plaintiff and defendant Max Cherry entered into a written agreement under terms of which Cherry was to employ plaintiff to perform services as an expressman for a period of one year after the date of the agreement at a wage of $30 per week. That in pursuance of the terms thereof plaintiff entered into the employment of defendant and continued in such service for sixteen weeks from the 1st day of August, 1925, to the 1st day of December following and there was paid to plaintiff for such services the sum of $480. That on the 1st day of December, 1925, defendant disposed of his express business, it being alleged the sale and transfer thereof was made with the intent to evade, deceive and defraud plaintiff of the moneys due him under his contract of employment and that by reason thereof, the sum of $1,080 for the remaining 36 weeks referred to in the contract became due, and in consequence of the disposal of the business by defendant, plaintiff could no longer continue his services as such expressman for the defendant. Judgment was prayed for in the sum of $1,080. Defendant denied all of the allegations of the complaint. Trial was had, and it appeared in evidence that after the contract sued on was entered into, defendant became ill and he turned the business over to his sons.

Plaintiff testified that he had no knowledge of the change in the ownership at the time it took place, and when he ascertained the fact some time later, he made demand upon defendant Max Cherry for the balance due under the unexpired contract period, claiming that because of the transfer his contract was breached and he thereby became entitled to such balance. Other portions of his testimony, however, show that he continued in his employment after he had knowledge of the change of ownership. Just how long he continued in his employment does not appear, but there is evidence to show that his wages had been increased in the hope that he would perform his work in a more satisfactory manner and that he had enjoyed the benefit of the increase for over a month. He had several accidents and had injured and lost property intrusted to his care, and when questioned concerning the same refused to give any satisfactory explanation. He also refused to obey orders. One of the sons of defendant testified that a week or two after his father became ill he took over the management of the business and that he had considerable trouble with plaintiff concerning the manner in which he performed his work, and in the hope of improving this condition he raised his wage upon plaintiff's promise to do better. The hoped-for improvement did not materialize, and the relation was terminated. Plaintiff then obtained other employment and subsequently purchased two trucks and went into business for himself. There was no proof of ability and willingness of plaintiff to continue in his employment, nor was there any attempt to show what sums he may or could have earned by the exercise of reasonable exertion in mitigation of damages, and no such question is here presented or argued by counsel for either party.

The theory upon which the case was defended and determined was that plaintiff, after knowledge of the change in the business, voluntarily continued his employment with the sons at an increased wage and that not having performed his duties in a satisfactory manner the sons were entitled to discharge him and terminate the employment. The trial court found that plaintiff had voluntarily continued in the service of the sons under a new contract of employment, and at the time of his discharge there was due him the sum of $21.20, and judgment was rendered for said amount. Appellant contends that the finding is not supported by the evidence. It is conceded that had plaintiff known of the fact of the sale of the business, from the father to the sons, and with full knowledge of that fact on his part and of all the circumstances he made a new contract with the sons regarding his employment, there would have been an abandonment of the old contract and a new one substituted in its place. He also concedes that under such circumstances he could be discharged for cause, but he claims that no new agreement was ever made. Assuming that there was technically an actual transfer of the business under the evidence narrated, it is perfectly apparent that there was no distinct transfer to a stranger resulting in an entire change of the business. The conditions under which appellant worked were just the same after as before the new arrangement. It would seem that such an immaterial change would give no cause of action for breach of contract.

[1, 2] It is a rule universally recognized, that while a master may not close out his business without becoming liable in damages to an employee under a contract of employment for a specific term, still, an immaterial change gives no cause of action for damages where there is otherwise no change in the manner of conducting the business and the employer continues in a way to be the real owner. 39 Corpus Juris, 76. See, also, Levy v. Friedlander, 24 La. Ann. 439. However this may be, and it is no part of this opinion, there is no evidence in the record to show, as alleged by plaintiff, that the business was transferred or disposed of with the intent to evade, deceive or defraud him. On the contrary, it shows that the sons had done everything to induce plaintiff to continue in his employment, and that they gave him an increased wage in the hope that he would properly perform his duties. A reading of the entire evidence also shows that plaintiff was familiar with the inability of Max Cherry to further continue the management of the business on account of sickness, and his sons were substituted in his place, and that he willingly continued in his employment under the new arrangement, and accepted the sons as his employers in the place of the father. This being so, the evidence fully supports the finding of the trial court.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, J. pro tem.

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89 Cal. App. 427

H. F. FITES CO. v. HARRIS MFG. CO.
(Civ. 4988.)

District Court of Appeal, Second District, Division 1, California. Feb. 24, 1928.

1. Master and servant ⚿4—Acts, statements, and letters held not to work an implied employment to sell harvesters on commission.

Acts and statements of field agent of defendant, manufacturer of harvesters, and letters from defendant's sales department to plaintiff, who for the previous year had a contract for purchase of harvesters from defendant, with exclusive right to sell them in certain territory, *held* not to work an implied employment of plaintiff to sell on commission for the following year.

2. Work and labor ⚿28(2)—Evidence held to support contention of rendering services in taking around in automobile to prospective customers, defendant's field agent, at his request, entitling plaintiff to reasonable compensation.

Contention of plaintiff that, through its president, it rendered services to and for the benefit of defendant, manufacturer of harvester, at the request of its field agent, in taking such agent around in an automobile to prospective customers, for purpose of soliciting orders and rendering field inspection, for which plaintiff is entitled to a reasonable compensation from defendant, *held* supported by the evidence.

3. Work and labor ⚷29(1)—Compensation for plaintiff's president taking field agent of defendant harvester company around in automobile to prospective customers held to be reasonable value of use of machine and of time and services of president.

The proper measure for determining the value of services of plaintiff's president in taking around in an automobile to prospective customers the field agent of defendant harvester manufacturing company *held* not to be the discount which a purchaser for resale would get, though plaintiff had the previous year a contract for purchase and sale, nor the commission of a farm implement dealer, but the reasonable value of the use of the automobile when in the service of defendant's agent, and the reasonable value of the time and services given and rendered by plaintiff's president in aiding defendant's agent in securing prospective purchasers.

4. Trial ⚷398—Findings of same services being rendered under express contract and quantum meruit held inconsistent.

Findings of services being rendered under an express contract for certain commission, and of the same services being rendered under a quantum meruit, *held* inconsistent.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the H. F. Fites Company against the Harris Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Parkinson & Parkinson, of Stockton, for appellant.

M. C. Atchison, of Calexico, and J. W. Hocker, of Los Angeles, for respondent.

HAHN, Justice pro tem. This appeal comes to us from a judgment rendered by the superior court, in and for the county of Imperial, in an action wherein the plaintiff and respondent brought suit to recover a judgment against defendant and appellant. The complaint contains two counts. The first alleges that a contract of employment was entered into during the month of February, 1922, whereby the defendant employed the plaintiff to act as its agent, salesman, and representative in the county of Imperial to find purchasers for combined harvesters manufactured by the defendant corporation, and as compensation for such services agreed to pay plaintiff 15 per cent. commission on all combined harvesters manufactured by the defendant and sold to persons procured by the plaintiff; that, pursuant to said contract of employment, plaintiff secured purchasers for four harvesters, for which the defendant received the sum of $11,750; and that the sum of $1,762.50 was still owing to the plaintiff from the defendant as commissions on said sales.

The second count sounds in quantum meruit, and alleges that, at the special instance and request of the defendant, the plaintiff performed services for the defendant in the sale of its harvesters, and that the reasonable value of said services is and was the sum of $1,762.50. This count is based upon the same claim forming the foundation for count 1.

The court found as true the allegations contained in both counts of the complaint, but judgment was entered for only $1,762.50. From the judgment entered upon these findings the defendant appeals, making its principal point that the evidence is insufficient to support the findings and judgment.

It appears from the record that in February, 1922, plaintiff and defendant entered into a written agreement, by the terms of which plaintiff purchased from defendant certain harvesters at specified prices, the harvesters to be delivered from time to time as requested by plaintiff during the season which, under the contract, ended on September 30, 1922. By the terms of the contract, plaintiff agreed to pay 5 per cent. of the purchase prices for the harvesters at the time of the execution of the agreement, 20 per cent. upon delivery of each machine as ordered, and the balance upon extended payments to be evidenced by interest-bearing notes executed by the plaintiff. It was further provided that during the season the plaintiff would have the sole right in Imperial county to sell the harvesters manufactured by the defendant company; also that, in the event any farmer purchased a harvester from the plaintiff, and was unable to pay cash for the same, the notes of such farmer given to plaintiff were to be delivered as collateral to the notes given by the plaintiff for the balance of the purchase price of the harvester owing to the defendant company from the plaintiff, or the defendant would accept such notes of the farmer purchaser on account of the plaintiff's obligation to the defendant when such notes were guaranteed by the plaintiff. The contract further provided that, upon the final payment by plaintiff for each harvester, defendant would allow plaintiff certain discounts from the prices listed in the contract. These discounts ranged from 5 to 15 per cent. depending in part upon the time of payment, and also in part upon whether the defendant or plaintiff rendered certain setting up service and field inspection for the harvester after purchase by the farmer. The contract contained an explicit provision that it was to terminate on September 30, 1922.

For several years previous to 1922, similar contracts had been entered into annually by the plaintiff and the defendant, but, subsequent to February, 1922, no such written contract was executed by the parties. It may be important to note at this point that the contract of 1922, as all previous contracts, was executed on behalf of the defendant company by either its president, vice president or general manager, and that these contracts all contained a specific provision that no contract would be binding upon the defendant corporation unless it was executed by its president, vice president, or general manager.

On January 4, 1923, one E. W. Fowler, who was then, and for several years prior thereto had been, a field agent in the employ of the defendant company, called at the place of business of plaintiff in Calexico, and discussed with Howard P. Fites, the president of the plaintiff corporation, the prospects for sales of the Harris harvesters in Imperial Valley for the coming grain season. Fites was well acquainted with Fowler, having known him for several years as the field inspector for the defendant company. There is a marked conflict in the record between the testimony of Fowler and Fites as to what occurred in their conference on January 4th, but it does appear without conflict that Fowler had with him at that time a letter written directly to the defendant company at Stockton, Cal., by one W. I. Green, a rancher in Imperial Valley, who was the owner of a Harris harvester, and who in his letter expressed a desire to purchase a smaller harvester from the defendant company. Fites testified that at the time Fowler called he knew that Green was considering the purchase of a harvester, but had not up to that time interviewed him personally about it. Fowler expressed a desire to interview Green, and together with Fites on January 5th drove out to see Green. At that time Green expressed a desire to secure a smaller harvester, but definitely stated that he could not and would not sign up an order, except upon condition that his larger machine was disposed of. Fowler and Fites talked over the possible prospects for the sale of Green's old machine, but did not secure a buyer. During the ten days following the visit to Green, Fowler and Fites visited a number of farmers in Imperial Valley in an endeavor to interest them in Harris harvesters, but without any tangible results. On January 15th Fowler alone again visited Green, and induced Green to sign a written order for a new harvester, upon Fowler's agreement that this order would not be effective until he (Fowler) had found a purchaser for Green's old harvester. This order was made out in duplicate on a form of contract which evidently had previously been used by the plaintiff company in selling the Harris harvester, and named the plaintiff company as seller and Green as buyer. No mention is made of the defendant company in the order, nor is the defendant company obligated in any way by the terms of the order. Under the provisions of the order when accepted by the plaintiff, the plaintiff company agreed to sell and deliver to Green a harvester, and Green in turn agreed to pay the plaintiff company for the harvester. After securing the execution of this order in duplicate by Green, Fowler took both copies to plaintiff company. Fites was somewhat in doubt as to whether to accept the order, as he had some question as to the financial responsibility of Green. In any event, the order never was accepted by plaintiff company. On the following morning, Fowler returned to the place of business of plaintiff, and secured the Green order, giving as a reason therefor that he desired to change some of its terms. A day or two later Fowler advised Fites he had decided to recommend the firm of Dossey & Gurisch, of Brawley, as the dealers for the Harris harvester in the valley for the year 1923, and from that time Fites engaged in no activities on behalf of the sale of Harris harvesters.

It is important to note at this point that on January 4th, when Fowler first arrived in the valley, he discussed with Fites the matter of Fites Company securing a new contract from the defendant company similar to the 1922 contract. Fites in that conversation stated that he had the matter under consideration, but that he felt he would be more likely to secure such a contract if with the application for the same he would be able to send in an order for the purchase of a harvester, and, in view of the fact that Green was a prospective purchaser, he thought it a wiser policy to attempt to make a sale to Green and send in this order with his request for a new contract.

During the ten or eleven days that Fowler was in the valley interviewing prospective purchasers, the matter of a new contract was frequently the subject of discussion between Fowler and Fites, but Fites on each occasion expressed the view that he stood a better chance of securing such a contract if he could send in an order with the contract. When the Green order was finally signed, inasmuch as it was conditioned upon the sale by Fowler of Green's old harvester, it did not serve the purpose which Fites had in mind as helpful to secure a new contract. Fites admitted on the stand that he understood that it would be necessary for him to get a new contract for 1923 if he continued to sell the Harris harvester in Imperial county; that he well knew that such a contract could only be executed by one of the officers of the defendant company at Stockton; and that Fowler had no authority to execute such a contract.

It further appears that, in conversations with prospects, Fowler on several occasions stated that Fites was or would be the agent for the Harris harvester in Imperial county, and, as an inducement to prospective purchasers, Fowler stated that Fites would carry in stock extra parts of the Harris harvester.

Subsequent to January 16th, Dossey & Gurisch executed a contract with the defendant company similar in form to that which the plaintiff had for the year of 1922, and proceeded to make the four sales of harvesters, the commission for which is the foundation of the plaintiff's action. One of the four sales was made to Green under a new order obtained directly by Dossey & Gurisch from Green. This order, like the one obtained from Fowler, was conditioned upon Dossey & Gurisch finding a purchaser for Green's old harvester, and not until Dossey & Gurisch had accomplished a sale of the old harvester did Green consummate the purchase. The only possible connection that the plaintiff can urge in relation to any of these four sales is that Fowler had previously secured a written order from Green which was conditioned upon the sale of the old harvester, and that Fites, together with Fowler, had previously interviewed the other three purchasers.

In addition to the matters hereinbefore set forth, which respondent urges tend to support its theory of an implied contract, there are two letters written by L. F. Kidd, of the sales department of the defendant corporation. One was dated January 8, 1923, directed to the plaintiff company, and referred to a typewritten price list for the year 1923. The closing paragraph of this letter reads as follows:

> "Mr. Fowler reports some good prospects in your territory and we sincerely hope he will be of assistance to you in closing these sales before he leaves the valley."

The other letter was also from the sales department of the defendant, dated January 18, 1923, and closes with the following language:

> "From the reports reaching us from Mr. Fowler there is a good prospect for several sales in your territory and we are hoping that sales will be realized from these prospects."

[1] Giving full effect to all these circumstances, we do not believe they constitute such a contract of employment as is alleged in count 1 of plaintiff's complaint. There was no written contract for 1923, nor do we construe the circumstances as sufficient to support an implied contract. Respondent in its brief bases its right to recover upon the legal effect of Fowler's actions and statements and the two letters from the sales department of defendant corporation, but whether it is respondent's theory that these matters operated to effect a renewal of the 1922 contract or a new oral agreement of employment we cannot determine. The complaint alleged the contract of employment was made in February, 1922, while the findings declare "that it is true that on or about the 4th day of January, 1923, the defendant employed plaintiff," etc. The answer to the first theory is that the contract of 1922 is one of purchase and sale of harvesters, and not one of employment. Respondent does not contend that it complied with the provisions of the 1922 contract. Nor in the light of the evidence as to Fites' knowledge of the methods employed by defendant in selling its harvesters and Fowler's limited authority of which Fites was fully cognizant, can it be successfully urged that plaintiff was employed, on January 4, 1923, to act as defendant's agent to sell its harvesters for a compensation of 15 per cent. of the purchase price. Fites testified that he knew this contract of 1922 had expired, and that he was anticipating securing a new contract from the company; that the only kind of a contract he expected to get was one similar to the 1922 contract. There is nowhere in the record the slightest suggestion that Fites ever had been employed by defendant on a commission basis, or that he expected to be employed as an agent on a commission basis; furthermore, it clearly appears that he knew that Fowler had no authority to bind the defendant company on a new contract. Undoubtedly Fites and Fowler, as well as Kidd of the sales department of the defendant company, expected that Fites would get a new contract for 1923, and upon that expectation Fites unquestionably gave his time and furnished his automobile in an endeavor to interest prospective purchasers in the Harris harvester, but at no point does it appear that Fites was misled by any one connected with the defendant company into the belief that he already had a contract, or that he was to be employed as an agent, to sell for the defendant company its products on a 15 per cent. basis. The only contract in Fites' contemplation for 1923 was one similar to the 1922 agreement, which, as we have heretofore stated, is clearly an agreement of purchase and sale.

[2, 3] As to the second count, which is based on a quantum meruit, the evidence supports respondent's contention that through its president, Mr. Fites, it rendered services to and for the benefit of the defendant, and at the request of defendant's agent Fowler, for which he is entitled to a reasonable compensation from the defendant. Fowler was unquestionably the representative of defendant company for the purpose of soliciting orders and rendering field inspection. In the performance of these duties it was necessary for Fowler to have the use of an automobile, and it might be reasonably inferred that he had the authority to secure such aid as was furnished him by Fites in interviewing prospective purchasers. Then, too, the two letters from the sales department of the defendant clearly indicate that the defendant company knew Fowler was working with Fites, and really was encouraging Fites to expend efforts with Fowler in securing prospective purchasers. The difficulty, however, arises from the basis urged by respondent and evidently adopted by the court in fixing the reasonable value of the services rendered by Fites. The only evidence offered on this question is the contract of 1922, which apparently respondent interprets as providing for a commission of 15 per cent. on all sales, and

the testimony of Fites that farm implement dealers usually were allowed 15 per cent. on all sales made by them when they represented manufacturers. But neither of these methods provided competent or proper evidence of the reasonable value of services rendered by Fites on behalf of his company.

Respondent evidently assumes that the 15 per cent. discount allowed in the contract is the proper measure to determine the value of Fites' services. But this clearly is erroneous, for Fites did not render the services provided in the contract for which the 15 per cent. discount was to be allowed.

Nor does the testimony as to the prevailing commission allowed on sales made by dealers meet the requirements of the case, for the plaintiff made no sales. As we have already pointed out, the transaction that could most nearly constitute a sale was the Green order, and the conditions imposed by Green were never met by the plaintiff company. The true rule would be the reasonable value of the use of plaintiff's automobile when in the service of Fowler, and the reasonable value of the time and services given and rendered by Fites as president of the plaintiff company in aiding Fowler in securing prospective purchasers.

[4] While not important to our conclusion, it may be pointed out that there is a marked inconsistency in the findings of the court in this, that the plaintiff could not recover on a contract as alleged in count 1 and also on a quantum meruit as alleged in count 2. If the services claimed were rendered under the contract, there could be no quantum meruit basis of action, and, on the other hand, if the services were rendered under the quantum meruit, there could be no basis of recovery on contract. The findings declare the existence of both contract and quantum meruit right of actions.

For the foregoing reasons, the judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

89 Cal. App. 324

EVA v. SMITH. (Civ. 6031.)

District Court of Appeal, First District, Division 1, California. Feb. 18, 1928.

1. Libel and slander 🔑10(2)—Newspaper article over mayor's signature, criticizing plaintiff's qualifications for office only, held not libelous.

Publication in newspaper to voters of city, over signature of defendant as mayor of city, as to mayor's associates on council seeking reelection, that he had kindest personal regards for them, but good of city compelled him to state that two incumbents should not be returned, and that he favored keeping city council free from suspicion of unfairness in city's contracts, *held* not libelous; incumbents not being charged with dishonest conduct as to public contracts.

2. Libel and slander 🔑48(3)—Candidate for public office invites public criticism as to fitness and qualifications, and it is proper subject of comment.

An individual who seeks or accepts public office invites and challenges public criticism so far as affects his qualifications, and it is proper subject of comment.

3. Libel and slander 🔑48(3)—One may communicate to constituency any matter respecting a candidate material to the election.

Since candidate for office invites public criticism as to his qualifications, one may communicate bona fide to constituency any matter respecting him material to the election.

4. Libel and slander 🔑48(2, 3)—One may not wrongfully impute dishonesty to candidate for office or who accepts public office.

Though individual seeking or accepting public office challenges public criticism as to his qualifications no one may wrongfully impute dishonesty to him.

5. Libel and slander 🔑48(2)—Conduct of public officers being open to criticism, their acts may be freely published, with fitting comment.

Since the conduct of public officers is open to public criticism, it is in interest of society that their acts may be freely published, with fitting comment.

6. Libel and slander 🔑48(2)—"Criticism" of public officer pertains only to his work as such, but does not follow him into private life.

As regards a candidate for public office, distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow candidate into his private life or pry into his domestic concerns.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Criticism.]

7. Libel and slander 🔑48(3)—Rule permitting fair and honest criticism of candidate for public office is based on public policy.

Right to criticise a candidate for public office as to fitness and qualifications is based on public policy, since it is promotion of the public good.

8. Libel and slander 🔑48(3)—Mayor of city could assert opinion that by returning plaintiff to office city would not progress along fair and honest lines.

Mayor of city, in signed article published in newspaper as to his associates in city council who were asking for re-election, that, in event of plaintiff's return to office, it was his opinion city would not progress along fair and honest lines, due to plaintiff's want of zeal and temperament, such statement not implying plaintiff was dishonest, in view of statement that mayor held plaintiff in highest personal regard.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by William J. Eva against Frederick J. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

Ross & Ross, of Redwood City, for appellant.

Wyckoff & Gardner, of Watsonville, and Kirkbride & Gordon, of San Mateo, for respondent.

TYLER, P. J. Action for libel. The complaint alleges, in substance:

That plaintiff was, and now is, a duly elected, qualified, and acting member of the city council of the city of San Mateo. That the legislative power of said city at all times mentioned was, and now is, vested in said city council. That he was a candidate for re-election to said city council at an election held in said city on Tuesday, April 7, 1925. That the only other incumbent member of said city council who was seeking re-election at said election was one John E. Casey. That for more than 19 years last past plaintiff has been, and now is, a resident of the city of San Mateo. That for over 11 years he was a member of its board of trustees, during 2 years of which he served as mayor thereof. That for about 7 years he was a member of the board of trustees of the grammar school district of said city. That for the past 12 years he has been, and now is, engaged in the wholesale grocery business in San Francisco as president of the H. Janssen Company. That on Saturday, the 4th day of April, 1925, some 3 days prior to the election above referred to, defendant published in the San Mateo Times and in the Daily News Leader, newspapers of daily circulation, published in San Mateo county, an article as follows:

> "To the Voters of San Mateo:
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> "From time to time there have appeared statements in the San Mateo papers as to where I stand in the present political campaign that will elect three members of the council.
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> "Ordinarily, I would be loath to inject myself into the campaign. The charter of the city of San Mateo was adopted through the efforts of the progressive people of this city, and they expected when they adopted this charter that it would eliminate politics that heretofore thwarted the advancement of the city. This the charter will do with the proper men and women in office.
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> "As to my associates on the city council who are asking for re-election, I hold kindest personal regards, but candor, frankness, and my desire to see the city of San Mateo advance systematically and along fair and honest businesslike lines, compels me to state that these two incumbents should not be returned to city council.
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> "They have neither the zeal nor the temperament to administer the business of San Mateo under the present charter, as it should be administered.
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> "The best interests of San Mateo require the election to the city council of Fred E. Beer, Thomas J. Brady, and Albert J. Watson, men who are in sympathy with progressive and wholesome measures for the advancement of the city of San Mateo.
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> "The present issue has been thoroughly discussed both pro and con. I am strongly in favor of keeping the city council free from any suspicion or taint of unfairness in the city's contracts. No contractor should be influenced to buy from any one particular firm.
>
> "Therefore, I strongly urge, for the best interests of San Mateo, the election of Candidates Fred E. Beer, Thomas J. Brady, and Albert J. Watson.
>
> "They will be able to render excellent service for the new charter, and the city manager form of government which it provides for the city. Sincerely, Frederick J. Smith,
>
> "Mayor of San Mateo."

That by the foregoing false, malicious, and defamatory language defendant contrived and wickedly and maliciously intended to injure plaintiff in his good name, fame, and occupation, and to bring him into public contempt and disgrace, and to cause it to be believed that he was guilty of dishonesty as a member of the city council in influencing city contractors to buy from one particular firm, which said facts are false and known by defendant to be so. That by reason of such publication plaintiff has been brought into public disgrace and injured in his good name in the sum of $25,000. For a separate, second, and distinct cause of action, plaintiff complains of the further statements in the publication concerning the plaintiff:

> "My desire to see the city of San Mateo advance systematically and along fair and honest businesslike lines compels me to state that these two incumbents should not be returned to the city council." "I am strongly in favor of keeping the city council free from any suspicion or taint of unfairness in the city's contracts. No contractor should be in any way influenced to buy from one particular firm."

It is alleged that the reference to the "two incumbents" referred to the plaintiff and one John E. Casey of San Mateo.

[1] A demurrer to the complaint was interposed by defendant, and the same was sustained without leave to amend. Judgment dismissing the action and awarding defendant his costs followed. From this judgment plaintiff has appealed. It is claimed that the demurrer was improperly sustained, for the reason that it is manifest that the article was published to disparage plaintiff; its plain import being to characterize him as the type of a man who should not be returned to public office. Taking the article as a whole, it seems clear to us that it amounts to no more than a criticism of plaintiff's qualifications for office and one which defendant was entitled to make. No malversation on the part of plaintiff is charged. On the contrary, the article states that for his as-

sociates, of whom plaintiff was one, defendant held the kindest personal regards, but, by reason of lack of zeal and temperament, neither incumbent should be returned to office. Nor does the article charge that plaintiff was guilty of dishonest conduct with reference to any public contracts.

[2-5] An individual who seeks or accepts public office invites and challenges public criticism so far as it may relate to his fitness and qualifications, and it is a proper subject of comment. It is therefore justifiable for one to communicate, bona fide, to the constituency any matter respecting a candidate material to the election. Having offered profert of himself for public investigation, a candidate must expect some criticism of his personal fitness. No one, of course, has the right to wrongfully impute dishonesty to him, but temperament and qualifications are mere matters of opinion of which the electors are the only judges. There should be freedom in discussing, in good faith, the mental or other qualifications of any person seeking or holding public office. The conduct of public officers being open to public criticism, it is for the interest of society that their acts may be freely published with fitting comment or strictures. This right, as stated, does not warrant aspersive attack on the motives or character of the officer.

[6] The distinction between criticism and defamation is that the former deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns, but only his work. Triggs v. Sun Printing Ass'n, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326; 36 Cor. Jur. 1280. The right of criticism rests upon public policy, and those who seek office should not be supersensitive or too thin-skinned concerning criticism of their qualifications. Newell on Libel and Slander (4th Ed.) p. 536. In commenting upon a published article of the character here involved, the Supreme Court of Nebraska used the following apt language:

> "It relates to the fitness for office of those who adhere to the ruling clique and their conduct in office. It imputes no crime to them. It employs no degrading or insulting epithets toward them, but in extravagant language denounces them as derelict in the duties of their office, unfit, unfaithful, etc. This we understand a political stump orator may do, and outside of ethics there is no rule against using the pulpit for a like purpose. It would be absurd to hold it libelous to say of a candidate for office that he was utterly unworthy of public confidence. To maintain that proposition all political arguments are advanced against a candidate. They are sometimes * * * rambling, * * * but the law does not undertake to punish the man who sums them up in a single sentence." Arnold v. Ingram, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976.

And, again, it has been said that it is one of the infelicities of public life that a public officer is thus exposed to critical and often unjust comment; but these, unless they pass the bounds of what the law will tolerate, must be borne for the sake of maintaining free speech. Sillars v. Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680.

[7, 8] The purpose of the rule permitting fair and honest criticism is that it promotes the public good and hence is based upon public policy. Triggs v. Sun Printing Ass'n, supra. In thus permitting criticism the law gives a wide liberty, there being an honest regard for the truth. Within this limit public journals, speakers, and private individuals may express opinions and indulge in criticism upon the character or habits, or mental or moral qualifications of official candidates. Cooley on Torts, vol. 1, p. 443. Here, as above pointed out, no malversation in office is directly charged against plaintiff. In so far as the articles might imply that, in the opinion of defendant, plaintiff was unfitted for the office he was seeking to be returned to, no complaint can be made, for defendant had the right to express his opinion in this respect. So, also, did he have the right to assert, in the event of plaintiff's return to office, that in his opinion the city would not progress along fair and honest lines, due to his want of zeal and temperament. This statement cannot be construed to imply that plaintiff was dishonest, for the article further states that defendant had the highest personal regard, but was wanting only in the qualifications named. Nor is it charged that plaintiff had ever been interested dishonestly or otherwise in any public contract. It is a matter of public knowledge and general comment that many public officials are lacking in these very qualifications in consequence of which public affairs do not progress along fair and honest business lines. This is about all the article complained of can possibly be said to infer, and, this being so, plaintiff has no cause for complaint. We have been cited by counsel for plaintiff to several California cases as supporting his contention that the article is libelous. What was said in those cases had reference to the particular facts there involved, and no useful purpose would be accomplished by a review of them.

The order and judgment are affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

89 Cal. App. 351

SMART v. SPANGLER. (Civ. 4737.)

District Court of Appeal, Second District, Division 2, California. Feb. 20, 1928.

1. Appeal and error 🔑979(2)—Trial court's order granting new trial for insufficiency of evidence is conclusive on appeal, in absence of abuse of discretion.

Granting new trial for insufficiency of evidence is within trial court's discretion, and its order will not be disturbed on appeal, unless it clearly appears that it has abused its discretion.

2. Appeal and error 🔑979(5)—Trial court's order holding that jury gave excessive damages because of passion and prejudice will not be disturbed, if question is debatable.

Trial court's order granting new trial unless defendant remits portion of verdict and holding that jury gave excessive damages because of passion and prejudice will not be disturbed, if question of its propriety be open to debate.

3. Appeal and error 🔑933(1)—On appeal from order granting new trial unless plaintiff remitted portion af verdict, every intendment is to be indulged in support of trial court's action.

On appeal every intendment is to be indulged in support of trial court's action in granting new trial unless plaintiff should remit certain portion of verdict.

4. New trial 🔑162(3)—Ordering remittitur of damages above $500 for breaking jaw of plaintiff afflicted with cleft palate held not abuse of discretion.

In action for personal injuries for breaking jaw of plaintiff afflicted with cleft palate, granting new trial unless plaintiff remitted damages above $500 *held* not abuse of discretion.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by John C. Smart against George Spangler. Verdict for plaintiff. From an order granting a new trial, unless plaintiff remitted all damages in excess of $500, plaintiff appeals. Affirmed.

Arthur E. Koepsel, of Santa Ana, for appellant.

Scarborough, Forgy & Reinhaus, of Santa Ana, and Otto Sanaker, for respondent.

HAZLETT, Justice pro tem. Plaintiff (appellant) sued to recover $5,125 actual and $5,000 exemplary damages on account of personal injuries resulting from a blow on his mouth administered by defendant. A jury trial was had and the jury awarded plaintiff $1,625 actual and $1,000 exemplary damages.

Defendant moved for a new trial and the court made its order granting the motion, conditioned as provided in the order, as follows:

"Motion for new trial granted if plaintiff does not on or before February 19, 1924, remit all damages in excess of $500, exclusive of costs, upon the ground of the insufficiency of the evidence to sustain the verdict, and also upon the ground of excessive damages appearing to having [sic] been given under the influence of passion and prejudice."

Plaintiff appeals from the order contending that he is entitled to the full amount awarded by the jury, and that the reduction in the amount made by the trial court was greater than justified by the evidence.

The following facts are fairly shown by the evidence produced by each party, considered together:

Each party was a blacksmith, and at the time the events complained of occurred each had a blacksmith shop in Whittier and they were business rivals. Plaintiff had worked for defendant in defendant's shop for about three years, ceasing the employment about a year prior to the time complained of, and plaintiff opened his shop a short time before the events occurred. Defendant complained that plaintiff interfered with his business and persisted in taking customers away from his shop, and defendant was very resentful towards plaintiff. Immediately preceding the events complained of certain horses were brought to defendant's shop to be shod and defendant's employee commenced to work on them when they were taken away to plaintiff's shop. Defendant then went to plaintiff's shop and complained that plaintiff had caused the removal of the horses from defendant's shop, which plaintiff denied. Defendant testified that plaintiff called him a liar, which plaintiff denied. Defendant then called plaintiff a vile name and struck plaintiff on the mouth with his hand or fist. During all of his life plaintiff had been and was then afflicted with a cleft palate, united in front and with only one-half to three-quarters of an inch of bone or that much of fibrous structure. The blow broke his upper jaw apart at its weak point, broke off a false tooth that had been fastened to a root of a tooth, and loosened one or more natural teeth. The injuries kept plaintiff from his work for two weeks, caused him pain and suffering, and affected his ability to eat. The probability was that the break in the jaw never would fully unite. Plaintiff was caused expense of $72 for hire of a man in his place and $10 medical charges.

The cleft palate had always caused plaintiff to enunciate his words in the manner peculiar to persons so afflicted, and, while the evidence does not directly show that defendant was aware of plaintiff's affliction, the close association of the two men during the previous years should and no doubt did inform defendant of its existence, and he should have known that plaintiff's upper jaw would be more easily broken than that of a normal person.

[1] While we might conclude from a consideration of the cold print in the briefs and

transcript of the evidence, not having the witnesses before us or the opportunity to observe their demeanor on the stand or their manner of testifying, that there is sufficient evidence to sustain the awards of the jury, the province of the trial court would be infringed should we disturb its ruling.

The well-settled and familiar rules governing courts of appeal are that insufficiency of the evidence to justify the verdict is a ground for new trial peculiarly within the province of the trial court, and its order granting a new trial will not be disturbed on appeal unless it clearly appears that there was an abuse of discretion. These rules have been so often announced that citation of authorities is unnecessary.

[2, 3] The same rules apply in relation to the holding of the trial court that excessive damages were given by the jury under the influence of passion and prejudice. As announced in the leading and often cited case of Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 164, 47 P. 1019, every intendment is to be indulged upon appeal, in support of such action of the trial court, and its order will not be disturbed if the question of its propriety be open to debate.

[4] Under the evidence the action of the trial court is at least open to debate, and it does not appear that there was an abuse of discretion.

The order granting a new trial is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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89 Cal. App. 354

HEDGER v. HOGLE et al. (Civ. 6175.)

District Court of Appeal, First District, Division 1, California. Feb. 21, 1928.

Principal and agent 🔑103(7)—Used automobile dealer, fraudulently obtaining ownership certificate for automobile sold him conditionally could make valid sale where car was left in salesroom (Motor Vehicle Act).

Where secondhand automobile dealer obtained certificate of ownership under Motor Vehicle Act (St. 1923, p. 517), for car which was sold to him conditionally by changing certificate of ownership signed by conditional seller and by false affidavit, he could nevertheless make valid sale of car where it was voluntarily left in his salesroom, where he had other cars for sale; he having been vested with such indicia of authority to sell as usually accompanies such authority.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action of claim and delivery for automobile by Vera Walklin Hedger against H. J. Hogle and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

D. P. Hatch, of Los Angeles, for appellant.

Waldo & Hinds, Waldo, Hinds & Lawrence, and John H. Waldo, all of Pasadena, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in an action of claim and delivery of an automobile. The court found that the defendants were the owners of the automobile and entitled to retain possession, and entered judgment accordingly. From this judgment plaintiff has appealed.

On November 8, 1924, appellant was the owner of the automobile in question given to her by her father, and it was then registered in her name as required by the Motor Vehicle Act (St. 1923, p. 517). On that date appellant and her father went to the salesroom of National Motor Sales, under which name F. Koehl was conducting the business of selling used automobiles, and there delivered appellant's Packard automobile to the "National Motor Sales, F. Koehl, Proprietor," for $2,000, and $200 cash was paid on account of the purchase price, and the National Motor Sales was to sell the car and pay the balance due within ninety days. A promissory note of National Motor Sales, Frank Koehl, for $2,000 was given to plaintiff, dated November 8, 1924, due in 90 days, with interest at 7 per cent. per annum, stating in the body of the note, "Value received for Packard sedan No. 168100," and indorsed, "Received by cash this day $200.00 Nov. 8, 1924, rec'd by Vera Walklin Hedger."

On the same day appellant delivered to National Motor Sales, F. Koehl, proprietor, her official pink "ownership certificate" issued to her by the state motor vehicle department, and signed the same so as to permit the issuance of a new certificate to National Motor Sales as the registered owner. She also signed this certificate as the new legal owner. This signature was crossed out and an affidavit was filed with the motor vehicle department by Koehl with this certificate stating that this new legal owner signature of appellant was made by mistake. On the same day appellant made, signed, and delivered a bill of sale of her automobile to National Motor Sales, F. Koehl, proprietor, "free and clear of all incumbrances except $1,800."

It is appellant's contention that the sale by her of the automobile to National Motor Sales, F. Koehl, proprietor, was a conditional sale, and that the title was to remain in appellant until the purchase price was fully paid, and this contention is supported by her testimony and the testimony of her father. That such was her intention was found by the court, the court finding:

"That plaintiff delivered the said pink ownership certificate so signed to the said F. Koehl for the purpose of having a new pink ownership certificate for said automobile issued to said National Motor Sales, F. Koehl, proprietor, as the new registered owner, and intending to have said certificate also show plaintiff as the new legal owner."

The evidence is without material conflict. Appellant delivered her automobile to National Motor Sales, a business establishment engaged in the sale of used automobiles, and accepted a promissory note for $2,000, and received $200 in cash, which she receipted for on the back of the note. She gave a bill of sale to National Motor Sales, F. Koehl, proprietor, which bill of sale was in the usual form, but contained the statement that the automobile was "free of all incumbrances except $1,800." Appellant produced to National Motor Sales, F. Koehl, proprietor, her official pink ownership certificate issued to her by the state motor vehicle department, on which she had signed her name in the place thereon provided for signature by the registered and legal owner, and she there signed the certificate on the reverse side on the first line designated as the line for the legal owner to sign in making a transfer, and wrote her address on the second line at the place there provided, and also signed her name and wrote her address on the bottom two lines at the place there designated for the new legal owner, intending to retain the legal ownership of the automobile as found by the court—"that the plaintiff delivered the said pink ownership certificate so signed to said F. Koehl for the purpose of having a new pink ownership certificate for said automobile issued to said National Motor Sales, F. Koehl, proprietor, as the new registered owner, and intending to have said certificate also show plaintiff as the new legal owner." On November 12, 1924. four days later, Koehl presented the pink certificate to the motor vehicle department with appellant's name as the new legal owner crossed out and the affidavit that appellant's name was written upon the pink certificate by mistake and secured a pink certificate of ownership issued to National Motor Sales, F. Koehl, proprietor, as the registered and legal owner of the automobile, and in which no mention is made of appellant. On December 11, 1924, respondent H. J. Hogle purchased the automobile from National Motor Sales, F. Koehl, proprietor, upon a conditional sales contract for $620 cash and note for $1,452.48. The note and conditional sales contract were sold to respondent D. B. Rose, Inc., a corporation, for $1,180. Neither Hogle nor D. B. Rose, Inc., had any knowledge or notice at the time of the purchase of any claim in the automobile by appellant. They had seen the pink ownership certificate issued by the motor vehicle department showing National Motor Sales as the registered and legal owner, believed National Motor Sales to be the true owner, and had no reason to think otherwise; in fact, Koehl informed them that he owned the car.

It therefore appears from the evidence and findings that appellant desired to sell her automobile, and left it at the salesrooms of National Motor Sales to be sold; that, while she accepted a note for the amount stipulated as the selling price, she did not intend to part with the ownership or legal title until she received the purchase price; that in the bill of sale, which was in the usual printed form, she inserted "free and clear of incumbrances except $1,800"; that she signed the pink ownership certificate so that a new one might be issued, naming National Motor Sales, F. Koehl, proprietor, as the new registered owner, but naming herself as the legal owner, and therefore the one who would have to sign the certificate transferring title in the event of a sale by Koehl; that Koehl crossed out her name and presented the certificate, accompanied by a false affidavit, to the motor vehicle department and through fraud obtained a certificate showing National Motor Sales to be the legal owner as well as the registered owner.

Appellant, in support of her contention that the sale was a conditional sale, cites us to Rodgers v. Bachman, 109 Cal. 552, 556, 42 P. 448, 449, holding, "The question is always one of intention, and whenever, upon a proper construction of the instrument, it is apparent that it was the intention of the parties thereto that the sale should be conditioned upon the payment of the price, it is the duty of the court to carry out that intention;" and also to Greene v. Carmichael, 24 Cal. App. 27, 140 P. 45, holding that conditional sales are fully recognized in this state, that one in possession under a contract of conditional sale cannot by selling or creating a lien on the property impair the rights or interests of the owner. Our attention is further directed to Walsh v. Hunt, 120 Cal. 46, 52 P. 115, 39 L. R. A. 697, in which case the agent altered a note and mortgage. There the court says:

> "It would be absurd to hold that there was upon the facts any implied or ostensible authority conferred upon him [the agent] to commit a forgery—the plain legal effect of his act—and bind the defendant thereby; * * * that, where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime and not the negligent act which is the proximate cause of injury; and in such a case the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application."

We do not question the principle of law contended for by appellant, but here another principle is involved which is absent in the cases cited. Here appellant took her automobile to the place of business of National Motor Sales, F. Koehl, proprietor, which was a place of business where the proprietor was ordinarily engaged in selling secondhand cars, to whom it was confided to sell.

While mere possession, it is true, even by one who happens to be a dealer in the same commodity or class of goods, is not sufficient evidence of ownership or of authority to protect one who purchases from the possessor (Covill v. Hill, 4 Denio [N. Y.] 323; Linnen v. Cruger, 40 Barb. [N. Y.] 633; Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. App. 76, 209 P. 1024), yet where, in addition to possession by the vendor, the owner has given such evidence of authority to sell as usually accompanies such authority according to the custom of trade or the general understanding of business men, the vendor's possession under such circumstances is evidence, not that he is the owner, but that he has received authority from the owner to sell (Wright v. Solomon, 19 Cal. 76, 79 Am. Dec. 196; Heath v. Stoddard, 91 Me. 499, 40 A. 547; Pickering v. Bush, 15 East [Eng.] 38). In Pickering v. Bush, supra, Lord Ellenborough uses this language:

> "If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse sent it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe."

The question presented here is quite similar in fact and analogous in principle to Carter v. Rowley, 59 Cal. App. 486, 211 P. 267, in which case the principle involved is fully discussed and the cases bearing upon the question distinguished. In that case the plaintiff drove his car to McNabb's place of business, exhibited it to McNabb, and instructed the latter to try and find a purchaser; that, if he found one, to "bring him to me and I will sign the necessary license transfer and anything else necessary for the completion of the sale." Plaintiff's car, along with a number of other secondhand machines, was on exhibition for sale in McNabb's vacant lot. McNabb sold the car to the defendant, but did not claim to be the owner and defendant knew the car was owned by plaintiff. Plaintiff never signed any statement or transfer indorsed on the certificate of registration. McNabb must have forged plaintiff's name to the transfer on the registration certificate as defendant received through the mail a certificate of transfer from the state motor vehicle department. The court in that case says:

> "The principles governing this case are well stated by the Supreme Judicial Court of Maine in Heath v. Stoddard [91 Me. 499, 40 A. 547], supra: 'A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. 1 Am. & Eng. Ency. of Law (2d Ed.) p. 969, and cases cited. Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, What did such third person, dealing with the agent, believe, and have a right to believe, as to the agent's authority from the acts of the principal? Griggs v. Selden, 58 Vt. 561, 5 A. 504; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Walsh v. Hartford Ins. Co., 73 N. Y. 5. For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that at least the owner had by his own act invested the person with whom the article was intrusted with an apparent authority which would protect an innocent purchaser?' * * * McNabb was more than a mere bailee; he was plaintiff's agent to find a purchaser. Whatever may have been the private arrangement between plaintiff and McNabb, whatever the latter's *actual* authority may have been, plaintiff, by his own voluntary act, clothed McNabb with such *indicia* of authority to sell the car as usually accompanies such authority according to the custom of trade and the general understanding of business men."

In the present case, conceding the sale to be a conditional sale, the automobile was left with Koehl to be sold for appellant and was voluntarily placed by her in his salesroom, where he had secondhand cars for sale, and she thereby clothed him with such indicia of authority to sell the car as usually accompanies such authority according to the custom of trade and the general understanding of business men.

In Carter v. Rowley, supra, the plaintiff did not sign the ownership certificate, but said to the proprietor of the secondhand car establishment:

> "When you find a purchaser for this car who will pay me $575 net, you bring him to me and I will sign the license transfer and anything else that is necessary for the completion of the sale of the car."

The secondhand merchant sold the car and forged the name of the owner to the ownership certificate. Here the secondhand car merchant sold the car of appellant, crossed out her name as the new legal owner, and filed a false affidavit that appellant's name as the new legal owner was written in the certificate by mistake.

On principle, the Carter Case and the present case are analogous, and, on the authority of that case, which we think states the correct rule, the judgment must be affirmed, and it is accordingly so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 421

CRYSTAL PETROLEUM PRODUCTS CORPORATION v. ABBOTT et al. (Civ. 6146.)

District Court of Appeal, First District, Division 2, California. Feb. 24, 1928.

Execution ⚷264—Sale of leasehold within two years before term expires, under execution issued at either secured or unsecured creditor's request, confers absolute title (Code Civ. Proc. §§ 688, 700, 700a).

Unexpired term of leasehold being subject to execution under Code Civ. Proc. § 688, sale thereof within two years before expiration of term confers absolute title on purchaser under sections 700, 700a, whether execution issued at request of secured or unsecured creditor, though holder of security may delay proceedings until day after expiration of two years, so as to deprive debtor of right of redemption.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by the Crystal Petroleum Products Corporation against Thomas C. Job and another, with cross-complaint against F. J. Abbott. From a judgment for defendants, plaintiff and cross-defendant appeal. Affirmed.

Claud B. Andrews and John C. Gillham, both of Los Angeles, for appellants.

Romaine L. Hogan, of Los Angeles, for respondent Hull.

STURTEVANT, J. The appellant F. J. Abbott was lessee of certain lots in Los Angeles county. He borrowed moneys from Thomas C. Job and assigned the lease as security for the repayment of those moneys. Thomas C. Job assigned to George B. Hull. F. J. Abbott failed to pay the moneys when due. Being in default, he sought to protect his interests by preserving his right to redeem if respondent should attempt to enforce his claim. He commenced an action against the respondent, praying for that relief. The respondent answered and also filed a cross-complaint. The cross-complaint was answered. The respondent made a motion for judgment on the pleadings. The motion was granted, and the appeal is from that judgment. If the one question of law presented by appellants is decided against them the judgment should be affirmed. That question involves section 700a, Code of Civil Procedure, which is as follows:

> "Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. * * *"

The appellants concede at once that the section provides that the sale of certain fractional terms are absolute. But they contend that at the time of making the sale the sheriff should inquire when the security was given and what, at that time, was the length of the unexpired term. The appellants argue that otherwise the holder of the security may delay his proceedings until one day after the two years have expired and then file a proceeding which will result in the debtor losing his right of redemption. The contingency noted may at times arise, but the Legislature in its wisdom has adopted the statute. The clear wording of the language is equivalent to the statement that all sales of personal property are absolute. The unexpired term of a leasehold is subject to execution. Code Civ. Proc. § 688. The case may arise where the execution is levied on a leasehold by an unsecured creditor. In that event it is patent that the sheriff before making out his certificate of sale would inquire what is the length of the unexpired term. That question is answered by the preceding section, section 700:

> "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto *on the date of the levy of the execution* thereon, where such judgment is not a lien upon such property. * * *" (Italics ours.)

In the case before us the record discloses that the decree was rendered September 15, 1925—less than two years before the expiration of the lease. It does not disclose when, if at all, the levy was made. In any event, it would be some date subsequent. If the writ ran in favor of an unsecured creditor it is clear that under the provisions of section 700a, supra, the title of the purchaser would be absolute. When, as here, the writ ran in favor of a secured creditor, the statute contains no exception and we are forced to the conclusion that the sale would confer the same rights whether the execution issued at the request of the secured creditor as on an unsecured creditor.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

203 Cal. 541

O'CONNELL v. O'CONNELL. (S. F. 12168.)

Supreme Court of California. March 5, 1928.

1. Divorce 🔑183—Absence of record held to prevent consideration of appeals from orders in divorce action, where papers contained in transcript were not authenticated (Code Civ. Proc. § 953).

Absence of record provided for by Code Civ. Proc. § 953, *held* to prevent consideration of appeals from orders in divorce action, where "transcript on appeal" contained indiscriminate lot of papers, and affidavits not authenticated as having been used in court below.

2. Appeal and error 🔑616(1)—In absence of record, documents and evidence used on hearing on application for order must be authenticated by bill of exceptions (Code Civ. Proc. § 953a).

Unless record on appeal is prepared pursuant to Code Civ. Proc. § 953a, only other method for authenticating of documents and evidence used on hearing in support of application for an order is by bill of exceptions duly authenticated.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Walton J. Wood and Kirby S. Mahon, Judges.

Actions by Anna M. O'Connell against Daniel O'Connell for divorce and to set aside an interlocutory divorce decree granted defendant on his cross-complaint in the divorce action. From an adverse judgment in the equity action and from orders entered in the divorce action, plaintiff appeals. Judgment and orders affirmed.

Daniel O'Connell, of San Francisco, in pro. per.

Keyes & Erskine, of San Francisco, for respondent.

PRESTON, J. There are before us for consideration appeals in two causes, though in but one transcript. The first is a divorce action begun by the plaintiff, Anna M. O'Connell, against the defendant, Daniel O'Connell, which never ripened into a final decree. The second action is one in equity to impeach for extrinsic fraud the interlocutory decree of divorce granted on the cross-complaint in the above-entitled action for the defendant, Daniel O'Connell. For a complete and more accurate history of this litigation, and for a specification of the various appeals taken therein, reference is made to the statement of facts prepared for the court by Mr. Justice Richards when certain motions to dismiss appeals were heard. 255 P. 514.

In the proceeding last referred to, the appeal from the order denying said defendant's motion for new trial in the equity action was dismissed, and all other motions to dismiss in the matter were denied. In the divorce action we have an appeal taken on September 1, 1925, by defendant and cross-plaintiff from the order of the trial court denying his motion for a final decree of divorce. On September 22, 1925, said defendant and cross-plaintiff in said divorce action appealed from seven separate orders theretofore made therein, to wit: (1) From an order denying his motion for transfer of said action for trial before another judge; (2) from the order overruling the demurrer to the application for an injunction; (3) from an order refusing to strike out a certain affidavit which had been theretofore filed by the plaintiff in said action; (4) from an order issuing a certain

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

special injunction restraining the defendant from doing certain acts during the pendency of the action; (5) from a preliminary injunction which had been made and entered by the court in said action; (6) from an order of said court denying the motion to dissolve said injunction; (7) from an order to show cause why the defendant should not be punished for contempt.

We have in the equity action an appeal upon the judgment roll alone from the judgment entered therein annulling the interlocutory decree entered in said divorce action. So far as the action in equity is concerned, we have before us none of the evidence or proceedings taken on said judgment, save alone said judgment roll. This we have examined carefully, and see no reason whatsoever therefrom to disturb the judgment therein, and the same is hereby affirmed.

[1, 2] We are without power to consider the other appeals above noted from various orders in the divorce action in the absence of the record provided for by section 953 of the Code of Civil Procedure. The volume called "Transcript on Appeal" contains an indiscriminate lot of papers and affidavits, not one of which is authenticated as having been used in the court below upon the hearing of any of the orders appealed from. Unless a record is prepared pursuant to section 953a of the Code of Civil Procedure, the only other method for the authenticating of the documents and evidence used upon a hearing in support of application for an order, is by bill of exceptions duly authenticated as provided by law. Estate of Broome, 169 Cal. 605, 147 P. 270; People v. Terrill, 131 Cal. 112, 63 P. 141; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 P. 522; Melde v. Reynolds, 120 Cal. 234, 52 P. 491; Harrison v. Cousins, 16 Cal. App. 515, 117 P. 564.

The said judgment and said orders and all other orders herein appealed from and not mentioned above, if any, are affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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203 Cal. 453

RUDELSON v. PAULES et al. (L. A. 9257.)

Supreme Court of California. Feb. 27, 1928.

1. Principal and agent 🔑123(11)—Evidence held to show person to whom plaintiff paid rent money and who absconded with it was defendant's agent to lease (Civ. Code, §§ 2316, 2317).

In action against property owners for money had and received which plaintiff had given to a third person as agent for defendants as rental money for certain property and with which agent had absconded, evidence *held* to show third person was defendant's agent for leasing purposes, having actual authority as defined by Civ. Code, § 2316, or ostensible authority, under section 2317, and hence loss should fall on defendants.

2. Appeal and error 🔑1008(1)—Finding of ultimate fact is invalidated if probative facts on which it must rest lead to repugnant conclusion.

If probative facts on which the ultimate fact found must rest lead to a conclusion repugnant to finding of the ultimate fact, it must be *held* that finding of ultimate fact is invalidated.

Department 1.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Morris M. Rudelson against P. B. Paules and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Loeb, Walker & Loeb, of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondent.

SEAWELL, J. P. B. Paules and Max Hartfield, appellants, were, and for some months before the earliest contract considered herein had been, the owners of the real property which furnishes the basis of the action in which judgment for respondent was rendered.

Prior to June 23, 1923, Morris M. Rudelson, respondent, was occupying as a tenant of appellants a room of the building erected on said real property in which he conducted a market. Some time prior to June 23, 1923, appellants had decided to construct a new building on said real property. Accordingly the old building was destroyed and removed from the lot to make room for said contemplated new structure. Grant McCartney was a real estate broker and promoter, doing business under the firm name of Grant McCartney Company. On June 22, 1923, appellants and Grant McCartney Company entered into a contract, of which the following are the pertinent provisions:

> "We hereby agree that if we enter into a written agreement with Mr. L. A. Smith or any of his associates, or if you furnish us with any other parties with whom we enter into an agreement for the building and financing of a building on our property at the southwest corner of Temple and Broadway, Los Angeles, to make you our exclusive agents for negotiating the original leases for said entire building. * * * In the event said building is not built or financed by Mr. L. A. Smith or his associates or any other parties furnished by you, we are to be under no obligations to carry out this contract."

Ten days thereafter, to wit, July 2, 1923, Grant McCartney Company and respondent Rudelson entered into the following contract:

> "Received of Morris Rudelson $2,000, being deposit on five-year lease at the rate of $1,000 per month, on property owned by Messrs. Hartfield & Paules, at the southwest corner of Temple and Broadway, Los Angeles, Cal., described

as follows: [Here follows description of same property described in first contract.]

"It is hereby agreed that Mr. Rudelson will deposit with owners of said property $4,000 more, upon completion of building, and

"It is further agreed he will receive 7 per cent. per annum on $5,000 of said deposit, including $2,000 received this date, same to be held as security for said lease.

"This agreement subject to approval of owners."

Respondent did not at any time have knowledge of the limitation placed upon the Grant McCartney Company by the contract of June 22, 1923. Being desirous of remaining at his old location, respondent, upon suggestion of appellants, visited them on June 29 for the purpose of agreeing upon terms on which he would occupy a room in said reconstructed building. Upon this last visit appellants informed respondent that they could not talk business with him as to lease terms, inasmuch as they had turned over the entire matter of leasing said rooms to their agent, Grant McCartney. Respondent was advised to take the matter up with Grant McCartney, and this advice eventuated in the lease or contract made July 2, 1923, between respondent and Grant McCartney Company. Respondent paid to Grant McCartney Company the sum of $2,000 as acknowledged in said lease and contract, and thereafter said Grant McCartney absconded with said funds. Respondent brought an action for money had and received in the court below, and recovered a judgment against appellants. The point is made by them that Grant McCartney had no authority from them to make the contract entered into by Grant McCartney Company, and respondent, and therefore, it could in no way bind them. It is true that the financing and leasing contract made by appellants and Grant McCartney Company did not upon its face authorize Grant McCartney Company to bind appellants to the terms of the contract entered into by the former with respondent, and if this was all there was to the case we would be compelled to reverse the judgment.

While the testimony of the respondent was flatly contradicted by evidence offered by appellants, it was sufficient, if credited by the court, to compel us to affirm the judgment. In addition to the testimony of the respondent as above pointed out, there are some circumstances which tend to corroborate respondent's testimony. He testified that at the time he visited appellants and they directed him to the Grant McCartney Company they telephoned to said company in advance that respondent would call upon said company and requested said company to give respondent's proposals full consideration as he was a former tenant. There was some slight corroboration of this evidence adduced by another witness. Another circumstance which gives support to respondent's contention that Grant McCartney Company was held out as the ostensible agent of appellants exists in the fact that during the period of negotiation between respondent and Grant McCartney Company there remained upon said premises a large and conspicuous sign placed there by Grant McCartney, bearing the following words:

"Exclusive Agents.
"Grant McCartney Co.
"Pico 302
"Main Office
"937–939 Merchants' Nat. Bank Bldg.
"Will Lease:
"Hotel Roof Garden
"Drug Store Restaurant
"Market Florist
"Bank Barber Shop
"Or Any Other Suitable Business."

Appellants had knowledge that said sign was upon their premises. Respondent had also observed it, and it could have had no other effect upon him than to confirm him in the belief that Grant McCartney Company was fully authorized to contract with persons who desired to become tenants of the building proposed to be constructed.

We are of the opinion that the record contains evidence sufficient to conclude appellants under either of the two following sections of the Civil Code:

"2316. Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

"2317. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

[1, 2] What we mean to say is that the positive testimony of the respondent, which was credited by the court, supports the theory of actual authority; also the acts of appellants, support the theory of ostensible authority conferred upon the agent, Grant McCartney Company.

Appellants contend that the findings of fact are inconsistent with themselves and contradictory, and, further, that the probative and ultimate facts are in conflict and in such cases the ultimate facts control. We think no serious conflict exists in the instant case. The term "agent" where used is interchangeable with "principal," inasmuch as the act of the agent was the act of the principal. If, however, the probative facts upon which the ultimate fact must rest lead to a conclusion repugnant to the ultimate fact, the latter must be held to be invalidated by the former. Hammond Lumber Co. v. Barth Investment Corporation (Cal. Sup.) 262 P. 29; 24 Cal. Jur. 972.

The material findings are supported by the evidence, and we find no substantial reason for a reversal of the case.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

203 Cal. 438

FAUCETT v. RIVEROLL et al. (L. A. 9128.)

Supreme Court of California. Feb. 25, 1928.

1. Pleading ⚷72—Prayer for relief must be considered as a whole in determining extent of relief demanded.

In determining character and extent of relief demanded, prayer for relief in complaint must be considered and construed as a whole.

2. Liens ⚷22—Plaintiff, filling in lots for defendant, had right to recover debt in personal action, as well as by foreclosing lien (Code Civ. Proc. § 1197).

Where complaint alleged that work and labor in grading streets and filling in lots was performed for several defendants, plaintiff had right to recover amount of debt by personal action against one person for whom work was performed, under Code Civ. Proc. § 1197, independent of right of action to foreclose lien.

3. Judgment ⚷101(2)—Prayer for judgment for amount of debt and foreclosure of lien for filling in lots, and deficiency judgment, held to authorize default judgment against defendant for full amount of debt (Code Civ. Proc. §§ 580, 1197).

Complaint to recover balance due for grading streets and filling in lots, and to foreclose lien on land, with prayer for judgment against defendants for amount of debt, with interest and costs, and for the sale of land to satisfy lien and deficiency judgment, *held* to authorize entry of default judgment against one defendant for full amount of debt, under Code Civ. Proc. §§ 580, 1197, since prayer for judgment was not restricted by demand for amount of deficiency.

Department 1.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by S. Y. Faucett against E. Riveroll, the Hellman Commercial Trust & Savings Bank, and others. From a judgment entered against it, defendant Bank appeals. Affirmed.

Page, Nolan, Rohe & Hurt and Arthur F. Coe, all of Los Angeles, for appellant.

J. R. Jaffray, of Los Angeles, for respondent.

CURTIS, J. Action to recover the balance due for grading streets, filling in certain lots, and removing earth from others in a tract of land in the city of Beverly Hills, in the county of Los Angeles, and to foreclose a lien upon said tract of land for said unpaid balance. The prayer of the complaint was as follows:

> "Wherefore plaintiff prays judgment against defendants for the sum of $5,357.70, with interest from January 28, 1925, and costs; that said sum be declared to be a lien upon the lands heretofore mentioned; that said lands may be ordered sold to satisfy such lien, and that the proceeds may be applied to the costs of sale and upon such judgment; that a deficiency judgment may be entered against defendants for the amount of the judgment not satisfied by such sale; and for all other equitable relief in the premises."

The summons was served upon the defendant Hellman Commercial Trust & Savings Bank, and said defendant failed to answer. Thereupon its default for failure to answer was regularly entered. The action came on regularly for hearing, and the plaintiff dismissed the same as to all defendants, except the defendant Hellman Commercial Trust & Savings Bank. Judgment was thereupon entered against said last-named defendant for said sum of $5,357.70, together with interest thereon and costs. From this judgment the said defendant has appealed.

On this appeal appellant contends that the court had no power or authority to enter the judgment which it did in this action against appellant upon its default. Appellant claims that such a judgment is not permissible or warranted by section 580 of the Code of Civil Procedure, which reads as follows:

> "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

[1-3] It is defendant's position that the judgment in this action exceeds the prayer of the complaint, in that, as claimed by appellant, the prayer of the complaint only asks for a deficiency judgment against appellant, after the sale of the premises described in the complaint to satisfy the lien claimed by the plaintiff against said premises, while the judgment rendered was a personal judgment against appellant for the full amount of plaintiff's demand. We are not able to acquiesce in this construction of the prayer of the complaint. By reference to it, as it appears above, it will be noted that the plaintiff therein expressly "prays judgment against defendants for the sum of $5,357.70." While the prayer further asks that the sum be declared to be a lien upon said real property, for a sale of the premises, and a deficiency judgment against said defendants for the amount of the judgment not satisfied by such sale, this subsequent portion of the prayer cannot be taken as any limitation upon that portion of the prayer preceding it. The prayer must be considered and construed as a whole, and as so considered and construed the relief demanded therein was sufficiently broad to include a personal judgment against appellant. The complaint alleges that the work and labor mentioned therein was performed for all the defendants, including the appellant. A personal action, therefore, would lie against the appellant to recover the debt sued for, independent of his right of action

to foreclose a lien therefor. Code Civ. Proc. § 1197.

Appellant has cited a number of authorities in support of its position, with none of which do we differ. They do not, however, apply to the facts in this case. It claims that the case of Olcott v. Kohlsaat, 55 Hun, 607, 8 N. Y. S. 117,[1] is exactly like the one under consideration. It is more like the present action than any other cited by it, but we think it fails in an important respect to present a state of facts like those in the present action. In the case referred to, quoting from its syllabus, which defendant relies upon to support his contention:

> "A complaint, in an action to enforce a lien on a bond held as collateral security, demanded a sale of the debtor's interest in the bond, and a deficiency judgment, but did not demand a judgment for the debt. Held, under Code Civ. Proc. N. Y § 1207, providing that where there is no answer, plaintiff can recover no other or different judgment than is demanded in the complaint, that a judgment against the debtor for the amount of the debt was unauthorized."

It will be seen in that action that there was not, as there was in the present action, any demand for a personal judgment against the defendant. This fact differentiates it from the present action, and renders it, as an authority in appellant's behalf, of no value. The relief granted by the judgment in the present action did not exceed that demanded in the prayer of the complaint.

The judgment, therefore, is valid and binding upon appellant.

Judgment affirmed.

We concur: SEAWELL, J.; PRESTON, J.

203 Cal. 450

BOURN v. KIDD et al. (L. A. 9219.)

Supreme Court of California. Feb. 27, 1928.

Quieting title ⊂⊃44(4)—Evidence held to support findings that plaintiff was owner in fee of property in dispute in suit to quiet title.

In suit to quiet title to real property, evidence *held* sufficient to support findings that plaintiff was the owner in fee of the realty acquired at sale under execution against party to whom defendant had conveyed apparently to defeat plaintiff's claim.

Department 1.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action to quiet title by T. J. Bourn against James K. Kidd, sometimes known as the J. K. Kidd Company, John E. Kidd and others. Judgment for plaintiff, and John E. Kidd appeals. Affirmed.

Drapeau, Orr & Gardner, of Ventura, for appellant.

Clarke & Bowker, of Los Angeles, and Robert M. Sheridan, of Ventura, for respondent.

CURTIS, J. Action to quiet title to certain real property described in the complaint. The plaintiff's title to said real property was acquired at a sale under execution under a money judgment in his favor and against the defendant James K. Kidd. The record title to said real property at the date of said execution sale stood in the name of John E. Kidd. At the trial it was the plaintiff's contention that said defendant James K. Kidd was at the date of said execution sale the owner of said real property, and that by virtue of said sale he (the said plaintiff) became the owner thereof. The trial court found in favor of plaintiff and entered judgment in his favor as prayed for. The defendant James K. Kidd, though served with summons, made no appearance in said action, and judgment was taken against him by default. The defendant John E. Kidd appeared by answer in said action and denied the allegations of the complaint. He has appealed from the judgment entered against him, and is the sole appellant.

The evidence as to the ownership of said real property at the time of said execution sale, and whether it was the property of James K. Kidd or of the appellant John E. Kidd was conflicting, and the trial court, in a brief but careful review of said evidence at the close of the trial, which is set out in full in the record, held that the weight thereof was in favor of plaintiff, and accordingly made findings in plaintiff's favor. Appellant now contends that this evidence was insufficient to support the court's findings, in that it only shows, if it proves anything, that the defendant James K. Kidd at the time of the execution sale owned an equitable interest only in said real property, while the legal title then stood in the name of John E. Kidd. Therefore appellant contends all that plaintiff acquired at said execution sale, if he acquired anything, was an equitable interest in said real property, and that an action to quiet title will not lie in favor of the holder of an equitable title as against the owner of the legal title, citing Buchner v. Malloy, 155 Cal. 253, 100 P. 687; Gray v. Walker, 157 Cal. 381, 384, 108 P. 278; Burns v. Ross, 190 Cal. 269, 212 P. 17.

Conceding appellant is correct in his legal contention, we are of the opinion that he has misconceived the purport of the evidence in the case. The evidence was to the effect, not only that defendant James K. Kidd had the title to said real property taken in appellant's name, presumably for the purpose of defeating plaintiff's claim for which he had been given judgment against James K.

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[1] Reported in full in the New York Supplement; not reported in full in Hun's Report.

Kidd, but that thereafter the appellant had made a deed to said real property in favor of James K. Kidd, by virtue of which the latter became and was at the date of said execution sale the legal owner of said real property, and it was this interest which plaintiff acquired at said sale. While this deed was not produced, there was evidence that appellant had admitted that he had made such a deed and delivered it to James K. Kidd. The evidence further showed that James K. Kidd exercised exclusive control and management of the property, collecting all revenues therefrom, and paying all taxes and other expenses incurred in the care and preservation thereof, even to insuring the buildings on said real property in his own name, and upon the destruction of said buildings by fire collecting the insurance thereon and appropriating the proceeds thereof to his own use, without any objection or protest on the part of appellant and without any demand or request for any accounting of said proceeds. The evidence was sufficient to support the findings that plaintiff was the owner in fee of said real property, and that it was not true that defendant John E. Kidd was the owner thereof.

Judgment affirmed.

We concur: PRESTON, J.; SEAWELL, J.

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203 Cal. 543

CALDWELL v. WEINER. (L. A. 8176.)

Supreme Court of California. March 6, 1928.

1. Executors and administrators ⚷221(1)—One seeking to establish claim against estate of decedent has burden of proof.

One seeking to establish a claim against an estate of a decedent has burden of proof in trial court.

2. Appeal and error ⚷901—Appellant has burden of showing error.

The appellant has the burden of showing error on appeal.

3. Evidence ⚷594—Though, generally uncontradicted testimony may not be disregarded, most positive testimony may be contradicted by circumstances satisfying court of falsity or casting doubt on accuracy of witness' statements.

While it is a general rule that uncontradicted testimony on particular fact may not be disregarded but should be accepted by court as proof of fact, such rule has its exceptions, and the most positive testimony may be contradicted by circumstances in evidence in connection with the matter which satisfy the court of its falsity, and the manner of witness in testifying may impress the court with a doubt as to accuracy of witness' statement and influence court to disregard his positive testimony as to a particular fact.

4. Executors and administrators ⚷221(4)—Claim against decedent's estate for money decedent allegedly contracted to pay for care will be sustained only on most satisfactory proof.

Claim against estate of decedent for money decedent allegedly contracted to pay for his care will be scrutinized carefully by courts and will be sustained only on the most satisfactory proof.

5. Executors and administrators ⚷221(4)—Evidence held to sustain finding that decedent did not agree to pay mortgage on plaintiff's home for care furnished him.

Evidence *held* to sustain finding of trial court that decedent did not promise to pay plaintiff amount of mortgage then on her home when he should sell a certain parcel of land for care and support rendered decedent by plaintiff.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Suit by Flora M. Caldwell against Henry E. Weiner, executor of the estate of Henry C. Weiner, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Superseding opinion in District Court of Appeal, 258 P. 125.

N. B. Nelson, of Los Angeles, for appellant.

Redwine & Redwine, and H. G. Redwine, all of Los Angeles, for respondent.

LANGDON, J. Plaintiff appeals from a judgment for defendant in a suit brought on a rejected claim filed against the estate of the deceased, Henry C. Weiner.

The complaint alleges:

"That on or about the month of November, 1919, at Los Angeles, Cal., the plaintiff herein and Henry C. Weiner, now deceased, entered into an agreement whereby this plaintiff was to furnish said decedent, Henry C. Weiner, with a home during his lifetime, including room, such meals as he should desire or request, to care and nurse him when he was ill or indisposed, and to take him into her home and treat him as one of her family, and as compensation therefor said decedent, Henry C. Weiner, promised and agreed to pay this plaintiff the sum of $25 per month for his room rent, and, in addition thereto, promised and agreed to pay this plaintiff the amount of a mortgage then upon her home, namely, a mortgage in the sum of $6,000, as soon as he should sell a certain piece and parcel of land then owned by him and which was located near the city of Long Beach, county of Los Angeles, state of California; that immediately upon the making of said agreement, the said decedent, Henry C. Weiner, came to plaintiff's home to live and make his home, and that he resided with plaintiff and her family continuously up to the time of his death, excepting therefrom short periods of time when he made occasional visits out of the city of Los Angeles; that during all of the said time that

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

said decedent lived with plaintiff and her family, this plaintiff and her family provided a home for said decedent, and treated him in all respects as one of her family, furnished him with room, such meals as he requested or desired, did some of his laundry, nursed and cared for him while he was ill or indisposed, and in all things looked after his welfare and comfort at all times, to the best of her ability; that this plaintiff has fully performed all of the conditions of said contract on her part to be performed; that on or about the month of March, 1922, said decedent, Henry C. Weiner, sold the said parcel of land owned by him in or near the city of Long Beach; that said sum of $6,000, nor any part thereof, has not been paid."

The answer denies the foregoing alleged agreement, except it is alleged by defendant that:

"Henry C. Weiner did promise and agree to pay plaintiff the sum of $25 per month and no other sum or amount, for the rent of a room in plaintiff's residence, and for no other purpose."

The court found the following facts:

"That it is not true that on or about the month of November, 1919, or at any other time, at Los Angeles, Cal., or elsewhere, the plaintiff and Henry C. Weiner, now deceased, entered into an agreement whereby the plaintiff was to furnish said Henry C. Weiner with a home during his lifetime, including room, such meals as he should desire or request, to care for and nurse him when he was ill or indisposed, and to take him into her home and treat him as one of the plaintiff's family; and that it is not true that said Henry C. Weiner promised and agreed to pay the plaintiff the amount of a mortgage then upon her home in the sum of $6,000, or any other sum, as soon as he should sell a certain parcel of land owned by him and which was located near the city of Long Beach, Cal., or at any other time; that it is not true that said Henry C. Weiner ever at any time promised and agreed to pay plaintiff the said sum of $6,000, or any other sum, at any time or in any manner, except the sum of $25 a month for his room rent, and that the only promise which said deceased made to pay plaintiff any sum of money was to pay her the sum of $25 per month for his room rent, and this sum was paid by him to plaintiff, and that all the averments and allegations of paragraph No. 1 of the complaint herein are untrue; that all the allegations and denials of the answer herein are true and all the allegations of the complaint herein are untrue."

[1, 2] The appeal is based upon an argument that the evidence is insufficient to justify the decision of the court. It is contended that the defendant did not submit any direct evidence to justify the findings made, but in this contention appellant overlooks the fact that the plaintiff has the burden of proof in the trial court and the burden of showing error upon appeal. The testimony as to the making of the alleged contract is very unsatisfactory and largely inferential, the strongest testimony being given by plaintiff's daughter. While, as is argued by appellant, the testimony is not inherently improbable, it is greatly weakened by the circumstance that plaintiff did not seek to enforce her claim for the nine months after the sale of the property out of which she alleges her mortgage was to be paid, during which decedent was alive, and that decedent left her home and traveled across the continent and remained there for several months before his death without an adjustment of this matter.

[3] It would seem that this case, with all the circumstances appearing in the record, comes within the rule of Blanc v. Connor, 167 Cal. 719, 141 P. 217, and Davis v. Judson, 159 Cal. 121, 113 P. 147, to the effect that while it is a general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions, and the most positive testimony may be contradicted by the circumstances in evidence in connection with the matter which satisfy the court of its falsity and the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact.

[4, 5] The instant case presents the type of alleged contract which in many jurisdictions is scrutinized by the courts with great care, and is only sustained upon the most satisfactory proof. Owen v. McNally, 113 Cal. 446, 45 P. 710, 33 L. R. A. 369. The record before us presents abundant justification for the findings made by the trial court, and as there is no other error assigned by appellant the judgment appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

89 Cal. App. 499

WEBB v. M. J. BRANDENSTEIN & CO. et al.★

(Civ. 4819.)

District Court of Appeal, Second District, Division 2, California. Feb. 27, 1928.

Hearing Denied by Supreme Court April 26, 1928.

1. Sales ⚷476—Saleswoman held entitled to possession of automobile under contract, where she had paid sum in excess of monthly installments, though not each month.

In action for conversion of automobile where saleswoman had entered into contract with employer whereby employer agreed to advance money for purchase of automobile, and saleswoman agreed to pay $35 per month, and she was permitted to make payments exceeding $35 per month, and at end of eight months, having paid in $340, employer possessed self of car, claiming that she was in default and was obligated to pay $35 per month, despite fact that more was paid in some months, *held* that, under contract, saleswoman was entitled to possession of automobile.

2. Sales ⚷479(6)—In possessory action for automobile, where plaintiff had lawful possession, questions of equitable title and estoppel to deny defendant's ownership held premature.

In pure possessory action by plaintiff for conversion of automobile repossessed by defendant, where plaintiff was not in default and therefore in lawful possession, question of whether defendants had equitable title, or whether plaintiff was estopped to deny that defendant was legal owner, *held* premature and immaterial.

3. Sales ⚷479(7)—Evidence held to justify finding that car purchased by plaintiff was new car, contrary to defendant's contention.

In action for conversion of automobile, where defendant contended that plaintiff fraudulently used money advanced by them for purchase of new automobile, and one they took was secondhand, evidence *held* to justify court's finding that car purchased was new.

4. Sales ⚷476—Saleswoman purchasing automobile under agreement that title remain in employer until she made payments in installments, held not under obligation to register car in employer's name.

Where saleswoman, advanced money for purchase of automobile by employer under agreement that she pay money back in monthly installments, and that title remain in employer until payments were made, did not register automobile in name of employer, and, although saleswoman was not in default, employer repossessed self of car, *held*, that there was no obligation on plaintiff to register car in name of defendant.

5. Trial ⚷397(5)—Court's failure to find on affirmative defenses held not error, where finding was unnecessary.

Court's failure to find on affirmative defenses in action for conversion of automobile *held* not error, where such findings were unnecessary.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action by Frances D. Webb against M. J. Brandenstein & Company and others for damages for conversion of an automobile. Judgment for plaintiff, and defendants appeal. Affirmed.

Ernest M. Torchia, of Los Angeles, for appellants.

C. H. Hartke, of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This is an action for damages for conversion of an automobile. Judgment was rendered for plaintiff against the defendants M. J. Brandenstein & Co., a copartnership, and M. J. Brandenstein, Edward Brandenstein, and Manford Brandenstein only for the sum of $600. These defendants appeal from the judgment.

On or about August 5, 1921, the defendants M. J. Brandenstein & Co. (herein called the company) and the plaintiff (who was then in their employ as a coffee saleswoman) entered into the following agreement:

"Agreement.

"Agreement between M. J. Brandenstein & Co., San Francisco, Cal., party of the first part, and herein called company, and Mrs. Frances D. Webb, Los Angeles, Cal., party of the second part, witnesseth:

"Whereas, said Frances D. Webb was advanced the sum of eight hundred forty-five and 74/100 dollars ($845.74) toward the purchase of a new 1921 Ford coupe, numbered 5146917;

"And whereas, said Frances D. Webb desired to purchase the above automobile from said company for the sum of eight hundred forty-five and 74/100 dollars ($845.74):

"Now, therefore, it is agreed between the parties herewith as follows:

"Said company agrees to sell to said Frances D. Webb and said Frances D. Webb agrees to purchase said automobile and accessories for the sum of eight hundred forty-five and 74/100 dollars ($845.74), payable as follows: In monthly payments of thirty-five dollars each; said sum of thirty-five dollars ($35.00) to be deducted from salary check on the end of every month, commencing with August 31, 1921, while said Frances D. Webb remains in the employ of said company, and until entirely paid up.

"In addition to said purchase price, said Frances D. Webb agrees to pay for all accessories for said automobile during its life and to pay for all insurance thereon. Upon payment in full of said purchase price and all sums of money which may be due from said Frances D. Webb to said company for insurance, etc., the title to said automobile shall vest absolutely in said Frances D. Webb, but until the payment of such sums of money as aforesaid, the title to said automobile shall remain in and be the property of said company.

"If said Frances D. Webb desires to pay the balance of said purchase price prior to the expiration of this agreement, the company hereby grants such privilege, and upon the payment in

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★Hearing denied by Supreme Court.

full of any balance due the company, the automobile will become the property of said Frances D. Webb.

"Executed in duplicate this fifth day of August, nineteen hundred and twenty-one.

"M. J. Brandenstein & Co.,
"By Mignacco.
"Frances D. Webb."

The whole question on this appeal is: Was the plaintiff in default under the terms of this agreement at the time defendants took the automobile? The plaintiff was discharged from the employment of the company in December, 1921, at which time she was handed a statement of her account with the company, which was introduced in evidence, as follows:

"Frances D. Webb Auto.

Aug. 9.	Ford purchase		845 74	
Aug. 15.	By cash			10 00
Aug. 31.	By cash			72 50
Aug. 31.	By cash			27 50
Aug. 31.	By cash			35 00
Sept. 30.	By cash			35 00
Nov. 30.	By cash			62 50
Dec. 15.	By cash			62 50
				340
Dec. 7.	Insurance—4 mos.......	42 00		
	By debit balance...		557 82	
		887 82	887 82"	

She retained possession of the car thereafter and used it in her own affairs until February, 1922, when, after an accident, she left it in the repair department of the Dunham Agency, where the defendant company found and took possession of it, claiming the right to do so under the terms of the contract.

Appellants contend that at this time plaintiff was in default. The trial court found that the plaintiff had been in the lawful possession of said automobile during the entire period from August 5, 1921, up to and including March 18, 1922. There is no specification that this finding is not supported by the evidence, and we might feel justified in declining to consider it except that its determination may dispose of most if not all of appellants' other contentions.

[1] Appellants argue that the proper construction of the contract is that plaintiff was obliged to pay $35 each month, regardless of whether she paid more in any one month. Respondent's contention is that she was only chargeable with $35 each month, starting August 31, 1921; that the car was taken by the appellant company March 18, 1922; and that the total amount of the payments made by her to March 18, 1922, was $340. The court examined the plaintiff about the circumstances of the months when she paid more than $35:

"The Court: Let me see that statement. 'August 9;' 'August 15, $72.50; August 31, $27.50; August 31, $35; August 31, $35;' three payments on August 31st, how did that occur? A. I had $135 coming to me in August.

"Q. And you told them to apply all of that on the machine? A. Yes.

"Q. What about the November 30th, $62.50; how did they happen to credit that, instead of $35? A. On December 1st I was discharged. I had that amount of salary coming to me, and I allowed them to apply that on the automobile account.

"Q. That is, you had $62.50 coming to you as salary? A. Yes.

"Q. And you told them to apply that? A. Yes."

There was also conflicting evidence as to whether plaintiff should be charged with certain items of insurance before she had completed the payments on the car. Plaintiff introduced a letter from appellants to respondent as follows:

"These two policies the total premium charged to you amount to $126.25 will be paid in the course of the next month, and we shall charge it to your automobile account and will be deducted from your salary check after you have cleared off the indebtedness now shown there for the purchase of this machine. We trust that our explanation of the manner in which these forms of insurance operate will be fully understood by you and that you advise us in the near future which feature of collision you wish to carry."

The court found in favor of plaintiff and respondent, and construed the contract accordingly, and we think correctly.

[2] It seems unnecessary to discuss at length other contentions of appellants. The only question presented on this appeal is the right of the plaintiff to immediate possession of the automobile at the time of the commencement of the action. The action is purely a possessory action, and if the plaintiff was not in default under the agreement, and therefore in lawful possession or entitled to possession of the automobile, the question of whether appellants had the equitable title or whether the plaintiff is estopped to deny that the company was the legal owner as urged by appellants are premature and immaterial here. 5 Cal. Jur. 5, p. 163, and cases cited.

[3] Appellants contend that there was fraud on the part of respondent in that the money to purchase the automobile was advanced by the company to plaintiff to buy a new automobile and the one they took was a secondhand one. This contention appears not to affect the question whether appellants had the right to the possession of the car; but, aside from the question of whether appellants had the right to raise this question until respondent was in default, again the evidence justifies the court's finding:

"Q. Did you purchase an automobile? A. I did.

"Q. From whom did you purchase it? A. Dunham Agency; the Ford Dunham Agency.

"The Court: You bought this car new, did you? A. Yes."

The registration certificate in evidence, dated August 4, 1921, shows: "Make—Ford.

Engine No. 5146917"—the same as in the agreement.

[4] The only other specification of error by appellants is as follows:

> "Second. That the plaintiff cannot take advantage of her own fraud in not registering the automobile in the name of M. J. Brandenstein & Co. as the legal owners."

The mere statement of this proposition is its own refutation. Aside from the fact that there is no fraud shown, as long as plaintiff was not in default, we find nothing in the contract obliging plaintiff to so register it.

[5] Finally, appellants complain that the court made no finding on the affirmative defense. This was in substance that respondent was in default in her payments when the car was taken. No additional finding on this was necessary. Adams v. Anthony, 178 Cal. 158, 172 P. 593; Los Angeles Furniture Co. v. Hansen, 46 Cal. App. 5, 188 P. 292; Rogers Lamb Co. v. Coast Securities Co., 58 Cal. App. 744, 209 P. 246; Hegler v. Eddy, 53 Cal. 597; Liver v. Mills, 155 Cal. 459, 101 P. 299; Phillips v. Stark, 65 Cal. App. 136, 223 P. 443; Tower v. Wilson, 45 Cal. App. 123, 188 P. 87.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

HULSMAN et al. v. IRELAND et al.★

(Civ. 4894.)

District Court of Appeal, Second District, Division 2, California. Feb. 24, 1928.

Hearing Granted by Supreme Court April 23, 1928.

1. Trial ⚷404(1)—All findings and facts must be considered as to whether they support judgment.

All the findings and all the facts must be considered as to whether they support the judgment; it being insufficient to examine only one finding.

2. Estoppel ⚷105—Defendant was not estopped from denying his connection with partnership, in view of court's finding that he had no connection with it.

In action against defendants as individuals and as copartners doing business under a firm name, defendant in whose favor costs were adjudged as against plaintiffs was not estopped to deny his connection with the partnership, in view of court's finding that he was not engaged with other defendants in a joint venture.

Appeal from Superior Court, Los Angeles County; M. I. Short, Judge.

Action by B. W. Hulsman and another, copartners doing business under the style and firm name of the Market Company, against Louis E. Ireland and others, individually and as copartners doing business under the style and firm name of Tubells Company. Judgment for plaintiffs against certain defendants, and from the judgment for costs in favor of Rufus W. Russell, plaintiffs appeal. Affirmed.

William Ellis Lady, of Los Angeles, for appellants.

J. W. Morin, of Pasadena, for respondents.

VALENTINE, Justice pro tem. In this action judgment for $7,912.76 was rendered for plaintiffs and appellants against the defendants Ireland and Mrs. Elizabeth B. Russell, and in favor of defendant Rufus W. Russell against the plaintiffs for costs. The appeal was originally taken by plaintiffs by mistake from the whole of the judgment, but was dismissed as against the defendants Ireland and Mrs. Russell, so that the present appeal is only from the judgment for costs in favor of defendant Rufus W. Russell against the plaintiff.

The action was brought by plaintiffs against all three defendants, who are alleged to be copartners doing business under the style and firm name of Tubells Company, for goods sold to Tubells Company. The answer of defendant Rufus W. Russell, among other things, denies that he was a partner of or with defendants Louis E. Ireland and Mrs. Elizabeth B. Russell in any business whatsoever, or at all, and this is the main question attempted to be raised by appellants on this appeal.

In appellants' own words, this appeal is not on the ground that the evidence does not support the findings, but upon the ground that the facts found by the court do not sustain the judgment rendered in favor of defendant Rufus W. Russell, but do support a judgment in favor of plaintiffs as against said defendant. Therefore we must accept the findings of fact as true. The facts as found are stated later.

Appellants' opening brief contains no specifications or assignments of error, but merely a general expression of the views of appellants' counsel, ending with the somewhat naive comment:

> "We have not been able to find any authority on the subject, but believe we are correct on principle as well as in equity, and if that be so, then the judgment of the lower court eliminating Mr. Russell from the judgment obtained by plaintiffs is erroneous and the same should be reversed."

But in his closing brief appellants' counsel remarks:

> "The law applicable to the facts found is elementary and no citation of authorities is necessary."

Whatever may be our mental reactions as to whether counsel for appellants is correct

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★Superseded by opinion of Supreme Court, 270 P. 948.

on principle as well as in equity, before reversing the trial court's judgment as counsel suggests, we feel constrained to first examine into whether that judgment is sustained by the findings. The judgment after the usual recitals as to evidence, etc., is short, and we quote it in full:

> "Wherefore, it is ordered, adjudged, and decreed that plaintiffs do have and recover of and from defendants Louis E. Ireland and Elizabeth B. Russell, individually and as copartners doing business under the style and firm name of Tubells Company, the sum of $7,912.76, together with their costs and disbursements incurred herein, taxed at the sum of $———.
>
> "And it is further ordered, adjudged, and decreed that defendant Rufus W. Russell do have and recover of plaintiffs his costs and disbursements incurred herein, taxed at $7.
>
> "Done in open court this 1st day of December, 1923."

The findings are long, and we deem it unnecessary under the circumstances to quote them in full, referring only to those portions which are material.

Counsel for appellants in his closing brief, under the heading "Points and Authorities," advances four propositions, which are as follows:

> "I. The facts found in finding 7 warrant a judgment in favor of plaintiffs against the defendant Rufus W. Russell.
>
> "II. Rufus W. Russell by his conduct in allowing the $12,000 of community property to go in, and remain in, the business known as Tubells Company, thereby engaged in a joint venture with Ireland and Elizabeth B. Russell, and, as to plaintiffs, is estopped to deny his connection with the partnership.
>
> "III. However innocent of intention to do wrong the conduct of Rufus W. Russell may have been, he is, nevertheless, liable to the plaintiffs.
>
> "IV. The authorities upon which respondent seems to rely do not touch the question presented in this appeal."

[1, 2] As to No. I, it is not sufficient to examine only one finding. All the findings and all the facts must be considered as to whether they support the judgment. No. II assumes facts directly contrary to those found. No. III also assumes facts and conclusions directly opposed to those found by the trial court. As to No. IV, counsel for appellants in his argument states:

> "The authorities cited by respondent, on his page 6, have no application on this appeal; they may be conceded as correctly stating the law as to partnership applicable to the facts involved in those cases. The case at bar, however, does not so much involve the question whether defendants were in fact partners, as it does the question whether defendant Rufus W. Russell is not estopped to deny that his money constituted one-half the capital of the concern. * * *"

Counsel appears to forget that one of his main contentions in the case at bar is that defendant Rufus W. Russell was in fact a partner of the other defendants. It is difficult to see how defendant Russell can be estopped from denying facts which the court has found were not facts.

We think it unnecessary to discuss appellants' arguments further. We have departed from the rule and have voluntarily done a great deal of work on this appeal which should have been done, and undoubtedly would have been done, by counsel if counsel for appellants had followed the rules and cited his points and authorities in his opening brief. We have done this upon the assumption that counsel was derelict in this respect because of ignorance of the rules, and not for any other reason. 2 Cal. Jur. 415 et seq.; Bell v. Germain, 12 Cal. App. 375, 107 P. 630.

Judgment affirmed.

CRAIG, Acting P. J., and THOMPSON, J. We concur in the conclusion, but are of the opinion that where the specifications of error are insufficient we should not assume the burden of the labor which rightly rests upon the shoulders of counsel.

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89 Cal. App. 405

PEOPLE v. CLAYTON. (Cr. 1555.)

District Court of Appeal, Second District, Division 1, California. Feb. 23, 1928.

1. Criminal law ⚷576(2)—That court was engaged in trial and witness for prosecution was confined to bed and defendant's attorney was engaged held "good cause" for postponement (Pen. Code, § 1382, subd. 2).

Where in prosecution for robbery on day set for trial court was engaged in trial and one of principal witnesses for prosecution was confined to bed and attorney representing defendant was engaged in trial of another action, *held* that circumstances showed "good cause" required by Pen. Code, § 1382, subd. 2, necessary for postponement of trial beyond 60-day period within which trial should have been commenced after filing of information.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Cause.]

2. Criminal law ⚷543(1)—Reading deposition of witness at preliminary hearing shown to be absent from state held not abuse of discretion (Pen. Code, § 686, subd. 3).

In prosecution for robbery and driving automobile of another without his consent, reading at trial testimony given by certain witness at preliminary hearing in justice court after showing that witness had left state *held* not an abuse of discretion granted trial court by Pen. Code, § 686, subd. 3, providing for reading of deposition of witness containing testimony taken down by question and answer in presence of defendant upon satisfactory showing that he cannot be found within state.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Criminal law 🔑1169(3)—Reading deposition of absent witness assuming foundation was insufficient held of no importance, where accused confessed to practically all facts and companion of absent witness corroborated testimony.

Reading in evidence deposition of witness after insufficient foundation upon which to base discretion exercised by trial judge in admitting evidence, even assuming it to be error, *held* of no importance, where defendant had confessed practically all facts to which such witness testified and companion of absent witness fully corroborated his testimony.

4. Robbery 🔑9—Knocking strong box from under arm of victim and grabbing and running with it held robbery within meaning of statute (Pen. Code, § 211).

Where accused attempted twice to knock strong box from under arm of victim and succeeded in second attempt and grabbed box and ran away with it, and victim then pursued and overtook accused and held him until taken into custody, *held* that this was "robbery" as defined by Pen. Code, § 211.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

5. Robbery 🔑9—Refusal to instruct that in order to find accused guilty of robbery jury must believe that accused took box by means of force and fear caused by dangerous weapon held not error (Pen. Code, § 211).

Refusal to instruct in prosecution for robbery that before you can find accused guilty of robbery you must believe from all evidence that accused did take box by means of force and fear, and that such fear must have been real, direct, and caused by means of dangerous weapon, *held* not error, since Pen. Code, § 211, is silent as to method which may be employed by robber in committing crime by which he exerts force upon or produces fear in victim.

6. Criminal law 🔑829(3)—Refusal of requested instruction in prosecution for robbery held not error, where given instruction adequately protected rights of accused.

Refusal to instruct in prosecution for robbery that jury must acquit defendant if it did not believe that he took box from victim by force and fear caused by use of dangerous weapon *held* not error, where jury was instructed in effect that if it believed from evidence beyond reasonable doubt that by means of force and fear and against consent of victim that defendant feloniously took from such person or from his immediatee presence property the jury should find defendant guilty, since defeidant was in no wise harmed by refusal of requested instruction.

7. Criminal law 🔑1186(4)—Inflammatory remarks by prosecutor held not reversible error under Constitution where evidence showed guilt, since there was no miscarriage of justice (Const. art. 6, § 4½).

In prosecution for robbery, where district attorney in argument to jury termed accused potential murderer and arch criminal and referred to him as perjurer, *held* that such argument was not reversible error under Const. art. 6, § 4½, providing that notwithstanding error as to matter of procedure judgment shall not be set aside unless examination of entire cause, including evidence, shows that there has been miscarriage of justice since evidence unquestionably showed guilt of defendant.

8. Criminal law 🔑720(6)—Facts portrayed by evidence, together with proper inferences, constitute sole basis for legitimate argument of prosecutor.

Facts as produced by evidence, together with proper inferences deducible therefrom, constitute sole basis for legitimate argument of prosecutor.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

James Allen Clayton was convicted of robbery and of driving an automobile without consent of the owner, and he appeals. Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction, as well as from an order denying his motion for a new trial, as to each of six counts in an information in which he was charged with the crime of robbery and as to each of two counts therein in which he was charged with feloniously driving an automobile in the absence and without the consent of the owner.

The first point advanced by appellant is that prejudicial error was committed in that the action was not brought to trial within 60 days after the information was filed against defendant.

Subdivision 2 of section 1382 of the Penal Code provides in effect that, unless good cause to the contrary be shown, the trial court must order an action dismissed "if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the * * * filing of the information." Briefly, the facts relating to the proceedings in the action preceding the trial were that on April 25, 1927, defendant was arraigned for plea, and at that time, on motion of defendant, was given until April 28th to plead to the information against him, which time to plead was from time to time postponed until May 9th, when defendant entered his plea of not guilty, and the trial was then set for June 20th, which date was 59 days after the information was filed. On June 20th counsel for defendant was engaged in the trial of an action in a department of the superior court other than that in which the action against defendant was pending, but nevertheless in the case against defendant appeared in open court, objected to a postponement of the trial, and announced that probably in the afternoon of that day, or on the day following, he would be ready to proceed with the trial. Defendant personally also objected to a continuance, and stated that he was willing to proceed with the trial in the absence of his attorney. It further appeared that one of the victims of one of the robberies with which defendant was charged was confined to his bed, either through illness or by reason of his observance of some religious rite in connection with the recent death of his wife, and that the trial court on that day was "already engaged in a trial," and, as stated by the trial judge, there was no "possibility of having it (defendant's case) tried to-day; we haven't any place to try it." Thereupon, the trial of the action against defendant was postponed by the court until June 27th, at which time, over the objection of defendant, and in opposition to his motion for dismissal of the action, it went to trial.

As hereinbefore set forth, the statute (subdivision 2, § 1382, Pen. Code) requires a dismissal of an action not brought to trial within 60 days after the filing of the information, only in the event that no good cause to the contrary be made to appear.

In the case of People v. Benc, 130 Cal. 159, 62 P. 404, it is held that where the reason for not bringing the case to trial within the 60-day period is that the trial court is engaged in the trial of another action, "good cause" is shown. To the same effect are: People v. Henry, 77 Cal. 445, 19 P. 830; People v. Camilo, 69 Cal. 540, 11 P. 128; People v. Vasalo, 120 Cal. 168, 52 P. 305; Murphy v. Superior Court, 53 Cal. App. 6, 200 P. 483.

[1] When, in addition to the fact that on the day set for the trial of the action against defendant the trial court was "already engaged in a trial," it is considered that one of the principal witnesses for the prosecution was confined to his bed, and that the attorney representing defendant was engaged in the trial of another action with no certainty of being released therefrom until the day following the date on which the trial in defendant's case had been set, it becomes clear that the condition of "good cause" required by the statute before the time of trial might be extended beyond the 60-day period was "shown," and that as a result therefrom the judge of the trial court was justified in ordering the postponement of the trial, to which objection is here made.

[2] It is further contended by appellant that error was committed by the trial court in permitting to be read in evidence at the trial the testimony given by certain witnesses at the preliminary hearing in the justice court.

Subdivision 3, of section 686 of the Penal Code, provides, in part, that:

> "In a criminal action the defendant is entitled: * * *
>
> "3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, * * * the deposition of such witness may be read, upon its being satisfactorily shown to the court that he * * * cannot, with due diligence, be found within the state. * * *"

As a foundation for the admission of the evidence in question, it was shown that one of the absent witnesses was not a permanent resident of this state, and that within four or five weeks preceding the date of the trial in the superior court he had returned to his home in the city of Detroit, Mich. It also appeared from the testimony of the absent witness, given at the preliminary examination of defendant in the justice court, that at such time he was a visitor in the city of Los Angeles; that he was engaged in the real estate business in the city of Detroit; and that "in about six weeks" he expected to return to said city. The foundation laid by the prosecution for reading the testimony given by a second witness at the preliminary examination of defendant consisted of a showing that respective inquiries at the former place of employment of the witness, as well as at the place of her residence while she was temporarily living in Los Angeles, elicited the information that the witness had returned to her home in Arizona, and that letters which came addressed to the witness in Los Angeles were regularly forwarded to her at her home address in the state of Arizona.

In such circumstances, and especially in view of the rule that the determination of whether a sufficient foundation has been laid for the purpose of admitting testimony received at a preliminary hearing of a charge against a defendant lies largely within the discretion of the trial judge, it is clear that in the instant matter, so far as such witnesses are concerned, the ruling of which complaint is made cannot be disturbed by this court. People v. Caballero, 41 Cal. App. 146, 182 P. 321; People v. Padilla (Cal. App.) 254 P. 585; People v. Lederer, 17 Cal. App. 369, 119 P. 949; People v. Nelson, 85 Cal. 421, 24 P. 1006; People v. Witty, 138 Cal. 576, 72 P. 177; People v. Lewandowski, 143 Cal. 574, 77 P. 467; People v. Plyler, 126 Cal. 379, 58 P. 904.

[3] As to a third witness, whose testimony given at the preliminary examination was read to the jury, the foundation for its introduction apparently consisted merely of a statement said to have been contained in a letter received by the prosecution from the sheriff of Kern county to the effect that the witness had departed from this state. As the letter is not made a part of the record on

this appeal, this court has no ready means of determining whether any basis existed for the conclusion reached by the sheriff of Kern county that the witness either had ever departed from this state or that he was not within the state at the time the trial took place. While it may be that the evidence was insufficient as a foundation upon which to base the discretion exercised by the trial judge in admitting the evidence given by the witness at the preliminary examination of defendant, in view of defendant's confession wherein he admitted practically all the facts to which such witness testified, as well as the additional circumstance that a companion of the absent witness fully coroborated his testimony, the error (assuming it to be such) becomes of no importance, as undoubtedly without such evidence no conclusion other than the guilt of the defendant as to the count covered by such evidence could have been reached by the jury.

[4] As hereinbefore stated, in each of six counts of the information defendant was charged with the commission of the crime of robbery. With reference to count 1 of the information, the evidence in substance shows that the victim of the robbery was carrying under his arm a "strong box" containing $4.13 in cash. In answer to a question propounded by the district attorney to the witness as to how the box was taken from him by defendant, the witness replied:

> "Well; it was knocked out of my arm by two attempts. The first time it did not fall; I caught it with my left hand; but the second time it fell and as soon as it fell—it was all before I could recall what happened, almost—the man grabbed it and was running away from me."

The victim then pursued, overtook, and overpowered defendant and held him until he was taken into custody. Before the trial started in the superior court defendant moved the court to dismiss the action against him so far as count 1 was concerned, on the ground that at the preliminary hearing the evidence showed that grand larceny only had been committed, and not the crime of robbery. The motion was denied, and such ruling is here assigned as error.

By section 211 of the Penal Code robbery is defined as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." It will be noted that to constitute the crime of robbery the elements of "force or fear" must be present. The attention of this court is directed to no evidence which would indicate that the crime was "accomplished by means of * * * fear"—the only question being as to whether the circumstances of the commission of the offense as hereinbefore set forth amounted to a "felonious taking of personal property in the possession of another, from his person, * * * by means of force. * * *"

In the case of Montsdoca v. State, 84 Fla. 82, 93 So. 157, 27 A. L. R. 1291, it is said:

> "The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance [citing cases]."

In People v. Campbell, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107, 14 Ann. Cas. 186, the evidence showed that the defendant snatched a diamond stick-pin from the shirtfront of the complaining witness. It was held that where the article was so attached to the person or to his clothing as to necessitate resistance, however slight, in such circumstances the taking constituted robbery (citing authorities).

In Stockton v. Commonwealth, 125 Ky. 268, 101 S. W. 298, the syllabus is as follows:

> "The two defendants met the prosecuting witness, when one of them asked him if he could change a $10 bill, holding out his hand, containing some silver. When the prosecuting witness held out the bill to exchange for the silver, the other defendant snatched it out of his hand, and both defendants ran away. Held, that they were guilty of robbery."

In Brown v. Commonwealth, 135 Ky. 635, 117 S. W. 281, 21 Ann. Cas. 672, a part of the syllabus is as follows:

> "Evidence that one of defendants asked prosecutor for a dime with which to buy beer, and that, on the latter's drawing some money from his pocket, the other defendant suddenly and forcibly wrenched the money from prosecutor's hand, and fled with it, authorized a conviction for robbery, and an instruction on larceny was properly refused."

In view of the foregoing authorities, it must be held in the instant matter that the crime committed by defendant constituted robbery within the meaning of the statute.

[5] Appellant predicates further error in the trial of the action against defendant in that the following instruction requested by defendant was refused by the court:

> "The court further instructs the jury that before you can find defendant guilty of robbery under count 1 of the information, you must believe from all the evidence that defendant did take the tin box from the possession of L. R. Lueck by means of force and fear; that such force and fear must have been real and direct, and that such force and fear was caused by means of some dangerous weapon, and the mere fact that some time after the commission of said offense some weapon was found concealed among the clothes of defendant, is not sufficient in law upon which to base a charge of robbery against defendant. If the jury believe from the evidence that defendant did not use force or fear in the taking of the said tin box from said L. R. Lueck, you must then find defendant guilty of larceny only and fix the degree of larceny committed."

[6] Adverting to the language contained in section 211 of the Penal Code, it will be noted that the statute is silent as to the method which may be employed by the robber in committing the crime by which he either exerts force upon or produces fear in his victim. No authority is cited by appellant for including within the proposed instruction the proposition that in committing the crime of which defendant was specifically charged it was necessary that the force applied by defendant must have been "real and direct," and that it "was caused by means of some dangerous weapon." In some circumstances, such a construction of the statute might possibly relieve a defendant from conviction of robbery in the first degree where, for example, if the "weapon" should consist of a small toy pistol made of soft rubber, or some other equally harmless material. In such case the "force" might be neither "real" nor "direct," nor might such a "weapon" necessarily be "dangerous"; nevertheless, if by its use, the victim of the robbery were put in fear, it is probable that the offense defined in the statute would be committed. But aside from such considerations, which are sufficient justification for the refusal on the part of the trial court of the proposed instruction, the jury was instructed in effect that if it believed from the evidence beyond a reasonable doubt that by means of force or fear and against the will and consent of the victim of the robbery, the defendant feloniously took from such person or from his immediate presence the property described in the information—then the jury should find the defendant guilty, etc. It is therefore manifest that in any event the defendant was in no wise harmed by the refusal of his requested instruction in that regard.

Misconduct by the deputy district attorney in charge of the prosecution of the case is also urged by appellant as a ground for reversal of the judgment and the order denying his motion for a new trial. It appears that, over the objection of defendant, with exception reserved by him to the ruling of the court thereon, the deputy district attorney, in part, made use of the following language in his argument to the jury:

> "This defendant, here, James Clayton, is the type of criminal—a potential murderer. * * * I wonder if you have ever seen a more cool, cold-blooded type of criminal than you have in this defendant. He sat on there in a nonchalant manner and committed willful and deliberate perjury, just the same as if he was going out to order a lunch; he thinks nothing of it—from your observation of this defendant—nothing about it at all. He will go out here, as the evidence shows, with a gun; he will even invade the sanctity of a home. * * * If you don't call this what you might term an arch criminal, I don't know where we are going to find an arch criminal. * * * This is a concocted and deliberate attempt at perjury. Talk about perjury, every statement out of that man's mouth, with the exception of his name, was perjury. * * * There is the type you are dealing with; there is the type. In order to keep this community safe, we should put such men in San Quentin and keep them there forever. * * * And we have here a man who is what you might term a wholesale criminal; not only what you might term, if there is such a thing in crime as a retail criminal, but a wholesale criminal. This man certainly can be dubbed and termed a wholesale arch criminal."

[7] Following an objection by defendant to the remark made by the deputy district attorney that "this defendant, here, James Clayton, is the type of criminal—a potential murderer," the judge of the trial court ruled as follows:

> "The objection will be overruled. Of course the jury understands that what counsel say is not evidence in the case, and merely the conclusions that counsel is drawing from the evidence; that the jury is to decide the case from the evidence adduced upon the stand, and they are not to take the remarks of counsel as evidence in the case."

All other objections of defendant were overruled by the court without comment thereon or instruction to the jury.

[8] It is clear that such statements made by the deputy district attorney had no place in a well-ordered argument. They constituted nothing less than invective and were probably uttered with no intention other than that of influencing the passions of the jury against the defendant. As such they were wholly unjustifiable. It must be remembered that above everything else in criminal procedure a defendant is entitled to a fair trial. The facts as portrayed by the evidence, together with proper inferences deducible therefrom, constitute the sole basis for legitimate argument. For the deputy district attorney, personally and apparently from his own knowledge, to characterize the defendant as "a potential murderer," that "he sat there and committed willful and deliberate perjury"; that "he will go out here, as the evidence shows, with a gun," and that "this man can be dubbed and termed a wholesale arch criminal," in each case was in effect a statement by an officer of the court, not under oath, nor subject to cross-examination by the defendant, which, owing to the position occupied by the district attorney, especially in the eyes of the jury, was well calculated to exert a powerful influence against the defendant when the time came for the jury to write its verdict. To take such an unfair advantage is subject to severe criticism and condemnation. That such conduct was prejudicially erroneous and affected substantial rights of the defendant is manifest. It follows that, unless it may be said that, notwithstanding such error, no miscarriage of justice has resulted to the defendant, a new trial must be ordered. The evidence shows that as to each of the charges against defendant his identification as the perpetrator of

the crime was complete and unmistakable. In addition thereto, as testified in detail by two police officers, the defendant confessed to his participation in each of the crimes charged in the information. In view of the provisions of section 4½ of article 6 of the Constitution, to the effect that, notwithstanding error as to any matter of procedure, the judgment shall not be set aside unless, after an examination of the entire cause, including the evidence, it shall appear that the error of which complaint is made resulted in a miscarriage of justice, it is concluded that, inasmuch as the evidence herein unquestionably shows the guilt of defendant, so far as the error of misconduct by the deputy district attorney is concerned, the judgment and order of the trial court denying the motion for a new trial should not be disturbed.

It is ordered that as to each count of the information on which defendant was found guilty, the judgment and the order denying the motion for a new trial be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

89 Cal. App. 330

COLEY et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6109.)★

District Court of Appeal, First District, Division 1, California. Feb. 20, 1928.

Rehearing Denied March 21, 1928. Hearing Denied by Supreme Court April 19, 1928.

1. Receivers ⚷146—Court has power after termination of receivership action to dispose of property in receiver's possession.

As general rule, upon termination of an action wherein receiver has been appointed, court has continuing power to make disposition of property which has come into receiver's possession by virtue of his appointment.

2. Receivers ⚷146—On termination of unlawful detainer, return of apartment house in possession of receiver to plaintiff who had possession prior thereto was within court's jurisdiction.

Where plaintiff in action for unlawful detainer was in possession of apartment house immediately prior to and at time possession thereof was taken over by receiver under authority of court's order, and on termination of action court restored plaintiff to possession, *held*, that court was acting within its jurisdiction in making order for restoration.

3. Receivers ⚷146—Defendants held not prejudiced by failure to give them notice of application for restoration of premises in possession of receiver, where hearing on motion to set aside restoration was had.

Where, in action for unlawful detainer, receiver was appointed to take possession of apartment house possessed by plaintiff and on termination of action property was restored, assuming that notice was not given to defendants of application for order of restoration, *held*, that rights were not prejudiced by failure to give notice, where afterwards they were afforded hearing on merits of their motion to set aside order.

4. Receivers ⚷146—Vacation of order wrongfully obtained, restoring premises in receiver's possession to possession of plaintiff, held within court's inherent power.

Where court issued order restoring apartment house in possession of receiver to plaintiff in action for unlawful detainer after termination of action and ex parte order was obtained setting it aside, and on following day judge, on learning that order had been procured through false statements, vacated order, *held*, that vacating order was within power of court, since court has inherent power to set aside on its own motion any order which has been wrongfully obtained.

5. Certiorari ⚷5(1)—Assuming invalidity of orders issued subsequent to judgment, certiorari will not be granted where they are appealable (Code Civ. Proc. §§ 963, 1068).

Where petition for certiorari was prayed to declare as nullities two orders of court issued subsequent to termination of receivership, even assuming orders were invalid, certiorari could not be granted, for Code Civ. Proc. § 963, allows appeal to be taken from any special order made after final judgment, and section 1068 declares that writ of review may be granted when there is no appeal nor in judgment of court any plain, speedy, or adequate remedy, and orders from which appeal lies are not reviewable by certiorari.

6. Appeal and error ⚷71(4)—Orders restoring property to plaintiff in unlawful detainer on dismissal of action held appealable.

Where action was brought for unlawful detainer and receiver was appointed and action was subsequently dismissed and orders issued restoring property to possession of plaintiff, *held*, that orders were appealable.

Petition for certiorari by J. A. Coley and others to annul the orders of the Superior Court of the State of California in and for the City and County of San Francisco, Hon. Timothy I. Fitzpatrick, Judge, relating to the restoration of certain property affected by receivership in an action in unlawful detainer. Affirmed.

H. M. Anthony, of San Francisco, for petitioners.

Albert Picard, of San Francisco, for respondents.

KNIGHT, J. The petitioners seek by this proceeding in certiorari to have annulled two orders dated, respectively, August 9 and August 26, 1927, made by the respondent court in an action in forcible detainer commenced by Grace Lanza against the petitioners Ho-

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★Rehearing denied. Hearing denied by Supreme Court.

gan, Craig, and others to obtain possession of an apartment house in San Francisco to which she claimed to have acquired title by purchase at trustee's sale. The orders challenged were made subsequent to a dismissal of the action by plaintiff, but before the action was tried, and relate to the restoration of the property.

It appears from the record that on July 7, 1927, a few days after the complaint in said action had been filed, the plaintiff therein, Grace Lanza, went into possession of the disputed property. As to whether her entry was made peaceably, the parties are not agreed, but that question is one with which we are not here concerned, for admittedly, on the day mentioned, she went into actual possession of said property. The next day the petitioner Hogan filed an answer to the complaint, and on July 19th made written application for the appointment of a receiver. The application, which was resisted by the said Grace Lanza, came on for hearing before Hon. H. D. Gregory and on July 22d was granted. The order made in that behalf directed the receiver to take possession of said apartment house, collect the rents, and pay the bills, etc.; and thereupon, in obedience to said last-mentioned order, the said Grace Lanza, who still held possession of the property, surrendered the same to the receiver. Thereafter, on August 9th, and while the apartment house was thus in the possession of the receiver, the said Grace Lanza dismissed the action in forcible detainer for the reason, as she asserted in an affidavit filed later, that nothing further could be accomplished thereby, that the purpose thereof was to obtain possession of said apartment house, and that since, subsequent to its commencement, she had gone into possession and thereafter continued to hold the same as against the defendants up to the time of the appointment of the receiver, the issues involved in said action had become moot. Immediately upon the dismissal of the action she obtained an order from Hon. T. I. Fitzpatrick dated August 9th, directing the receiver to restore to her forthwith the possession of said property, and to file his accounts and apply for a discharge, and the receiver complied with the terms of said order. Subsequently and on August 17th the petitioner Hogan moved to set aside Judge Fitzpatrick's order and to continue the receivership upon the ground that said order was inadvertently made. This motion was opposed by Grace Lanza, and on August 22d, after a full hearing upon the merits before Hon. Harold Louderback, during which the question of her peaceable entry into the possession of the property was made the main issue, the motion was denied. Notwithstanding that the order of August 9th was thus confirmed, an ex parte order was on August 25th obtained from Judge Fitzpatrick on behalf of the petitioner Hogan setting the same aside upon the ground, as the order recites, that the same was inadvertently made; but on the following day, August 26th, upon learning, as his answer herein alleges, that the order he had made on the day previous had been obtained through false statements made to him at that time, Judge Fitzpatrick made another order vacating the same. The effect of the order last above referred to was to continue in force the order of August 9th restoring the property to Grace Lanza; and no appeals were taken from any of the orders or proceedings hereinabove mentioned.

The contention petitioners make in the present proceeding is that Judge Fitzpatrick's order of August 9th restoring the property to the said Grace Lanza is null and void for the reason, as they claim, that the effect thereof was to adjudicate the question of title to and right of possession of said property without giving petitioners their day in court; and that consequently the order of August 26th which operated to continue in force the order of August 9th is also void.

[1] It may be stated as a general rule that, upon the termination of an action wherein a receiver has been appointed, the court has continuing power to make disposition of the property which has come into the receiver's possession by virtue of his appointment. It was so held in the case of Baughman v. Superior Court, 72 Cal. 572, 14 P. 207, cited by petitioners. The court there said:

> "Where a bill upon which the appointment of a receiver is made is afterward dismissed on demurrer, the duties of the receiver cease as between the parties to the action. And so where the defendant finally obtains judgment, the entry of judgment would seem to have the effect of terminating the receiver's functions, although plaintiff perfects his appeal to the appellate court. But the abatement of the action, or entry of final judgment, does not discharge the receiver ipso facto. Although as between the parties his functions terminate with the determination of the suit, he is still amenable to the court as its officer until he has complied with its direction as to the disposition of the funds he has received as receiver."

And continuing, the court declared:

> "And when the bill is dismissed on demurrer, it is the plain duty of the court to direct the receiver to restore the fund or property to the person from whom it was taken. High on Receivers, 833; Field v. Jones, 11 Ga. 413; [Beverley] Beverly v. Brooke, 4 Grat. [45 Va.] 220; Ireland v. Nichols [40 How. Prac. 85] supra."

[2, 3] In the present proceeding it appears without dispute that the plaintiff in said action, Grace Lanza, was in possession of said apartment house immediately prior to and at the time possession thereof was taken over by the receiver under the authority of the court's order. Therefore, upon the termination of the action in which the receiver was

appointed, the court was acting entirely within the limits of its jurisdiction in making an order for the restoration of the property; and even assuming that notice to petitioners of the application for the order of restoration should have been given, their rights have not been prejudiced by a failure to give the same for the reason that afterwards they were afforded a full hearing on the merits before Judge Louderback when their motion to set aside said order was heard and determined.

The case of Hidden v. Jordan, 1 Cal. Unrep. 216, cited and relied upon by petitioners, is not in point for several reasons. There the trial court, after the entry of judgment in favor of the plaintiff and in accordance with the terms thereof (which judgment was subsequently reversed on appeal), made a separate order "directing the receiver to deliver over to the plaintiff the said premises and the rents and profits," notwithstanding that the defendant in the action, as the decision plainly points out, had been in possession for the preceding seven years. In reversing the order the Supreme Court said:

> "* * * Admitting his [defendant's] possession to have been wrongful, this is not the proper remedy, if there be a remedy, to recover possession pending the litigation as to the rights of the parties."

And it was furthermore stated that:

> Said order was dependent "upon the judgment already reversed, and the rights of the parties ought not to be embarrassed by continuing the order formally upon the record, when it is in fact substantially reversed in the reversal of the judgment itself, covering the same ground."

[4] As to the legality of the order of August 26th, it is clear, without discussing the matter, that a court has inherent power to set aside on its own motion any order which has been wrongfully obtained.

[5, 6] Aside from the question of the validity of the orders in question, however, and even though it be assumed that the same were invalid, petitioners were afforded complete remedy by appeal for the correction thereof. Section 963 of the Code of Civil Procedure allows an appeal to be taken from any "special order made after final judgment"; and section 1068 of said Code in effect declares that a writ of review may be granted only when "there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Both of the orders sought to be annulled here were special orders made after the dismissal of the action, which dismissal amounted to a final judgment (Marks v. Keenan, 140 Cal. 33, 73 P. 751); and although it is held that an appeal may not be taken from an interlocutory order directing a receiver to distribute property, an appeal does lie where an order to the same effect is made subsequent to judgment (Broder v. Conklin, 121 Cal. 289, 53 P. 797; Hidden v. Jordan, supra; 22 Cal. Jur. 550); and if it be appealable it is well settled that certiorari is not an available remedy (Hildebrand v. Superior Court, 173 Cal. 86, 159 P. 147; Stensland v. Superior Court, 39 Cal. App. 172, 178 P. 549; Hochheimer & Co. v. Superior Court, 65 Cal. App. 206, 223 P. 564; Snyder v. Plummer, 174 Cal. 204, 162 P. 1040; Martin v. Miller, 65 Cal. App. 581, 224 P. 783).

For the reasons hereinabove stated, the orders sought to be annulled are affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

89 Cal. App. 521

COLE BROS. v. DIMMICK et ux. ★
(Civ. 6125.)

District Court of Appeal, First District, Division 2, California. Feb. 28, 1928.

Rehearing Denied March 29, 1928. Hearing Denied by Supreme Court April 26, 1928.

1. Brokers 🔑65(1)—As respects right to commission, broker's representation that corporation would issue owner certificate showing title free from mortgage held affirmation of fact.

In suit by broker to collect commission for land sold, though vendor and purchaser had mutually rescinded contract because of vendor's inability satisfactorily to clear title, *held*, that broker's representation title companies in city would issue bond whereby outstanding mortgage could be taken care of in such manner that certificate could be issued showing title to premises free and clear of mortgage was an affirmation of fact, and not a statement of opinion.

2. Brokers 🔑65(1)—In suit for commission, held, that, assuming broker's statements corporation would issue owner clear title certificate were opinion, yet they were actionable.

In real estate broker's suit for commission, where it was shown vendor had agreed to sale of land by broker on broker's statements that a corporation would make it possible, by issuance of certificate, to give title showing land free from mortgage, *held*, on its being shown that vendor and purchaser had rescinded contract because such certificate could not be procured, that, even assuming such statements were statements of opinion and not affirmations of fact, yet they were of that class which are, under proper circumstances, actionable.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Separate actions by Cole Bros., a copartnership consisting of F. W. Cole, F. W. Cole, Jr., and J. Byron Cole, against F. M. Dimmick and against Lucile M. Dimmick, tried together. Verdict for plaintiffs. From an order

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★Rehearing denied. Hearing Denied by Supreme Court.

granting defendants' motion for new trial, plaintiffs appeal. Order affirmed.

Newlin & Ashburn, of Los Angeles, for appellants.

Schweitzer & Hutton, of Los Angeles (B. R. Ware, of Los Angeles, of counsel), for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the husband, F. M. Dimmick, to recover commissions claimed to have been earned in negotiating a sale of real estate. For reasons best known to the plaintiffs, they commenced another action against the wife, Lucile M. Dimmick, for the same relief. Each defendant appeared and answered. The two actions, by consent, were tried together before the trial court sitting with a jury. The jury returned a verdict for the plaintiffs. The defendants made a motion for a new trial. The motion was granted, and the plaintiffs have appealed from that order.

Prior to September 1, 1923, the defendants were the owners of a tract of land in Los Angeles. The title stood in the wife, but the land was community property. The plaintiffs were copartners and were licensed realtors transacting a real estate business. As early as the month of August in that year the plaintiffs and defendants had commenced talking about a transfer of the land to R. V. New. The latter had, at different times, discussed the possible construction of an own your own apartment building, a hotel, and other possibilities. The defendants' tract was mortgaged to secure the payment of a promissory note in the sum of $65,000. The mortgage was held by the Misses Dent. By its terms the mortgage could be paid July 19, 1924. That fact was discussed by all of the parties, the owners, their agents, and the proposed purchaser, at various times when the materiality of that fact was under consideration. On one or more of those occasions the plaintiffs and R. V. New stated that the title insurance companies doing business in Los Angeles issued contracts even though the property was mortgaged. The exact terms of such contracts were not discussed nor examined in detail. On October 10, 1923, the defendant F. M. Dimmick gave the plaintiffs a written authorization authorizing them "to buy or sell the lot for $160,000—$60,000 cash and balance 1, 2, and 3 years at 7 per cent. interest." No transfer was made under that authorization. On October 26, 1923, another authorization was given. The term was five days. The price was stated at:

> "$160,000 on the following terms and conditions: $60,000 cash and balance on or before 1, 2, and 3 years.

It did not refer to the instrument dated October 10, 1923. It provided for a possible mortgage of $100,000 and therefore the existence of a mortgage for $65,000 did not conflict. Thereafter the plaintiffs wrote out and caused to be signed a paper as follows:

> "Phone 769-048.
> "Cole Bros., Real Estate.
> "1001 South Western Avenue.
> "Los Angeles, Cal., October 29, 1923.
>
> "Received from Robert Valentine New, address 1419 So. St. Andrews Pl., Tel 766-550, the sum of $1,000 as a deposit and part payment on the purchase of the following described property: Lot W. 80' of lot 3, block 7, tract, Wilshire Blvd. Tract corner of Wilshire Blvd. and Benton Blvd., which property the payor of the above-named deposit hereby agrees to buy for the sum of $160,000, on which sum the above deposit shall apply, the balance to be paid as follows:

$ 1,000.00	cash on deposit.
1,000.00	cash 10 days from opening of escrow.
1,000.00	cash 20 days from opening of escrow.
1,000.00	cash 30 days from opening of escrow.
156,000.00	cash 2 days prior to close of 90-day escrow.
$160,000.00	total purchase price in cash.

> "Purchaser to open escrow before close of current week.
>
> "This sale is made by Cole Bros., subject to the owner's approval. If so approved, it is a part of this agreement that the owner shall furnish a good and sufficient deed conveying the property to the purchaser *and a certificate of title to the Title Insurance & Trust Company or Title Guarantee & Trust Co., showing the title to be in the owner free and clear from incumbrance* except conditions, restrictions, reservations, and rights of way of record. Taxes, interest, and insurance to be adjusted to close of escrow.
>
> "If the owner does not approve this sale or cannot convey the property as herein provided, the said deposit shall be returned to the purchaser, but if the conditions of this agreement can be fulfilled by the seller and the purchaser fails to complete the purchase, the deposit shall be forfeited as liquidated damages.
>
> "The owner shall have two days to approve this agreement.
>
> "Cole Brothers, Agents.
>
> "Above terms approved.
>
> "Robert V. New, Purchaser.
>
> "I hereby approve and confirm the above sale October 29, 1923, and agree to pay Cole Bros. a sum equal to Los Angeles Realty Board rate of commission, 5% on $50,000, and 2½ per cent. thereafter.
>
> "Lucile M. Dimmick, Owner."

Later such other papers were signed that the case presents no question as to the statute of frauds. On the date last mentioned neither the plaintiffs nor R. V. New directed the attention of the defendants to the fact that the paper dated October 29, 1923, contained any words limiting the title insurance papers to any particular form, nor did the parties have any further discussions regarding the payment of the mortgage. Soon after the above instrument had been signed, R. V. New commenced to make arrangements looking toward the construction of a hotel and the issuance of bonds to obtain the funds to finance the project. It then transpired that the title companies would not issue a certificate showing "the title free and clear" until the mortgage was released; that the mortgagees would not, prior to July 19, 1924, release the mortgage; that, with the mortgage not released, the title companies would issue an insurance policy, but they insisted that the policy should recite the existence of the unpaid mortgage and the fact that the title company held the moneys to pay the mortgage on July 19, 1924. When these facts were considered in connection with the proposed bond issue it became apparent that the condition of the title would impair the salability of the bonds. Later the vendor and vendee mutually rescinded their contract. The plaintiffs refused to join in the rescission and sued for their commissions. In their answer the defendants pleaded certain denials and also pleaded certain affirmative matter. Among other things, they alleged:

"That prior to the execution of the agreement of October 29th, the said New and the plaintiffs, knowing of the existence of an unmatured mortgage upon the said premises, came to this defendant and stated *that the title companies in the city of Los Angeles could and would issue a bond whereby the said mortgage could be taken care of in such manner that a certificate could be issued showing the title to the said premises free and clear of the said mortgage;* that the defendant, in reliance upon the said representation and with the mutual understanding that the said certificate would be so obtained by the plaintiffs, executed the agreement of October 29, 1923, with New and the plaintiffs, and it was understood and intended and agreed by, between, and among the parties that if the said unmatured mortgage on the premises was so taken care of by the plaintiffs within the 90-day period provided for in the agreement, that the said Robert Valentine New would accept the said premises and certificate under the agreement, and make the payments to the defendant as provided for in the said agreement; and it was also understood and agreed by, between, and among the said defendant and plaintiffs and said New that if the plaintiffs were unable or failed to obtain the above-described bond and certificate of title, that the agreement of October 29th would be void, rescinded, and of no further effect between the said three parties to the agreement; that the defendant was at all times ready and willing to accept the said bond, but that the plaintiffs failed and refused to obtain the said bond.

"That the said Robert Valentine New and the plaintiffs were thereupon notified of the defendant's inability to convey free and clear of the said mortgage, whereupon, under and pursuant to the agreement of October 29th, all moneys paid into escrow by the said New and all moneys given to F. M. Dimmick were returned to the said New, and the said New executed in writing a release to the defendant, wherein the defendant was released from all further obligation and liability under the said contract and agreement of October 29th."

[1, 2] Except as we will presently mention, we do not understand the plaintiffs to contend that the defense, if true, was insufficient. However, they assert that the representations were but the expression of opinions. The unqualified statements of the class of contracts sold by certain corporations were not statements of opinions. Myers v. Lowery, 46 Cal. App. 682, 685, 189 P. 793; Edge v. Bryan, 47 Cal. App. 312, 315, 190 P. 476. But conceding that they were statements of opinions, they were of that class that, under certain circumstances, are actionable. Johnson v. Withers, 9 Cal. App. 52, 98 P. 42; Sheer v. Hoyt, 13 Cal. App. 662, 110 P. 477; Herdan v. Hanson, 182 Cal. 538, 189 P. 440.

As the plaintiffs had been the authorized agents of the vendors since October 10, that fact is of particular importance as bringing this case within the doctrine of the cases cited. Calmon v. Sarraille, 142 Cal. 638, 641, 76 P. 486; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 576, 126 P. 351, 42 L. R. A. (N. S.) 125. On the trial much evidence was adduced on the issue so made, and there was a sharp conflict in favor of the defendants. The surrounding circumstances were decidedly in favor of the defendants. We think it is quite clear that the trial court did not err in granting a new trial.

The order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

89 Cal. App. 505

JELLEN v. O'BRIEN, Chief of Police.

(Civ. 6065.)

District Court of Appeal, First District, Division 2, California. Feb. 28, 1928.

1. Judgment 🔑7—Jurisdiction of subject-matter and person and power to render particular judgment are elements in every valid judgment.

There are three jurisdictional elements in every valid judgment; namely, jurisdiction of the subject-matter, jurisdiction of the person, and power or authority to render the particular judgment.

2. Judgment 🔑349, 381—Judgment may be vacated on motion or without at any time for absence of jurisdiction of subject-matter or person or power to render particular judgment (Code Civ. Proc. § 1917).

For absence of either jurisdiction of subject-matter, jurisdiction of the person, or power to render the particular judgment, when properly apparent, judgment may be vacated at any time, whether before or after term or time limited by statute for motions on statutory grounds, either on motion or of court's own volition, in view of Code Civ. Proc. § 1917.

3. Parties 🔑11, 12—Party may sue for benefit of many, where question is of common interest, or it is impracticable to bring all parties before court (Code Civ. Proc. § 382).

Under Code Civ. Proc. § 382, a party may sue for the benefit of many, where question involved is one of common or general interest to many persons, or parties are numerous, and it is impracticable to bring them all before court.

4. Injunction 🔑114(2)—Secretary of furniture dealers' association held entitled to sue for benefit of all members to enjoin enforcement of license ordinance (Code Civ. Proc. § 382).

Secretary of furniture dealers' association, all members of which claimed that ordinance requiring license to deal in secondhand merchandise was invalid and were threatened with arrest for failure to buy license fee, *held* entitled to sue for benefit of all to restrain police chief from enforcing such ordinance; question being one of common or general interest to many persons within Code Civ. Proc. § 382.

5. Injunction 🔑114(2)—Parties not entitled to sue jointly in law may unite in suit for injunction.

Parties may unite in a suit for injunctive relief under a state of facts which would not warrant their suing jointly in law.

6. Injunction 🔑210—Injunction against enforcement of license ordinance against members of association effected at suit of its secretary being valid on face, court could not subsequently strike all reference to association and members.

Permanent injunction against enforcement of ordinance, requiring payment of license fee to deal in secondhand merchandise, against members of furniture dealers' association, at suit of secretary thereof, being valid on its face, court could not modify it a year later by striking therefrom all reference to such association and its members, who were properly before court.

7. Parties 🔑80(5), 88(3)—Objections to misjoinder, and nonjoinder of parties and uncertainty on face of complaint are waived by failure to demur (Code Civ. Proc. §§ 433, 434).

Under Code Civ. Proc. §§ 433, 434, objections to misjoinder and nonjoinder of parties and uncertainty as appear on face of complaint are waived by failure to interpose demurrer.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Suit by S. Fisher Jellen and others against Daniel J. O'Brien, Chief of Police of the City and County of San Francisco. From an order amending a decree granting an injunction, plaintiffs appeal. Reversed.

Walter McGovern, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Asst. City Atty., both of San Francisco, for respondent.

LUCAS, Justice pro tem. Plaintiff brought suit to obtain a permanent injunction restraining defendant, as chief of police of San Francisco, and all of his agents, servants, and employees, from enforcing against the plaintiff or any member of the San Francisco Furniture Dealers' Association the provisions of an ordinance requiring every person, firm, or corporation engaged in buying or selling secondhand merchandise to secure a quarterly permit, and to pay a license of $25 per quarter.

The complaint, among other things, alleges:

> "That San Francisco Furniture Dealers' Association is, and at all times herein mentioned was, a voluntary association of citizens of and residents of the city and county of San Francisco engaged in business at fixed places of business in the city and county of San Francisco as retail furniture dealers, and that the membership of such association proximates a large number of individuals, each and all of whom are affected by all of the matters and things hereinafter referred to, and each and all of them are subject to a like injury and damage as the injuries complained of by plaintiff in this action, and that the wrongs hereinafter complained of are threatened against each and all of the said San Francisco Furniture Dealers' Association by the said defendant; and that, in order to prevent a multiplicity of suits upon the same subject-matter, and to procure the same identical relief, this plaintiff, as the secretary of the said San Francisco Furniture Dealers' Association, has commenced this action in behalf of all of the members of the said San Francisco Furniture Dealers' Association."

Then follow allegations in reference to the enactment of the ordinance in question, its threatened enforcement against each and all of the members of the San Francisco Furniture Dealers' Association, including threats of arrest and imprisonment, allegations as to the invalidity of the ordinance, and its inapplicability to the members of said association, and a prayer for injunctive relief.

On October 15, 1923, the court granted the relief sought for, and in so doing found:

> "That neither the said plaintiff nor any of the members of the said San Francisco Furniture Dealers' Association are, or were, at the date of the alleged demand and threats by the said defendant, engaged in any business which required either a permit from the board of police commissioners, or which demanded the payment of any license tax, fee, or money as a condition to the continued conduct thereof."

On September 3, 1925, the court made its order amending its original decree by striking therefrom all reference to the San Francisco Furniture Dealers' Association, thereby making the injunction applicable to the plaintiff only.

From this order appeal was taken by "S. Fisher Jellen, as secretary and representative of the San Francisco Furniture Dealers' Association, and its members, and the San Francisco Furniture Dealers' Association, a voluntary association, and the members of the San Francisco Furniture Dealers' Association, a voluntary association."

Appellant Jellen contends that the judgment of permanent injunction became final for all purposes many months before respondent sought to modify or amend it; that the court was without jurisdiction to modify it, and that the order appealed from is therefore invalid.

Respondent urges that the members of the association in question, other than S. Fisher Jellen, were improperly joined as parties plaintiff, and that the court exceeded its jurisdiction in granting them a permanent injunction.

[1, 2] "There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject-matter, jurisdiction of the person, and the power or authority to render the particular judgment. For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time, whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without suggestion." Freeman on Judgments (5th Ed.) pp. 444, 445. See, also, Code Civ. Proc. § 1917.

It is not questioned that the court had jurisdiction of the subject-matter, nor that it had the power to grant injunctive relief providing the parties were properly before the court.

Upon the answer to the question, "Did the court have jurisdiction of the person of the members of the San Francisco Furniture Dealers' Association other than the plaintiff?" rests the validity of the injunction.

[3] Section 382, Code of Civil Procedure, provides that:

> "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

A party may therefore sue for the benefit of many in one of two cases: (a) Where the question is one of a common or general interest of many persons; or (b) where the parties are numerous and it is impracticable to bring them all before the court. Carey v. Brown, 58 Cal. at page 183.

[4] Appellant urges that he has brought himself within the provisions of both classes of cases, and particularly the first class. The complaint contains no allegation to the effect that it is impracticable to bring the parties all before the court, unless the allegation that the membership of the association proximated a large number of individuals might be held to be a sufficient allegation in that regard. However, we believe that appellant comes squarely within the first class of cases. The complaint in effect alleged, and the court found, identity of interest. All the members of the association on behalf of whom plaintiff brought suit were engaged in the same line of business; all claimed the ordinance invalid; all alleged they were not liable for the payment of a license fee; none of them had ever secured a permit to conduct his business, nor had he ever paid a license therefor. If the ordinance in question was applicable to one it was applicable to all. Plaintiff and each and all of the members of the association were threatened with arrest by the same party for the identical omission —failure to pay the license tax imposed by the ordinance.

From this it clearly appears that "the question" (both of law and of fact) "is one of common or general interest of many persons."

In urging improper joinder and lack of jurisdiction over the members of the association other than plaintiff, respondent relies quite strongly on the case of Noroian v. Bennett, 179 Cal. 806, 810, 179 P. 158, 160, where it is said:

> "But there is no case which holds that parties having separate causes of action against the same person, all claiming under the same rules of law, have a common interest which justifies

the joinder of all in one action to obtain the separate relief to which they may be entitled."

In this case the plaintiffs sought a judgment restraining the defendants from prosecuting pending actions and from beginning other actions against plaintiffs upon certain promissory notes made and executed by the plaintiffs separately and at different times. The suit of each rested upon a separate state of facts. In holding that the parties could not join in one suit, the court commented upon Professor Pomeroy's treatise on the subject of community of interest, in the following language:

> "In speaking of 'a community of interest' in the questions of law and fact involved, the author was referring to cases where a single fact was decisive of the claim of all the parties concerned, as where persons owning separate rights in the waters of a stream are injured by a diversion of the water higher up on the stream by another person, or where a single fraudulent conveyance operates to the injury of several separate judgment creditors in the collection of their judgments, in each of which cases a single fact is the sole subject of the inquiry; or cases where owners of separate tracts of land unite in an action to quiet title against another claiming under a single land grant adversely to all of them; or where residents of a city, owning vehicles therein, unite to enjoin the enforcement of an illegal ordinance imposing taxes on such vehicles, or a suit by several lot owners to enjoin an illegal assessment upon all their lots for the improvement of a street, in each of which cases the same question of law may determine the rights of all the parties.
>
> "It is clear from a consideration of the facts alleged in the complaint that the present case is not included in any of the classes to which the rule stated by Mr. Pomeroy is applicable."

[5] The cases of Foreman v. Boyle, 88 Cal. 290, 26 P. 94, and Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570, are authority for the rule that parties may unite in a suit for injunctive relief under a state of facts which would not warrant their suing jointly in law.

[6] A consideration of the facts in the instant case, together with the foregoing announced principles of law, and what appears to be the trend of California decisions, leads us to the conclusion that the court had and exercised jurisdiction over the members of the association in whose behalf the action was brought, and that the permanent injunction was valid on its face. Being valid on its face, the court had no jurisdiction more than a year later to modify it by striking from its provisions all reference to certain parties who were properly before the court, and the order appealed from is therefore void.

[7] It is to be noted that in the case at bar issue was joined without the interposition of a demurrer. Objections as to such misjoinder, nonjoinder, and uncertainty as may appear upon the face of the complaint are therefore waived. Sections 433 and 434, Code Civ. Proc.

The order appealed from is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

MEMORANDUM DECISIONS

1 203 Cal. 482

Oliver FETTERLEY, Plaintiff and Appellant, v. Helen M. RANDALL, Defendant and Respondent. (L. A. No. 9158.) Supreme Court of California. Feb. 29, 1928. Department 1. Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Hugh J. Crawford, Judge, of dismissal of an action for damages. Oliver Fetterley, in pro. per. Walter J. Little, of Los Angeles, for respondent.

CURTIS, J. This is an appeal from a judgment dismissing the action after an order made sustaining a demurrer to the fourth amended complaint without leave to amend. It appears from said complaint that plaintiff was on the 22d day of March, 1922, adjudged insane by the superior court of the county of Los Angeles and committed to the Southern California State Hospital at Patton, Cal., and that on December 19, 1923, by the same court said plaintiff was adjudged sane and restored to all his rights as a competent person; that between said two mentioned dates, that is, on August 4, 1923, the defendant procured letters of guardianship to issue to her upon the estate of plaintiff and thereby received control of his property. It is then alleged in said complaint that no notice of defendant's application to be appointed guardian of plaintiff's estate was ever served upon plaintiff, and that defendant procured her appointment as such guardian upon a false affidavit, but said complaint fails to show the contents of such affidavit, or the particulars in which it was false. A further allegation of said complaint sets forth that defendant had presented her final account as such guardian and the same had been approved by the court, and defendant discharged as guardian of plaintiff's estate. No question is made but that the defendant has paid and delivered to plaintiff all money or other property shown to belong to him by the order approving said final account. We are at a loss to understand upon what ground the plaintiff bases his claim for damages. None is set forth in his brief, and we discover none from an examination of said complaint. Judgment affirmed.

We concur: PRESTON, J.; SEAWELL, J.

2 89 Cal. App. 374

PEOPLE of the State of California, Plaintiff and Respondent, v. William GIBSON, Defendant and Appellant. (Cr. 1457.) District Court of Appeal, First District, Division 2, California. Feb. 21, 1928. Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, J. J. Trabucco, Judge, of conviction of violation of section 288a, Penal Code, and from an order denying motion for new trial. Harry S. Whitthorne, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried before a jury on an information charging a violation of section 288a of the Penal Code. From the judgment following the jury's verdict of guilty and from the order denying his motion for a new trial the defendant has appealed upon a typewritten record. The trial was held December 29, 1927, the judgment was pronounced December 30, 1927, and the clerk's and reporter's transcripts were filed in this court on January 12, 1928. The cause was placed upon the calendar for hearing February 14th, but the appellant did not appear to prosecute the appeal and has not filed a brief. We have examined the record, and are satisfied that the appellant was fairly tried and convicted, and that the record is free from error. Judgment and order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

CALIFORNIA REPORTER

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203 Cal. 504

HECQ v. CONNER et al. (L. A. 9267.)

Supreme Court of California. March 1, 1928.

1. Judgment ⚷390—Failure to state grounds upon which motion to vacate judgment was made held waived, where opposing party did not object but filed counter affidavit (Code Civ. Proc. § 1010).

Where notice of motion to vacate judgment failed to state grounds upon which said motion was made, and opposing party did not object, but in response appeared and filed counter affidavit, *held* that failure to state grounds of motion was waived, since Code Civ. Proc. § 1010, requiring notice of motion to state grounds upon which it shall be made being for benefit of party upon whom notice is served, may be waived.

2. Dismissal and nonsuit 🔑43(5)—Affidavit attached to notice of motion alleging supporting facts held sufficient information of grounds on which motion was made (Code Civ. Proc. § 1010).

Where notice of motion had attached to it an affidavit which set forth certain alleged facts in support of motion and upon which motion was based, *held* that affidavit was sufficient to apprise opposite party of grounds upon which motion would be made, and was sufficient notice under Code Civ. Proc. § 1010.

3. Judgment 🔑390—Contention that court erred in considering affidavit filed on motion in support of original motion to set aside judgment held without merit.

Where, after making motion to set aside judgment, second motion was made for leave to file additional affidavit in support of original motion and second motion was granted, court thereafter considering additional affidavit in passing upon merits of original motion, *held* that contention court's action was error was without merit.

4. Appeal and error 🔑927(2)—Appellate court must assume that court below, granting motion to set aside judgment of dismissal on allegations in affidavits, believed allegations to be true.

On appeal from grant of motion to set aside judgment of dismissal, where ground for motion was stated in affidavit, *held* that appellate court must assume that court below believed allegations to be true.

5. Dismissal and nonsuit 🔑43(2)—Grant of motion vacating judgment of dismissal because of alleged violation of understanding between plaintiff and defendant held not abuse of discretion.

Grant of motion to vacate judgment of dismissal because of defendant's alleged violation of understanding with plaintiff that action might lie dormant or be reset as counsel for plaintiff should decide, where defendant procured dismissal, *held* not abuse of discretion by trial court.

6. Appeal and error 🔑973—Appellate court will not interfere with action of trial court in granting order to vacate dismissal except in extreme cases.

Appellate court will not interfere with action of trial court in refusing or granting motion to vacate judgment of dismissal except in extreme cases.

Department 1.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by Alexander Hecq against W. S. Conner and others. From an order setting aside the judgment of dismissal, defendants appeal. Affirmed.

H. W. Kidd and W. O. Schell, both of Los Angeles (Gerald F. H. Delamer, of Los Angeles, of counsel), for appellants.

Eugene I. Fisher, of Long Beach, for respondent.

CURTIS, J. This appeal is from an order made after judgment; namely, an order setting aside and vacating a judgment of dismissal previously rendered in this action.

[1, 2] It is first contended by appellants that the notice of motion to vacate and set aside said judgment failed to set forth or state the grounds upon which said motion would be made, and therefore the order made granting said motion was erroneous and should be reversed by this court. The bill of exceptions upon which this appeal has been brought before this court, and which was, of course, prepared by the appellants, fails to show that appellants made any objection to said notice of motion in the court below. On the other hand, it shows that in response to said notice the appellants appeared in said court at the time and place specified therein, filed a counter affidavit to the affidavit of respondent attached to his said notice of motion and upon which this motion was based, and otherwise contested the granting of said motion. The first objection, therefore, as shown by the record herein, which appellants have made to said notice of motion, is made by them in this court. Section 1010 of the Code of Civil Procedure, requiring a notice of motion to state "the grounds upon which it will be made," is for the benefit of the party upon whom the notice is served. Being for his benefit, he can, of course, waive its requirement. By failing to object to the hearing of the motion at the time which it was noticed to be heard, the appellants impliedly waived this defect in the notice itself. Barron v. Deleval, 58 Cal. 95; Mallory v. See, 129 Cal. 356, 61 P. 1123; Bonfield v. Bonfield, 71 Cal. App. 705, 236 P. 162. The notice of motion, as stated, had attached to it an affidavit of the respondent, which affidavit set forth certain alleged facts in support of the motion and upon which the motion would be based. This affidavit was, in our opinion, sufficient to apprise appellants of the grounds upon which respondent's proposed motion would be made. This being the case, the notice was sufficient. Fink & Schindler Co. v. Gavros, 72 Cal. App. 688, 237 P. 1083; Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737; Savage v. Smith, 170 Cal. 472, 150 P. 353.

[3] At the time the above-mentioned motion came on for hearing, the court, after considering the affidavits of the respective parties in support and in opposition thereto, ordered the matter submitted. Thereafter, and before the court had ruled upon the motion, the respondent made a second motion in said proceeding. This second motion was for leave to file an additional affidavit in support of his original motion. This second motion was granted, and the court thereafter considered said additional affidavit of respondent in passing upon the merits of the original motion. This action on the part of the trial

court is now assigned as error. If we correctly understand appellants' objection in this regard, it is that, as the notice of the original motion stated that it would be made upon certain papers and affidavits then on file in said court, and as the additional affidavit, which the court permitted the respondent to file as a result of his second motion, was not on file at the time the first notice of motion was served and was not referred to in said notice of motion, it could not be considered by the court in passing upon the original motion. The only authority which appellants cite in reference to this contention is the case of Broderick v. Cochran, 18 Cal. App. 202, 122 P. 972, which they concede to be opposed to them. The contention is without merit, and we are satisfied that no authority can be found to support it.

The order appealed from was granted by the trial court after a hearing, as we have already seen, at which there were presented and considered by the court affidavits by respondent in support of his motion and counter affidavits on behalf of appellants contesting said motion. Briefly, these affidavits show that this action was instituted by the respondent against the appellants to recover damages for injuries sustained by respondent by being struck and run over by an automobile then being driven by the appellant Conner. The respondent employed an attorney living at Long Beach to prosecute the action, and this attorney in turn retained two other attorneys residing at Santa Ana, the county seat of Orange county, where the action was pending, to assist in the conduct of said action. The action was set for trial for December 17, 1925. Through some misunderstanding between the attorneys for the respondent none of them appeared in court at the time said action was called for trial, and the court, upon motion of appellants, dismissed the action. It also appears from said affidavits that there had been some discussion between respondent's attorneys, of which appellants' attorneys had been apprised, about dismissing this action and commencing another action of the same nature, for the reason that respondent's attorneys had failed to demand a jury at the time the action had been set for trial. Appellants' counsel refused to stipulate that the case might be tried by a jury, and for this reason, and because respondent desired a jury trial, his attorneys had considered the advisability of dismissing this action and instituting a second action in its place. In furtherance of this plan, respondent filed a second complaint based substantially upon the same facts as were alleged in the complaint in this action, but with this difference, that the appellant Conner was made the sole defendant in said second action. The date of the commencement of this action does not appear from any of the affidavits used on the hearing of the said motion to vacate the judgment of dismissal, but it had been commenced and was pending at the time said motion was heard. In one of said affidavits used at said hearing on behalf of respondent, in which respondent's counsel was the affiant, the following allegations were made:

> "That in conversation had by your affiant with Gerald F. H. Delamer, one of the attorneys for defendant as aforesaid, it was understood and agreed that no steps of any kind be taken with reference to said case when the same came up for trial on the 17th day of December, 1925; that the same lie dormant or be continued or go off calendar to be reset or dismissed, as your affiant should finally decide, the decision to depend upon what demurrers would be interposed to the new complaint and whether issue on the merits would finally be joined therein; that said conversations were had on the 9th day of December, 1925, and again on the 12th day of December, 1925, and again on the 14th day of December, 1925; that, in all of the said conversations, your affiant expressed an intention to dismiss the above-entitled case, but made it clear that the actual dismissal would have to depend upon two conditions—first, upon issue being joined in the new case, and, second, upon the filing of a written dismissal duly signed by your affiant—and that in no event would any steps be taken on the 17th day of December, 1925, to have the above-entitled case dismissed at the request of the said Delamer, and in the absence of your affiant; that in all of said conversations, the said Delamer expressed a willingness to grant a reasonable continuance, as requested by your affiant, for the trial of said case, even though his client refused to stipulate that a jury trial might be granted; that your affiant fully believed that said Delamer understood the position of your affiant and acquiesced in it."

[4-6] It would appear from these allegations, if they were believed by the trial court, and in support of its order vacating the judgment of dismissal we must assume that the court believed them to be true, that there was an understanding between counsel for the respective parties in this action that no steps would be taken by the attorneys for the appellants on December 17, 1925, to dismiss said action, but that the same might lie dormant or be continued or go off the calendar to be reset, or dismissed as the attorney for respondent might decide, the decision to depend upon what demurrers would be interposed to the new complaint, and whether issue on the merits would be finally joined in said second action. The granting of the motion to vacate the judgment of dismissal for the reason set forth in the portions of the affidavit above quoted cannot be held to have been an abuse of discretion on the part of the trial court. The trial court may well have concluded that the order of dismissal of said action had been made in the absence of respondent's attorneys and after an understanding between the attorneys representing all the parties to said action that the trial thereof might be continued to await the result of the second action.

It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character. "The law governing this class of cases is so well settled, and has been so often declared in the decisions of this court, that we may dispense with the citation of authority. An application to be relieved from a default under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and the action of that court will not be set aside on appeal unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits." Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353. "The rule is equally applicable whether the motion is granted or refused, although it has been said in some cases that we listen more readily to an appeal from an order refusing to set aside a default than where the motion has been granted. All presumptions will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order." Moore v. Thompson, 138 Cal. 23, 26, 70 P. 930, 932.

The appellants have advanced other reasons why the order appealed from should not be sustained by this court. We have carefully examined and considered all of such reasons, but we fail to find any merit in them. A detailed discussion of appellant's argument in support of them would, in our opinion, serve no useful purpose, and for that reason we will content ourselves with the general statement that the grounds advanced therein are not meritorious.

The order appealed from is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

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203 Cal. 618

In re OLDHAM'S ESTATE.

OLDHAM et al. v. OLDHAM et al.

(L. A. 9965.)

Supreme Court of California. March 14, 1928.

Wills ⚷130—Printed words "Los Angeles, Calif.," followed by date, written approximately on same line, held not to invalidate olographic will.

Will contained on three sheets of paper, deceased's office stationery, all in handwriting of deceased, except for the following printed matter: "Dr. John Y. Oldham, Merchants' National Bank Bldg., Los Angeles, Calif.," at head of each sheet, *held* valid as olographic will, where sole circumstance connecting printed words with the writing was the fact that words "Los Angeles" appearing on the first sheet were followed by the date, written approximately on the same line.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Proceedings by W. B. Oldham and another contesting the admission to probate of a document purporting to be the last will of John Y. Oldham, deceased, opposed by Grace Carr Oldham and another, proponents of the will. From an order denying the contest, contestants appeal. Affirmed.

W. M. Holland and Wingert, Nicholas & Shobert, all of Los Angeles, for appellants.

William L. Kuehn and James, Pace, Smith & Younkin, all of Los Angeles, for respondents.

CURTIS, J. This appeal is taken from an order denying the contest of W. B. and J. F. Oldham to the admission to probate of a certain document purporting to be the last will and testament of John Y. Oldham, deceased, and admitting said document to probate as the last will of said deceased. The ground of said contest is that said document, which purports to be an olographic will, is not entirely written, dated and signed by the hand of the said John Y. Oldham. The document consists of three sheets of office stationery of the deceased. Upon each of said sheets of paper there were printed at the top thereof the name of the deceased and his address, including the name of the building and the city wherein his office was located. The printed matter on said sheets of paper was as follows:

"Dr. John Y. Oldham
"Merchants National Bank Bldg.
"Los Angeles, Calif."

It is claimed by appellants that the printed words "Los Angeles, Calif.," appearing on the first of these three sheets of paper, are a part of said will, and, not being in the handwriting of the testator, render the whole document invalid as an olographic will. Appellants rely upon Estate of Bernard, 197 Cal. 36, 239 P. 404, in support of this contention. In that case it was held that the words "Long Beach, California," upon certain hotel stationery used by the deceased in her attempt to make an olographic will rendered the instrument invalid as an olographic will. In the Bernard Case, however, the document which it was sought to probate as an olographic will bore at the top of the first page thereof the following caption: "The following 4 sheets of paper included, Long Beach, California, Oct. 12, 1918," all of which was in the handwriting of the deceased, except the words "Long Beach, California." In holding that the words "Long Beach, California," were a part of the document which the deceased intended to execute, and that by their

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

inclusion therein said document was rendered invalid, this court said:

> "The printed words are incorporated in and doubtless were intended to be made a part of the heading of the document. The care with which the date has been placed upon the precise line with the printed words indicates that the words immediately preceding the date must have been intended to be made a part of the document as the name of the place of the execution of the document. Moreover, this construction, based upon the relative position of the words, is supported by the juxtaposition of the written word 'included' and the printed words 'Long Beach, California,' which are in a direct and immediate line thereto. It thus appears that decedent not only wished to make the date a part of the document, but to make, also, the printed portion, designating the place of the making of the document, an essential part of the document. Unless it can be said that the clause at the very top of the will, which reads, 'The following 4 sheets of paper included,' is a material part and parcel of the will, then there is nothing on the face of the document which in any wise indicates that the testator had executed a completed instrument; and if we take that clause to be a material part of the will, then we are confronted with the fact that the printed words 'Long Beach, California,' are likewise a material part and parcel of the will, and therefore it cannot be said, in keeping with the rule enunciated in the Estate of Thorn [183 Cal. 512, 192 P. 19] supra, that the will was entirely written by the hand of the testator."

It will thus be seen that in the Estate of Bernard great stress was laid upon the caption or heading of the document containing the printed words, and it was expressly held that, by the use of this heading, the deceased had made not only the date, which was absolutely necessary to the validity of the document as a testamentary disposition, but also "the printed portion, designating the place of the making of the document, an essential part of the document." In the instrument now before us, and which, it is contended, is the last will of John Y. Oldham, deceased, we find no reference whatever to the printed words appearing upon stationery used by the deceased in the preparation of said instrument. These printed words are not expressly, by direct reference, or impliedly, by inference or otherwise, made a part of the written instrument set forth on the sheets of paper upon which they appear. It is not contended by appellants that the name of Dr. Oldham, nor the name of the building in which he had his office, both of which were printed upon each of the three sheets of paper, are any part of the written document appearing thereon; neither is it claimed that the words "Los Angeles, Calif.," appearing upon the second and third sheets, are any part of the writing itself. It is claimed only that these words, appearing upon the first sheet, being followed by the date, written approximately on the same line, are thus made a part of the written document itself. In Estate of Bernard a similar situation was referred to, and was considered as a possible circumstance which, taken in connection with the fact that these printed words appeared in the caption of the instrument along with words written by the deceased, tended to show an intent on the part of the deceased to make the printed words a part of the instrument itself. This circumstance, standing alone, as it does in the present proceeding, is so slight that it would not warrant the conclusion that the deceased, by simply writing after the printed words the date of the document, thereby intended to make such printed words any part of the document itself. The printed words appearing upon the three sheets of paper upon which the deceased attempted to write his will are wholly disconnected from the writing itself, and they form no part thereof. Our attention has not been called to any authority, nor are we aware of any such, which holds that the mere presence of printed words upon a sheet of paper, used by a person for the purpose of writing thereon an olographic will, renders the will invalid when such printed matter is no part of the writing, and is wholly dissociated therefrom. It follows from the views expressed herein that the document admitted to probate was the valid will of said deceased, and the order denying appellants' contest and admitting to probate said document as the last will and testament of said deceased should be, and is hereby, affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

203 Cal. 510

PEOPLE v. DOBLE. (Cr. 3042.) ★

Supreme Court of California. March 2, 1928.

Rehearing Denied March 29, 1928.

1. Criminal law ⇐772(6)—Defendant, charged with violating Securities Act, held entitled to declaration of principles on acts of unauthorized agent (Corporate Securities Act).

Where defendant, charged with taking subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), denied all knowledge of alleged agent taking subscriptions in excess of permit, and declared that, if subscriptions were taken in excess of permit, they were taken in violation of his orders, he was entitled to declaration of legal principles applicable to situation.

2. Criminal law ⇐772(6)—Defendant, charged with conspiring to take unauthorized stock subscriptions, held entitled to declaration of applicable principles of agent's violating orders (Corporate Securities Act).

Where defendant, charged with conspiring to take subscriptions for corporate stock with-

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★Rehearing denied.

out permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), denied all knowledge of agent taking subscriptions in excess of permit, and declared that any subscriptions in excess of permit were taken in violation of his orders, he was entitled to declaration of legal principles applicable to situation.

3. Criminal law 🔑398(2)—Summary of alleged agent's books held inadmissible against defendant, where there was no showing that books themselves were admissible (Corporate Securities Act; Code Civ. Proc. § 1855, subd. 5).

Summary of books of alleged agent *held* inadmissible under Code Civ. Proc. § 1855, subd. 5, against defendant charged with conspiring to take subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), and with actually taking subscriptions for stock without permit, where there was no showing that agent's books were themselves admissible in evidence as genuine, true, and correct.

4. Criminal law 🔑410—Book entries by subagents held not binding on defendant, where he had no knowledge, custody, or control of books (Corporate Securities Act; Civ. Code, §§ 2349–2351).

Book entries made by subagents *held* not binding, under Civ. Code, §§ 2349–2351, on defendant charged with conspiring to take subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), and with actually taking subscriptions without permit, where defendant had no knowledge of books, and no custody or control over them.

5. Criminal law 🔑410—Agent's books and summary thereof held not admissible against defendant, as agent's acts, without proof that defendant knowingly aided or encouraged agent's acts (Corporate Securities Act; Civ. Code, §§ 2349–2351).

Books of agent and summary thereof *held* inadmissible, under Civ. Code, §§ 2349–2351, as acts of agent, against defendant charged with conspiring to take subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814) and with actually taking subscriptions without permit, where there was no proof that defendant knowingly and intentionally aided, advised, or encouraged acts of agent.

6. Criminal law 🔑62—Principal, to be held liable for agent's acts, must be shown to have knowingly aided or encouraged acts.

Principal, to be criminally liable for agent's acts, must be shown to have knowingly and intentionally aided, advised, or encouraged criminal acts committed by agent.

7. Licenses 🔑42(5)—Defendant, charged with taking stock subscriptions without permit, held entitled to instruction declaring principal's liability for agent's acts (Corporate Securities Act).

Where defendant, charged with taking subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), denied knowledge of contents of agent's books, and summary of such books was admitted in evidence against him, he was entitled to instruction that, before one can be convicted of crime by reason of acts of agent, a clear case must be shown, and that, unless codefendants were agents of defendants, and directly authorized to commit criminal acts, jury must acquit defendants.

8. Criminal law 🔑779—Coconspirator's books are not admissible against defendant, in absence of instruction requiring independent proof of conspiracy (Corporate Securities Act; Code Civ. Proc. § 1870, subd. 6).

Books of coconspirator are not admissible under Code Civ. Proc. § 1870, subd. 6, against defendant charged with conspiring to take subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), in absence of instruction that acts and declarations of coconspirators are not binding, unless and until, independent of such declarations and acts, conspiracy has been shown beyond reasonable doubt.

9. Criminal law 🔑427(3)—While evidence of acts and declarations of coconspirators are not binding without independent proof of conspiracy, order of proof is within discretion of court (Code Civ. Proc. § 1870, subd. 6).

While acts and declarations of coconspirators are not binding, under Code Civ. Proc. § 1870, subd. 6, unless, independent of such acts and declarations, a conspiracy is shown beyond reasonable doubt, order of proof is within discretion of trial court.

10. Licenses 🔑42(5)—Corporate president, charged with taking stock subscriptions without permit, held entitled to instruction concerning corporate officer's liability for acts of other officers or agents (Corporate Securities Act).

Where president of corporation, charged with taking subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), denied all knowledge of entries in books of corporation, and summary compiled in part from these books was admitted in evidence against him, he was entitled to instruction to effect that officer of corporation is not criminally liable for acts of other officers or agents thereof, unless he directly authorized or consented to such acts.

11. Conspiracy 🔑48—Corporate president, charged with conspiring to take stock subscriptions without permit, held entitled to instruction on officer's liability for acts of other officers or agents (Corporate Securities Act).

Where president of corporation, who was charged with conspiring to take subscriptions for corporate stock, without permit, under Corporate Securities Act (Deering's Gen. Laws, Act 3814), denied all knowledge of entries in books of corporation, and summary derived in part from these books was admitted in evidence against him, he was entitled to instruction to effect that officer of corporation is not criminally liable for acts of other officers or agents thereof, unless he directly authorized or consented to such acts.

12. Criminal law ⚷424(3)—Evidence of acts and declarations of coconspirators, occurring after conspiracy terminated, without defendant's knowledge, in his absence, held inadmissible as hearsay (Corporate Securities Act).

Admission of evidence to show acts and declarations of alleged coconspirators, occurring after termination of conspiracy, without knowledge of defendant, and in his absence, *held* error, in prosecution for conspiring to take subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814); such evidence being inadmissible hearsay.

13. Criminal law ⚷673(4)—Where court admitted evidence as to acts and declarations of alleged coconspirators against defendant, it should have declared limitations on evidence and controlling principles (Corporate Securities Act).

Where court admitted evidence to show acts and declarations of alleged coconspirators against defendant, charged with conspiring to take subscriptions for corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), it should have declared limitations on evidence and legal principles controlling whole transaction.

14. Criminal law ⚷1169(7)—Errors in admitting evidence as to acts and declarations of alleged coconspirators, and failing to limit evidence or declare applicable principles, held prejudicial, where defendant probably would not have been convicted otherwise (Corporate Securities Act).

Errors in admitting evidence as to acts and declarations of alleged coconspirators against defendant, charged with conspiring to take subscriptions to corporate stock without permit under Corporate Securities Act (Deering's Gen. Laws, Act 3814), and in failing to limit such evidence or to declare principles applicable to transaction, *held* prejudicial, where defendant probably would not have been convicted but for such errors.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Abner Doble was convicted of conspiracy to violate the Corporate Securities Act and of actual violation thereof, and he appeals. Reversed and remanded.

Superseding opinion of District Court of Appeals in 257 P. 81.

Rehearing denied: WASTE, C. J., and CURTIS, J., voting for a rehearing.

Carey Van Fleet, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary and Emery J. Mitchell, Deputy Attys. Gen., and Matthew Brady, Dist. Atty., and Robert E. Fitzgerald, Deputy Dist. Atty., both of San Francisco, for the People.

PRESTON, J. Appellant was convicted of conspiracy to violate the Corporate Securities Act (Deering's Gen. Laws, Act 3814, p. 1406); also on four counts charging substantive offenses in violation thereof. He has appealed from the judgment and order denying his motion for new trial.

The indictment in count 1 charges a conspiracy to violate said act by taking subscriptions in the state of California for shares of stock of the class A common capital stock of Doble Steam Motors Corporation, a Delaware corporation, without a permit so to do from the corporation commissioner of the state of California. Among other overt acts there was charged the taking of six specific subscriptions to said stock without a permit. The taking of each of said six subscriptions was made a separate count in the indictment, and it was upon four of such counts that appellant was convicted as above noted. Five defendants were charged in said indictment, to wit: Abner Doble, W. A. Doble, Harold E. Haven, F. G. Cox, and W. E. Barnard. Cox, Haven, and Barnard pleaded guilty, and testified for the people on the trial of appellant. The other defendant, W. A. Doble, was tried jointly with appellant, but was acquitted. Under the proof the offenses charged, if committed at all, were committed between July 1 and August 4, 1923. This fact should be noted, as the conspiracy indictment fixes no time for its duration and no time for its termination.

[1, 2] It is not contended that any stock certificates were actually issued at any time by said corporation during the period covered by the indictment in excess of the permit held by it. Neither is it claimed that at any time covered by said indictment bad faith was exercised in contracting for the sale of any stock in excess of such permit. Nor is it claimed that appellant did anything at any time personally to procure such excess subscriptions. The most that is or can be claimed in this connection is that appellant knew, or should have known, that such permits as the corporation had were being exceeded by the fiscal agent in charge of sales, to wit, the said F. G. Cox. Appellant strenuously denied all knowledge of the taking of any such excess subscriptions, and declared that, if any were so taken, they were in violation of his express orders forbidding such action. He was therefore entitled to a declaration from the trial court of the legal principles applicable to such a situation.

[3] Appellant was president of the corporation, but was actively engaged only in another department of the business, and had but little to do with the stock sales department. Permits to sell stock to the extent of 100,000 shares were issued to the corporation, and had not been revoked during the period covered by the indictment. Pursuant to such permits, on or about October 28, 1922, the corporation made a contract with said F. G.

Cox constituting him its fiscal agent, empowering him to take subscriptions for the sale of its stock, and requiring him to make reports and remittances at certain stated times. This contract did not authorize or contemplate a violation of the limit set by the permits. On June 19, 1923, the corporation, acting in apparent good faith, applied in writing to the corporation commissioner for an additional permit. This application was pending thereafter until August 9, 1923, upon which date the corporation, realizing that it would not be granted, withdrew it. The court properly charged the jury that there was no issue of fraud involved in the transaction; neither was there pecuniary loss suffered by others involved therein, and these elements were not to be considered in their deliberations and conclusions. The jury, in returning a verdict of conviction, recommended the defendant to the extreme mercy of the court. It will thus be seen that the charge as to this defendant was technical, and had little moral substance in it. The active persons in the plan acknowledged their responsibility by their pleas of guilty.

Said F. G. Cox kept, in connection with his contract of employment and other business as a stock broker, a combined set of books, some in Los Angeles and others in San Francisco. An expert on behalf of the prosecution was allowed access to certain books supposed to be the books of Cox, and from them, in connection with the books of the Doble corporation a summary was compiled and introduced in evidence, primarily for the purpose of showing that an excess of stock subscriptions had been taken, and fixing the approximate date of the beginning of such excess subscriptions, which date was by him declared to be June 19, 1923. This summary was admitted in evidence over the strenuous and repeated objections of appellant that the books from which it was made had not been properly authenticated, nor had they been received, nor were they admissible in evidence. The books themselves were never received in evidence, although those records from which the summary was taken were apparently accessible to the defense for inspection, and were marked as exhibits for identification. These books, if properly authenticated, would have been a proper place to resort for proof of the amount of outstanding subscriptions as a basis to be followed by proof of appellant's connection therewith, if any, and knowledge thereof, if any, but the evidence fell far short of showing proper authentication of the accuracy and reliability thereof.

No witness testified that the entries from which the summary was made were genuine, true, or correct. No witness was produced who knew, or claimed to know, whether said entries were true or correct. A witness Smith, who worked for Cox, gave part of his time to the books, and had complete charge of them under the supervision of a regular bookkeeper some months after the offenses charged, but this witness could not and did not testify as to the authenticity or accuracy of the entries prior to the time he took full charge thereof in the manner stated. Witness Penberthy testified only as to the dates between March and June 23, 1923, which said dates antedated the offenses charged. The coconspirator Barnard, sales manager, testified that he thought the books were accurately kept, but he had no first-hand knowledge of the matter. To this showing should be added the testimony of Cox himself that the books for a part of the period in question were kept under his general supervision, and were at all times acted upon by him as correct. This showing might have been sufficient for the introduction in a civil action involving Cox of the books, but the fact remains that the court did not admit them, but expressly or impliedly held the showing insufficient, and appellant strenuously and repeatedly objected to admission of a summary thereof until the books themselves were first in evidence.

It is manifestly error to admit in evidence, under section 1855, subd. 5, of the Code of Civil Procedure, a summary of books where the books themselves are not shown to be admissible in evidence. We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party, but their introduction in evidence is the safest rule, and it is not a technical objection to require that a showing be first made that such book entries are entitled to admission if they are actually offered. This we understand to be the effect of such cases as Shields v. Rancho Buena Ventura, 187 Cal. 569, 203 P. 114.

[4] Further, it will be seen that a more serious error was committed when it is recalled that appellant was in no wise connected with the said entries; it being expressly admitted that he had no knowledge whatsoever of the books, and had no custody or control whatsoever over them. The entries were not made by Cox, and were therefore at most the acts of subagents, and ordinarily would not be binding even in a civil action on appellant. Civ. Code, §§ 2349-2351.

[5-7] It is contended, however, that said books and the summary thereof were admissible as the acts of an agent as to the substantive offenses charged and as the acts of a coconspirator as to the offense of conspiracy. If we admit that Cox was the agent of appellant, this might allow his declarations, made within the scope of his agency, to be admitted in a civil cause, but human liberty does not rest upon so weak a foundation. A principal, in order to be held criminally liable, must be shown to have knowingly and

intentionally aided, advised, or encouraged the criminal act committed by the agent. In the absence of proof to this extent, the summary of the books should not have been received as a declaration binding upon appellant, and certainly, if other evidence was deemed sufficient to warrant a finding that appellant knew of the contents of the books, the smallest consideration of the rights of appellant, in view of his denial of such knowledge, would have required the court to have given in fact or in substance appellant's requested instruction No. 62, which it refused to do. This request was as follows:

> "You are hereby instructed that, before one can be convicted of a crime by reason of the acts of his agent, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. If a principal is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. Authority to do a criminal act will not be presumed. You are instructed that six of the charges contained in the indictment are based upon alleged violations of the Corporate Securities Act without the element of conspiracy. You are therefore instructed that unless you find from the evidence beyond a reasonable doubt that the codefendants F. G. Cox and W. E. Barnard were the agents of the defendants Abner Doble and W. A. Doble, Jr., in the perpetration of the acts alleged in said six charges, and were directly authorized to commit said alleged acts by the defendants Abner Doble and W. A. Doble, then you must find said defendants Abner Doble and W. A. Doble not guilty of said six charges."

In People v. Green, 22 Cal. App. 45, 50, 133 P. 334, 336, it is said:

> "Before one can be convicted of a crime by reason of the acts of his agent a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. 1 McClain on Criminal Law, § 188. While false pretenses may be made to an agent of the person defrauded, yet when made by an agent they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act, will not be presumed. 1 McClain on Criminal Law, § 683."

See, also, People v. Blackman, 127 Cal. 248, 59 P. 573; 21 R. C. L. §§ 113, 115, 116, pp. 934–936.

[8, 9] But it is asserted that these books were admissible as a declaration of Cox, a coconspirator, made during the period of the conspiracy, and in furtherance thereof. If the books were in fact the acts or declarations of Cox, and the record otherwise showed evidence warranting the finding that a conspiracy existed between the appellant and Cox, this position would be sound, provided always that the jury was told that the acts and declarations of a coconspirator were not binding, unless and until, independent of such declarations and acts, a conspiracy had been shown beyond a reasonable doubt to exist, and in no case should such declarations be received as proof of the conspiracy. Code of Civil Procedure, § 1870, subd. 6; People v. Irwin, 77 Cal. 494, 502, 20 P. 56; People v. Zimmerman, 3 Cal. App. 84, 87, 84 P. 446, is not opposed to, but is in accord with, this holding. The order of the proof is, however, in the discretion of the court. People v. Stokes, 5 Cal. App. 205, 209, 89 P. 997; People v. Donnolly, 143 Cal. 394, 77 P. 177; People v. Compton, 123 Cal. 408, 56 P. 44. The above was not done and the jury was thus allowed to consider ex parte acts of the agents of a person to prove a conspiracy between such person and the appellant. Therefore it was error to receive said testimony over objection and without limitation upon any hypothesis.

[10, 11] It should also be observed that said summary received in evidence was compiled, not only from the Cox books, but also from the books of the Doble corporation, and from a comparison of the two sets of books. But again appellant denied all knowledge of the entries in the books of said corporation, in so far as the same were summarized and received in evidence. The summary of the Doble corporation books was apparently admitted upon the theory that the set of books from which the entries were taken consisted of books required by law to be kept, and hence admissible for that reason. While the books were admissible for what they might show as to the excess of subscriptions over the permits, still, in view of the repeated claims of appellant that he knew nothing of their contents, he was entitled to an instruction to the effect that an officer of a corporation is not criminally liable for the acts of other officers or agents thereof, unless he directly authorized or consented to such acts. An instruction to this effect was requested by appellant in his request No. 61, and refused. "If there was evidence that the entries were made by the defendant or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him. They are clearly inadmissible, except as admissions or as acts done in furtherance of the crime charged against him. His knowledge and complicity in falsifying the books must first be shown. The presumption of innocence with which the law clothes the defendant is sufficient to overcome the presumption which might prevail in a civil case, that he knew because it was his duty to know. As before stated, he is not to be punished criminally for negligently performing his duty." People v. Blackman, supra, at page 253 (59 P. 574). See, also, People v. Martel, 21 Cal. App. 573, 132 P. 600.

In the case of Worden v. U. S. (C. C. A.) 204 F. 1, 9, Worden and others were jointly indicted on a charge of conspiracy to defraud the United States in the purchase of certain public lands through alleged "dummy" entrymen for the benefit of plaintiffs in error and the J. H. Worden Lumber, etc., Company, of which said Worden was president and manager. The books of account, both of Worden and of the company, played an important part on the trial; the opinion of the court being that, if the evidence afforded by them were eliminated, the proof would be insufficient to support a conviction. It was held that sufficient connection was not shown between Worden and the books of the lumber company to make the entries therein competent evidence as against him, and the judgment was reversed; the court saying:

> "It is manifest that Worden would be prejudiced by an improper treatment of the entries on the company's books as competent evidence against him. Unless the mere fact of Worden's presidency and management of the company raised a legal presumption of his acquaintance with the book entries, thus putting upon him, in defense of a charge of crime, the burden of rebutting such legal presumption, we think the books cannot, in the peculiar state of this record, be held as matter of law competent evidence against him. We have found no persuasive decision sustaining such legal presumption (in the absence of statutory requirement of correct bookkeeping), except on proof that the books were kept under the instruction, direction, or supervision of the person against whom the entries are offered, or that such person presumably had examined the books or in some way obtained actual knowledge of the entries."

In the case of McDonald v. U. S. (C. C. A.) 241 F. 793, 800, one Hendrey, the president of a Memphis bank, with plaintiffs in error and six others, was indicted for using the mails in furtherance of a scheme to defraud by organizing a company, called a bank, but in substance a holding company or chain of banks, and selling stock in and getting deposits therefor by false representations. Upon various errors alleged the verdict and sentence against Hendrey were reversed, the court, among others things, holding as follows:

> "Evidence was received as to the contents of the books of the Memphis bank of which Hendrey was president. This bank was a corporation, and the contents of the books of the corporation could not be put in evidence in a criminal prosecution against the president, without a more direct showing of his personal responsibility for the bookkeeping than we observe here. Worden v. United States (C. C. A. 6) 204 F. 1, 9, 122 C. C. A. 315."

It will thus be seen that in the trial of an offense highly technical in its nature serious prejudicial errors occurred affecting the substantial rights of appellant. Without the summary above referred to, the whole fabric of the case for the people would have been weak and unconvincing.

[12] But beyond all this a contemplation of the record in this case convinces one that in all probability appellant was convicted, not upon the pertinent evidence as to the charges laid, but upon evidence relating to a transaction commonly called in the record the "Portland transaction," which occurred subsequent to the offenses charged in the indictment, or, in other words, there was in all probability what is known as a trial upon one offense and a conviction upon another. It is noted that soon after August 9, 1923, a plan or scheme was put in operation which the prosecution asserts with much show of probability was for the purpose of absorbing the excess subscriptions then on the books of said Cox or of said corporation. The so-called Portland transaction consisted, in a word, of the opening of headquarters in Portland, Or., and the attempted perfecting of sales thereat to said Cox of large blocks of shares of the capital stock of said corporation; Cox thereafter using the stock so acquired to satisfy the subscriptions that he had upon his books in excess of the permits granted. It is asserted, and we think correctly, that the sale was what is commonly known as a "wash" sale, and in reality constituted the most serious misconduct shown by the record. This scheme or plan was carried out very largely by the defendants in this cause, who entered pleas of guilty. The connection of appellant therewith was slight, and largely shown by circumstantial evidence. However, the whole plan, regardless of the meager connection of appellant with it, was unfolded in great detail, and occupied by far the most prominent place in the trial of the case. It is said that one-third of the record is devoted to this subject, and an examination thereof shows that all of the rebuttal and surrebuttal testimony was directed to it. It had other damaging features, such as the predating of certain instruments, intended, doubtless, to create a record contrary to the true facts. Appellant denied personal connection with the scheme, and all intention on his part of using it to cover up any oversubscriptions, and contended that it was as to him a legal one for the purpose of pushing the sale of stock of the corporation in other quarters than the state of California. The treatment by the court and prosecution of the Portland transaction upon trial of the case was as though it were a part of the conspiracy charged in count 1 of the indictment, and the acts and declarations of the alleged former coconspirators, without the presence of appellant, were repeatedly and indiscriminately received in evidence. We have noted above that the conspiracy charged ended not later than August 4, 1923. The Portland plan originated subsequent to August 9, 1923, and originated after the corporation had knowledge that its application for an additional permit would be denied. It therefore cannot be said that the Portland transaction was in any sense a part of the conspiracy

charged in the indictment; hence it was palpable error to receive in evidence acts and declarations of alleged former coconspirators, made, after the conspiracy charged had terminated, without the knowledge or presence of appellant. This is hearsay testimony, and its inadmissibility is so elemental in the law of conspiracy that we need not pause for citation of authority. Any material act of the appellant himself, committed after August 4, 1923, could have been received in evidence, if limited in its application to the offense previously charged, such as proving system or motive. It is also true that any act committed by appellant after August 4th, which would tend to show previous knowledge of the existence of oversubscriptions, would have been admissible against him, but such admission would have to be carefully limited by the court to its bearing upon the previous offense, and the jury told that appellant was not upon trial for the Portland transaction.

[13, 14] Appellant contended that the Portland transaction was thoroughly legal and justifiable, and to that end tendered numerous instructions which were all refused by the court, and the Portland transaction went to the jury without a word of explanation of any kind, and without a declaration of the principles of law applicable to the situation disclosed by this evidence. It is useless to add that, after admitting the evidence, the court should have declared the limitations upon it, and also the legal principles controlling the whole transaction, so that appellant, if believed by the jury, might have had the benefit thereof. It is our view, from consideration of the record, that but for the introduction of this testimony and the failure of the court to limit it or declare the principles applicable, in all probability appellant would not have been convicted. These errors were therefore prejudicial. This conclusion renders it unnecessary to consider further assignments of error.

The judgment is reversed, and the cause remanded for a new trial.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.

I concur in the judgment: LANGDON, J.

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203 Cal. 483

MERCANTILE ACCEPTANCE CO. v. FRANK et al. (L. A. 9951.)

Supreme Court of California. March 1, 1928.

1. Contracts 🔑2—Validity of contract is determined by law of place where made.

Law of place where contract is made determines its validity, and contract valid at place where made is valid everywhere.

2. Chattel mortgages 🔑89—Chattel mortgage regularly filed in accordance with laws of another state held valid, notwithstanding failure to comply with local statute (Civ. Code, § 2957, subd. 1).

Chattel mortgage executed and filed for record in accordance with laws of Minnesota *held* valid and legal instrument in state of California, though it was not accompanied by affidavit required by Civ. Code, § 2957, subd. 1.

3. Chattel mortgages 🔑89—Statute for recordation of chattel mortgages applies only to domestic mortgages or mortgages on personalty within state (Civ. Code, § 2959).

Civ. Code, § 2959, providing for recordation of chattel mortgages, applies only to domestic mortgages or mortgages executed on personal property within the state.

4. Chattel mortgages 🔑89—Lien of chattel mortgage properly filed in another state held not lost by removal from state of mortgaged car without mortgagee's knowledge and sale to innocent purchaser; "larceny" (Pen. Code, § 538; Civ. Code, § 2957, subd. 1).

Lien of chattel mortgage created under Minnesota law by filing mortgage for record in that state *held* not lost by mortgagor's removal of mortgaged automobile without mortgagee's knowledge or consent, and sale thereof to innocent purchaser in California, notwithstanding mortgagee's failure to make affidavit of good faith required by Civ. Code, § 2957, subd. 1, since removal of mortgaged car by driving it into another state is "larceny," under Pen. Code, § 538, and rule protecting mortgagees is not objectionable as affording inadequate protection to local citizens.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

5. Chattel mortgages 🔑89—Mortgagor who drives mortgaged car into another state and sells it without notifying mortgagee is guilty of larceny (Pen. Code, § 538).

Mortgagor who removes mortgaged automobile from county in which it is located at date of mortgage and drives it into another state and sells it without notifying mortgagee is guilty of larceny, under Pen. Code, § 538, to same extent as if he had actually stolen the machine from its rightful owner.

6. Evidence 🔑80(1)—Law of another state, in absence of contrary showing, is presumed identical with local statutory law.

In absence of contrary showing, court must presume that law of another state upon given subject is the same as local statutory law.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Suit by the Mercantile Acceptance Company against Albert L. Frank and others. Judgment for defendants, and plaintiff appeals. Reversed.

Superseding opinion in Court of Appeal (256 P. 259).

Lewinson & Barnhill, of Los Angeles, C. W. Mullins, of Seattle, Wash., E. E. Morris and Frank L. Kostlan, both of Los Angeles, for appellant.

L. G. Shelton, of Glendora, Charles L. Evans, of Los Angeles, Arthur Wright, for respondents.

CURTIS, J. This is an appeal from a judgment in favor of the defendants after the sustaining of general demurrers to the complaint. In the complaint it is alleged that the plaintiff is the owner of a chattel mortgage upon a Studebaker automobile, to recover which the action was brought. This chattel mortgage was given by the defendant Frank to secure the balance due on the purchase price of said automobile. This defendant was not served with process and has not appeared in the action. The automobile was purchased by Frank in the city of Minneapolis, county of Hennepin, state of Minnesota, from the assignor of the plaintiff. The chattel mortgage was executed and filed for record in the state of Minnesota, as provided by the laws of said state. Thereafter, without the knowledge or consent of the plaintiff, Frank drove the automobile to California, where he sold it to the other defendants without any actual notice or knowledge on their part of plaintiff's chattel mortgage. While the mortgage was executed in accordance with the laws of Minnesota, it was not accompanied by the affidavit required in this state by subdivision 1 of section 2957 of the Civil Code. Neither was it recorded in this state prior to the sale of the automobile by Frank to the other defendants herein.

[1] It is a well-recognized principle of law in this state, as well as other jurisdictions, that the law of the place where a contract is made determines its validity. This rule is well and succinctly stated, as follows:

> "The validity and construction of a contract are determined by the law of the place where it is made. Accordingly, it is quite generally held that a contract valid in the place where made is valid everywhere; and that a contract invalid where made is invalid everywhere; and the validity or invalidity of a contract so determined will, on principles of comity, be recognized wherever it is sought to be enforced, even though the law of the forum would have determined otherwise if applied." 5 Cal. Jur. 449.

To the same effect is Corpus Juris, vol. 11, p. 422. See, also, Fenton v. Edwards & Johnson, 126 Cal. 43, 58 P. 320, 46 L. R. A. 832, 77 Am. St. Rep. 141; Platner v. Vincent, 187 Cal. 443, 202 P. 655; Pinney v. Nelson, 183 U. S. 144, 22 S. Ct. 52, 46 L. Ed. 125; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Thomas on Chattel Mortgages, 320; Jones on Chattel Mortgages, 301.

[2] There are certain exceptions to this rule, but none of these exceptions need be mentioned here, as they do not apply to or affect any question in the present action. Therefore the chattel mortgage of plaintiff upon the Studebaker automobile in controversy, even though it was not executed with formalities nor accompanied by the affidavit of good faith, required by the statute of this state, was, nevertheless, a valid and legal instrument not only in the state where executed, but in this or any other state into which the automobile might thereafter be brought.

The question whether the lien of such a mortgage executed in another state against the incumbered property is lost on the property being brought into this state has never been the subject of any decision of this court. In the case of Motor Investment Co. v. Breslauer, 64 Cal. App. 230, 221 P. 700, the District Court of Appeal held that the lien was not lost, but still subsisted after the property had been brought within this state, but in that action the mortgagee had learned of the location of the personal property, which also happened to be an automobile, and on learning that fact recorded its mortgage in the county where the property was being kept before a subsequent incumbrancer had advanced to the owner money on said machine and had taken a chattel mortgage thereon to secure the payment of the amount advanced. The chattel mortgage in that case was executed in the state of Oregon and in accordance with its laws and was not accompanied by the affidavit of good faith required by our statute.

The precise question in the present action was before the United States Circuit Court of Appeals in the case of Shapard v. Hynes, 104 F. 449, 52 L. R. A. 675. In that case the Circuit Court held as follows:

> "There has been much discussion concerning the effect of the removal of mortgaged goods and chattels from the state where the mortgage was made and recorded, to another state. The general consensus of judicial opinion seems to be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is duly executed and recorded in the mode required by the local law, so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not re-recorded in the state to which the removal is made. The mortgage lien is given effect, however, in the state to which the property is removed, solely by virtue of the doctrine of comity. Hence a state may by appropriate legislation decline to observe the rule of comity, and may require all mortgages affecting personal property which is situated therein or brought therein to be there recorded, as a condition precedent to the recognition of their validity in that state. But the statutes of a state which prescribe how mortgages on personal property shall be executed and recorded are generally, if not universally, regarded as speaking with respect to mortgages made within the state upon property there situated, and as having no reference to personalty brought within the state which is at the time incumbered with a valid lien created

elsewhere. These propositions are fully sustained by the following authorities: Hornthal v. Burwell, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740 [26 Am. St. Rep. 556]; Smith v. McLean, 24 Iowa, 322, 328, 329; Handley v. Harris, 48 Kan. 606, 29 P. 1145, 17 L. R. A. 703 [30 Am. St. Rep. 322]; Bank v. Morris, 114 Mo. 255, 21 S. W. 511, 19 L. R. A. 463 [35 Am. St. Rep. 754]; Kanaga v. Taylor, 7 Ohio St. 134 [70 Am. Dec. 62]; Langworthy v. Little, 12 Cush. (Mass.) 109; Whitney v. Heywood, 6 Cush. (Mass.) 82; [Ames] Iron Works v. Warren, 76 Ind. 512 [40 Am. Rep. 258]; Feurt v. Rowell, 62 Mo. 524, 526; Cool v. Roche, 20 Neb. 550, 556, 31 N. W. 367; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364; Offutt v. Flagg, 10 N. H. 46; Lathe v. Schoff, 60 N. H. 34; Barrows v. Turner, 50 Me. 127; Hall v. Pillow, 31 Ark. 32; Mumford v. Canty, 50 Ill. 370 [99 Am. Dec. 525]; Ballard v. Winter [39 Conn. 179]; 12 Am. Law Reg. (N. S.) 759; Jones, Chat. Mortg. (4th Ed.) § 260."

That this is the generally accepted rule is declared in Corpus Juris, vol. 11, p. 424, in the following language:

> "The great weight of authority is to the effect that a chattel mortgage, properly executed and recorded according to the law of the place where the mortgage is executed and the property is located, will, if valid there, be held valid even as against creditors and purchasers in good faith in another state to which the property is removed by the mortgagor, unless there is some statute in that state to the contrary, or unless the transaction contravenes the settled law of policy of the forum. In some jurisdictions this is held to be the rule without regard to the presence or absence of consent or knowledge on the part of the mortgagee as to the removal, but by the better authority it seems that, where the mortgagee has consented to the removal of the property, he will forfeit his right to a lien unless he takes such steps as are required for its protection by the statutes of the state into which the property is removed. The recognition and enforcement of a lien of a mortgage executed in a foreign state is, however, a matter resting purely in comity; hence a state may by appropriate legislation decline to observe the rule of comity, and may require all mortgages affecting personal property which is situated therein or brought therein to be there recorded, as a condition precedent to the recognition of their validity in that state, and, although the requirement that an instrument conveying or affecting movable chattels shall be recorded in the place where the property is situated may not be in strict harmony with the common-law doctrine that the disposition of movables is to be governed by the law of the domicile of the owner, it is certainly competent for a state to adopt a modification of this kind to the disposition of any property within its territorial limits."

[3] There are only four states which do not recognize this doctrine, and which refuse to uphold the right of foreign mortgagees against the claims of innocent purchasers or attaching creditors. These states are Michigan, Louisiana, Pennsylvannia, and Texas. However, a chattel mortgage is not recognized in any form in Louisiana, no matter whether made without or within said state. Delop & Co. v. Windsor & Randolph, 26 La. Ann. 185. In Pennsylvania, a chattel mortgage is not recognized unless accompanied by a delivery to the mortgagee of the mortgaged property. In some states the question is regulated by statutes. 11 Corpus Juris, p. 426. In California we have no statute providing for the recording of a chattel mortgage executed out of the state on property thereafter brought into the state. Section 2959 of the Civil Code of this state providing for the recordation of chattel mortgages has reference in our opinion only to domestic chattel mortgages or chattel mortgages executed on personal property in this state at the date of its execution. Shapard v. Hynes, supra; Motor Investment Co. v. Breslauer, supra.

[4] As we have no express statute upon the subject, and as the great weight of authority is to the effect that a valid lien by chattel mortgage is not lost by the removal of the mortgaged property into a different state than that in which the property was located when mortgaged, we are of the opinion that we should follow the rule which has met almost the unanimous approval of the highest courts of this country. In doing so we are not accepting this rule simply because it has been sanctioned by the greater number of the courts of our land, but also for the reason that it appeals to us to be more just and fair than the contrary rule. The reason of this rule has been well expressed by Mr. Justice Hart in Motor Investment Co. v. Breslauer, supra, in the following apt and concise language:

> "The rule, however, appears to be founded upon the principles of equity and natural justice. As applied to cases of the character of the one before us, it can produce no harsh or unjust results. The principle underlying it may be analogized to that upon which the owner of property stolen from him and taken or transported to another state may follow the thief into the latter state and reclaim or take possession of the pilfered goods or chattels wherever found. A state may, it is true, refuse to recognize the rule of comity in such cases, but should it do so, it would become a party to every such fraudulent transaction. It is not going too far to say and to hold that it is preferable and more desirable that an innocent purchaser or encumbrancer of personal property brought into a state under such circumstances as those characterizing the transaction with which we are here concerned should suffer loss, which possibly his own improvidence or want of diligence has brought to him, than that the state should assume and maintain an attitude towards such transaction which would necessarily stigmatize it as an accessory after the fact to the fraud inhering therein."

In the case of Bonin v. Robertson, 2 Ter. Law Rep. (Canada) 21, which was a case precisely like the present action, the court said:

> "If a thief brings property stolen in Minnesota into this country he surely cannot take advantage of our laws to enable him to turn his stolen property into cash by passing, to even an innocent purchaser, a title which he has not, and so defeat the title of the original owner. For a mortgagor, in defiance of a solemn agreement entered into by him that he will not remove property or dispose of it in fraud of the mortgage, to remove and (as far as he can) dispose of that property, may not yet in this country bring him in conflict with our criminal laws, but is he not morally just as much a thief as the more vulgar criminal who furtively deprives his neighbor of his property?"

[5,6] We might add that, according to the laws of this state, the mortgagor, Frank, in removing the automobile from the county in which it was at the date of the mortgage and driving it into another state and selling it without notifying the mortgagee, was guilty of larceny to the same extent that he would have been had he actually stolen the machine from its rightful owner. Pen. Code, § 538. Nothing being shown to the contrary, we must presume that the law of Minnesota upon this subject is the same as that of our own state. The opinion in Bonin v. Robertson, supra, continues as follows:

> "Are we then to help him to convert this property so as to complete his attempt to deprive the mortgagee of his rights by selling it to a purchaser here—innocent or otherwise? I humbly submit not. If the contention of the plaintiff here were to prevail, that once chattels come across our boundary it is only a question of speed between the mortgagee in his pursuit after the fly by night mortgagor and this usually alert individual in finding an innocent purchaser obligingly ready to purchase without too much enquiry or too many troublesome questions, the property he has brought with him in his flight."

It is claimed, however, by respondents that by the adoption of this rule adequate protection to the citizens of this state will not be afforded, and that such rule is in conflict with another well-established rule that a state will not give effect to the laws of another on the principle of comity when the effect would be injurious to the state or its citizens. 12 Corpus Juris, 1401; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205. In passing upon the question as to whether the rule contended for by the appellant adequately protects the rights of the citizens of our own state, we must consider this rule in all of its aspects. While the adoption of such a rule places upon the citizens of this state the duty of exercising a reasonable degree of care and diligence in purchasing property recently brought into the state, it also affords protection to our own citizens and secures them against the unlawful and criminal acts of mortgagors of personal property situated in this state. There are in this state, as there are in probably every other state in this country, vast sums of money loaned upon personal property, a large part of which is secured by chattel mortgages upon automobiles. To accept the rule for which respondents contend would be to jeopardize this large investment of capital by the citizens of our state in this class of securities. It would say to them:

> "Your security is valid so long as the property remains within this state, but the moment the mortgagor drives it over the state line your security is lost, and if the property is sold to a purchaser who has no knowledge of your lien, his title thereto is superior to any right you may have in said property."

It is true, the mortgagor in removing the property from the state and selling it has committed larceny and if apprehended may be prosecuted and punished for his crime. but this does not restore to the owner his lost property. When we look at this aspect of the question, the rule contended for by the appellant seems fair and just and, we think, completely answers the objection thereto raised by the respondents that its adoption and operation would injuriously affect our own citizens. As we view the question, its result would be to the great and lasting benefit and advantage of the citizens of our own state. There may be instances in which it would work a hardship upon the citizens of this state, but, as intimated by Judge Hart, their loss in most cases is the result of their "own improvidence or want of diligence." Their loss in our opinion would be but slight compared with that which might ensue to that larger body of our citizens who in good faith have invested their capital in chattel mortgages upon various kinds of personal property, and particularly upon motor vehicles.

In Texas, as we have seen, the courts do not recognize the lien of a chattel mortgage executed upon property situated without the state, when such property is brought within that state. The rule in that state goes further and is applied to conditional sales of personal property as well as chattel mortgages. Therefore, personal property in this state, for instance, an automobile bought under a conditional sales contract and by the purchaser taken into the state of Texas, without the knowledge or consent of the owner and for the express purpose of defrauding the owner of his rights therein, becomes free of all the conditions of said contract, and said purchaser may sell the same and give an absolutely good title thereto. Referring to the law of Texas upon this subject, Mr. Joseph H. Beale, in a recent article in the Harvard Law Review, says:

> "The operation of the Texas doctrine illustrates its inconvenience. It appears to be a regular course of business for a swindler to buy a motorcar on credit in California or elsewhere, drive it into Texas, and sell or pledge it there. The original seller is helpless in the face of this

practice; and Texas will doubtless continue full of willing bona fide buyers. That this result is most unfortunate from the point of view of commercial practice is clear." Vol. XL, No. 6, Harvard Law Review.

It seems to us that the safer and saner rule, and that which is most in accord with our ideas of justice and fair dealing as well as with the best business methods, both as to chattel mortgages and conditional sales contracts, is that which, as we have already seen, is approved by the great weight of authority, and which provides that the law of a state, into which chattels have been surreptitiously removed against the will and without the knowledge or consent of the owner, or person having a lien thereon, will not apply to divest the title of the absent owner in one instance or impair the rights of the lienholder thereof in the other. There may be cases in which the owner of a chattel mortgage has not acted with due diligence in following and reclaiming the property which is the subject of his mortgage, or he may be estopped on account of his acts and conduct in reference to the mortgaged chattels from recovering them after their purchase by persons having no knowledge of the mortgage lien, but the complaint in this case shows no facts which would indicate that plaintiff's rights are subject to either of these defenses. The complaint in our opinion states a cause of action, and the demurrers thereto should have been overruled.

Judgment reversed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

203 Cal. 547

WOOLNER v. HAWTHORNE IMPROVEMENT CO. et al. (L. A. 9125.) ★

Supreme Court of California. March 7, 1928.
Hearing Denied in Bank April 5, 1928.

Judgment ⚷143(12)—Refusing to set aside default where plaintiff failed, when offered opportunity to answer cross-complaint, held not abuse of discretion.

Where plaintiff failed to answer cross-complaint of substituted defendant, and refused at time of hearing on motion to strike out answer of such defendant to make and file answer to cross-complaint on condition default was vacated, trial court did not abuse its discretion in refusing subsequent motion to set aside default and judgment entered pursuant thereto.

Department 2.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by H. S. Woolner against the Hawthorne Improvement Company and others, wherein Theodosia B. Conner was substituted as defendant and filed a cross-complaint. From an order denying plaintiff's motion to set aside a default judgment entered pursuant to the cross-complaint, plaintiff appeals. Affirmed.

Fred W. Heath, of Los Angeles, for appellant.

Chas. S. Conner, of Los Angeles, for respondent.

RICHARDS, J. This appeal is from an order of the trial court, made and entered upon October 28, 1925, denying the motion of the plaintiff and appellant to set aside his default and the decree rendered against him thereon by reason of his failure to answer the cross-complaint of the substituted defendant in said action. The original complaint in this action to quiet title to certain real property in the county of Los Angeles was filed on April 23, 1923. One of the original defendants in said action appears to have been E. A. Montgomery, who filed an answer therein, wherein she denied that the plaintiff was the owner of any interest in the particular lot or parcel of land involved in this appeal. Some time thereafter she transferred her right, title, and interest in said property to Theodosia B. Connor by deed dated May 5, 1925, duly recorded in the records of Los Angeles county. Thereafter, and on or about June 18, 1925, said Theodosia B. Connor, served and filed in said action an answer and cross-complaint, in the latter of which she set forth affirmatively the chain of title upon which she relied for her ownership in fee of the particular lot in question, and upon which she prayed in her cross-complaint to have her title quieted thereto. The plaintiff's counsel was served with a copy of said answer and cross-complaint on June 18, 1925, and failed to answer the same, and his default for such failure to answer was entered on June 30, 1925. Thereafter, and on July 6, 1925, the plaintiff moved to strike the answer of Theodosia B. Conner from the files, upon the ground that it had been filed after issue had been joined through the previous filing of the answer of E. A. Montgomery, and that the answer of Theodosia B. Conner had been filed without leave of court first had and obtained. The trial court, upon a hearing thereon on said date, denied said motion, and its order denying the same not having been appealed from has become final. Judgment having been rendered and entered on August 10, 1925, upon said default, and no appeal having been taken therefrom, the said judgment became final within the time required by law, subject, however, to the right of the plaintiff to obtain relief therefrom under the provisions of section 473 of the Code of Civil Procedure.

On or about October 27, 1925, the plaintiff served and filed a notice of motion to set aside said default and judgment, and for leave to answer said cross-complaint upon the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

grounds of inadvertence and excusable neglect, basing the same upon the affidavit of his attorney of record, wherein the latter undertook to set forth that said cross-complaint had been filed without leave of the court first had and obtained, and that said cross-complaint was defective and insufficient, and that said plaintiff had a good and sufficient defense thereto upon the merits, and upon the further ground that the plaintiff had been absent from the county of Los Angeles during much of the intervening time since the entry of said default and judgment. A counter affidavit was filed thereto by Charles S. Conner, attorney of record for the cross-complainant, wherein most of the averments of the affidavit of plaintiff's counsel in support of said motion were denied, and wherein also it was affirmatively set forth that at or about the time of the hearing of the plaintiff's first motion to strike out the answer of Theodosia B. Conner, the latter's counsel making said counter affidavit, made an offer in open court that, if the plaintiff would make and file his answer to the cross-complaint at once, the affiant would submit to the vacation of said default, but that the plaintiff wholly disregarded said offer, and knowingly allowed judgment to be taken on the default 35 days thereafter. Upon the hearing upon the plaintiff's motion of October 28, 1925, the plaintiff presented and offered to file his answer to said cross-complaint. The trial court denied the motion on the date of the hearing thereon.

The only question presented upon this appeal is whether the trial court, under the foregoing circumstances, abused its discretion in refusing to grant the plaintiff's long-delayed motion to set aside said default and judgment. We are unable to discover any such gross abuse of discretion as would justify this court in setting aside the order of the trial court made and entered under the circumstances above set forth.

The order is affirmed.

We concur: LANGDON, J.; SHENK, J.

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203 Cal. 522

BARTLETT HAYWARD CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.★

(S. F. 12626.)

Supreme Court of California. March 2, 1928.

Rehearing Denied March 29, 1928.

1. Master and servant 🔑419—Workmen's compensation legislation in 1917 enlarged power of commission in its continuing jurisdiction to alter awards (Workmen's Compensation Act 1917, §§ 20 [d], 69 [a]; Const. art. 20, § 21, as amended in 1918).

Enactment in 1917, pursuant to Const. art. 20, § 21, as amended in 1918, of Workmen's Compensation Act, § 20 (d), being St. 1917, p. 850, *held*, in view of Workmen's Compensation Act 1913, §§ 25 (d), 82 (a), (b), 86 (a), being St. 1913, pp. 293, 317, 319, and under the liberal construction provided by section 69 (a) of 1917 act (St. 1917, p. 877), to have enlarged the power of the Industrial Accident Commission as to its continuing jurisdiction to alter, amend, or rescind any order, decision, or award on good cause being shown therefor.

2. Master and servant 🔑419—Continuing jurisdiction of commission extends to right to rescind, alter, or amend orders, decisions, or awards on good cause appearing (Workmen's Compensation Act 1917, § 20 [d]).

Under Workmen's Compensation Act 1917, § 20 (d), being St. 1917, p. 850, the power of the Industrial Accident Commission as to its continuing jurisdiction is not limited to consideration of changes in physical condition of workman, but is extended to right to rescind, alter, or amend orders, decisions, or awards on good cause appearing therefor.

3. Master and servant 🔑419—"Good cause" for commission's amending orders, decisions, or awards depends largely on circumstances of each case (Workmen's Compensation Act 1917, § 20 [d]).

Under Workmen's Compensation Act 1917, § 20 (d), being St. 1917, p. 850, relative to the Industrial Accident Commission's right to rescind, alter, or amend its orders, decisions, or awards on good cause appearing, what constitutes "good cause" depends largely on the circumstances of each case; term being relative.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Cause.]

4. Master and servant 🔑419—Industrial Accident Commission's mistake in rating injury as 25 per cent. permanent disability when employee was 100 per cent. permanently disabled, held "good cause" for commission's exercise of continuing jurisdiction (Workmen's Compensation Act 1917, § 20 [d]; § 9, subsec. 2, subds. [9], [10]).

Under Workmen's Compensation Act 1917, § 20 (d), being St. 1917, p. 850, relative to the Industrial Accident Commission's right to rescind, alter, or amend its orders, decisions, or awards, commission's having rated an employee's injury as 25 per cent. permanent disability when, as matter of law, he was entitled to rating of 100 per cent. permanent disability under section 9, subsec. 2, subds. (9), (10), *held* to constitute "good cause" for exercise of commission's continuing jurisdiction.

5. Master and servant 🔑419—That employee was barred from redress to courts for failure to apply for rehearing held not to estop commission's exercising continuing jurisdiction (Workmen's Compensation Act 1917, §§ 20 [d], 64 [b]).

That an injured employee was barred by Workmen's Compensation Act 1917, § 64 (b), being St. 1917, p. 873, from resorting to the courts for redress in failure of commission to award him percentage of disability he was entitled to by his failure to apply for rehearing *held* not to work as an estoppel against Industrial Accident Commission to exercise its con-

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★Rehearing denied.

tinuing jurisdiction as provided by section 20 (d), being p. 850, when invoked by employee or on commission's own motion.

6. Master and servant 🔑419—Res judicata or other common-law doctrine as incorporated in Code may not be invoked to defeat employee's claim under Compensation Act (Code Civ. Proc. § 1908 et seq.; Workmen's Compensation Act).

Doctrine of res judicata and other common-law doctrines as incorporated in Code Civ. Proc. § 1908 et seq., may not be invoked to defeat an employee's right under the Workmen's Compensation Act (St. 1913, p. 279, as amended).

7. Judgment 🔑540—Doctrine of res judicata rests in estoppel.

Doctrine of res judicata rests in estoppel.

8. Master and servant 🔑396—Resort to, and interference by, courts in workmen's compensation matters may take place only in accordance with Legislature's rules and regulations.

Resort to, and interference by, the courts, relative to controversies between employer and employee for injuries to latter, may take place only in accordance with rules and regulations established by the Legislature.

In Bank.

Proceeding under the Workmen's Compensation Act by John George Slate, employee, for loss of the sight of his right eye, opposed by the Bartlett Hayward Company, employer, and the Ocean Accident & Guaranty Company, Limited, insurer. To review an order of the Industrial Accident Commission granting an award, employer and insurer petition for certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

John B. Haas and John D. Home, both of Los Angeles, and G. C. Faulkner, of San Francisco, for respondents.

SHENK, J. This is a proceeding to review and annul an order of the Industrial Accident Commission. On October 2, 1922, John George Slate, a boilermaker's helper, 37 years of age, suffered an injury arising out of and in the course of his employment with the petitioner, Bartlett Hayward Company, which caused the loss of his right eye. On June 1, 1923, he filed an application for compensation under the provisions of the Workmen's Compensation Act. St. 1913, p. 279, as amended. The jurisdictional facts were stipulated and the only issue was the disability rating. At the hearing before the commission it appeared that the applicant had previously, in 1914, lost the sight of his left eye, and after the accident in 1922 the applicant was sightless. On July 12, 1923, the commission found that:

> "Said injury caused permanent disability consisting of loss of sight of right eye, with cosmetic defect due to coloboma of iris, upper half of iris being torn loose; also cosmetic defect of upper lid, margin of upper lid being sigmoid shaped. The percentage of said permanent disability is 25, entitling him to $20.83 a week for 100 weeks, amounting to $2,083,"

—and made its award accordingly. No petition for a rehearing was filed. Nothing thereafter was done by the applicant with reference to the award until after the decision of this court in the Liptak Case, which was decided on December 16, 1926. Liptak v. Industrial Accident Com., 200 Cal. 39, 251 P. 635. In that case the petitioner had previously been deprived of the sight of one eye. He then lost the sight of his remaining eye in an industrial accident and sought compensation therefor. The commission made an award, basing the same on a partial disability rating of 26¼ per cent. He contended before the commission that he was entitled to a rating of permanent total disability on the theory that the loss of his remaining eye was a total and permanent loss of vision. He sought a rehearing, which was denied. On his petition for a writ of review this court decided that upon a proper construction of subdivisions (9) and (10) of subsection 2 of section 9 of the act (St. 1917, p. 839, as amended) the petitioner was entitled to a permanent total disability rating, annulled the award, and directed the commission to proceed in accordance with such determination.

Thereafter, on March 4, 1927, the applicant herein filed with the commission his petition praying that the commission amend its findings and award to conform to the holding in the Liptak Case and allow a rating of 100 per cent. permanent disability. The commission entertained the petition, granted a hearing, and on May 14, 1927, made its order reciting that "good cause" appeared therefor and amended its former findings and award to the end that applicant should receive compensation based on 100 per cent. permanent disability. Subsequently and within the time prescribed by law the employer, Bartlett Hayward Company, and its insurance carrier, Ocean Accident & Guaranty Corporation, Limited, applied for a rehearing on the ground, among others, that the commission acted without and in excess of its jurisdiction, claiming that the findings and award of July 12, 1923, had finally adjudicated the rights of the parties and that there was not shown any new or further disability which would give the commission the power to increase the award pursuant to the continuing jurisdiction conferred on it by subdivision (d) of section 20 of the act. St. 1917, p. 850. The application for a rehearing was denied, whereupon this proceeding was brought.

If the commission had the power to reopen the case and amend its award under the foregoing facts, such power was derived from section 20 (d) of the Act of 1917, which provides:

> "(d) The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; *provided*, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. Any order, decision or award rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards."

The respondents take the position that the power given by the foregoing provisions of the act is a broad power which enables the commission, during the continuing jurisdiction so vested in it, to rescind, alter, or amend any order, decision, or award on good cause being shown therefor; that the phrase, "Such power including the right to review, grant or regrant, diminish, increase or terminate, * * * any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated," does not have the effect of limiting the power of the commission exclusively to that specifically defined, but on the contrary operates as an extension definitely of the power of the commission to that specifically mentioned. On the other hand, petitioners contend that the portion of the section last quoted is such a limiting phrase and has been so interpreted by this court in the case of Georgia Casualty Co. v. Industrial Acc. Com., 177 Cal. 289, 170 P. 625, and in cases referring to that case with approval. The Georgia Casualty Company Case, decided in January, 1918, announced the construction and meaning of section 25 (d) of the Workmen's Compensation Act of 1913. St. 1913, p. 293. Section 25 (d) of the 1913 Act provided:

> "(d) The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections twelve to thirty-five, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor; *provided*, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the accident. * * *"

Section 82 of the Act of 1913 (St. 1913, p. 317), in subdivision (a) thereof, authorized any party aggrieved to apply to the commission for a rehearing on five separate grounds and none others, and subdivision (b) of said section provided as follows:

> "Nothing contained in this section shall, however, be construed to limit the right of the commission, at any time within two hundred forty-five weeks from the date of its award, and from time to time, after due notice and upon the application of any party interested, to review, diminish or increase, within the limits provided by this act, any compensation awarded upon the grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated."

In the Georgia Casualty Company Case it was held that said sections 25 (d) and 82 (b) of the 1913 Act should be read together and when so read section 82 (b) operated as a limitation upon the more general terms of section 25 (d) and confined the subject-matter of the re-examination within the 245 weeks to new facts occurring since the original award, and not to a reconsideration of the facts upon which the former award was made. That proceeding was commenced by the filing of the petition in this court on July 17, 1916. Before the Legislature of 1917 convened, the petitioner had served its brief on counsel for the commission wherein the claim was advanced that although said section 25 (d), standing alone, would appear on its face to give the commission unlimited jurisdiction to alter or amend its awards at any time within 245 weeks from the date of the injury, yet when said section 25 (d) was read and considered in connection with said section 82 (b) it should be concluded that the Legislature intended to limit the power of the commission in so altering or amending its awards to the ground only that the disability of the person in whose favor such award was made has either increased or diminished or terminated. It is not difficult to surmise that this attack on the power of the commission was the subject of consideration by the Legislature in 1917, and that it prompted the amendments to the statute and re-enactments therein during that session. The subject-matter of section 82 (b) of the 1913 Act relating to rehearings before the commission was incorporated and re-enacted in section 65 of the new statute. (St. 1917, p. 874). There was this significant change, however, in the amended and re-enacted statute. The grant of the continuing jurisdiction was eliminated from said section 65, and subdivision (b) thereof was made to read as follows:

> "(b) Nothing contained in this section shall, however, be construed to limit the grant of continuing jurisdiction contained in subsection (d) of section twenty of this act."

[1] Subsection (d) of section 20 was then worded as above quoted. The vital question now presented is, Did the Legislature in 1917, by the enactment of section 20 (d) of the act, intend to enlarge the continuing jurisdiction

of the commission or to leave the same as it had theretofore been in force? We are persuaded that the enactments of 1917, when properly construed, had the effect of enlarging the power of the commission in its continuing jurisdiction. We approach the subject in this regard in the light of the history of the Workmen's Compensation Laws in this state, both constitutional and statutory.

At the special election held October 10, 1911, the original constitutional provision (section 21 of article 20) was adopted, in which it was provided that:

> "The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. * * *"

This step was a distinct innovation in this state respecting liability and remedies as between employer and employee. It enabled the Legislature to deprive the trial courts of the state of jurisdiction over such disputes and to deny to the employee the right to a jury trial. Dominguez v. Pendola, 46 Cal. App. 220, 188 P. 1025. It also took from the workman many other common-law remedies. As compensation for such deprivations, it enabled the Legislature to afford him compensation regardless of his own negligence. While the new laws on this subject have administered a severe wrenching to many preconceived notions of legal wrongs and remedies, a casual observation of the tendency of such legislation and of the construction and interpretation thereof by the courts has disclosed a gradual breaking away from the technical rules of practice and procedure in the administration of such laws. Section 86 (a) of the Act of 1913 (Stats. 1913, p. 319) definitely enjoined a liberal construction of the act upon the courts in the following language:

> "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court."

This language was in general terms, and applicable to either party to a proceeding. Section 69 (a) of the Act of 1917 (Stats. 1917, p. 877) went further and provided:

> "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

We also find the direct mandate of the people of the state in section 21 of article 20 of the Constitution, as amended in 1918 as follows:

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation. * * * A complete system of workmen's compensation includes * * * full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.
>
> "The Legislature * * * may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it."

By the foregoing constitutional amendment the legislation of 1917 was given the stamp of approval as the social public policy of the state in its remedial and humanitarian purposes. So when the language of section 20 (d) of the Act of 1917 is approached in the light of the foregoing considerations, the conclusion seems inevitable that it was intended thereby to enlarge and extend the continuing jurisdiction of the commission beyond that which had obtained under the Act of 1913. Indeed, the wording of the 1917 enactment, without any collateral aids of interpretation, would seem to admit of no other reasonable construction than that by so combining sections 25 (d) and 82 (b) of the 1913 Act into section 20 (d) of the statute of 1917, it was intended by the use of the phrase "including the right" to enlarge and extend the continuing jurisdiction of the commission beyond the power theretofore possessed by it merely to "review, grant or regrant, diminish, increase or terminate" any compensation awarded upon the ground that the disability had "recurred, increased, diminished or terminated" and to embrace the power to rescind, alter or amend its orders, decisions and awards within the period of 245 weeks "upon good cause appearing therefor."

The interpretation of section 20 (d) of the Act of 1917 was under consideration by the District Court of Appeal in the case of Kennedy v. Industrial Acc. Com., 50 Cal. App. 184, 195 P. 267. In that case it was contended by the petitioner that the enactment of section 20 (d) in 1917 endowed the commission with no broader powers than were conferred upon it by sections 25 (d) and 82 (b) of the Act of 1913 as construed by this court in the Georgia Casualty Company Case. Commenting on this contention, it was said by the court, speaking through Mr. Presiding Justice Finlayson:

> "The vice of counsel's argument lies in the assumption that the 'continuing jurisdiction' conferred upon the commission by the Act of 1917 is no greater or other than that which had been conferred upon it by the Act of 1913. Under the Act of 1913 'continuing jurisdiction' was

given to the commission in general terms by subdivision (d) of section 25. * * * No such narrow construction can be put upon the language of subdivision (d) of section 20 of the present act whereby 'continuing jurisdiction' is conferred upon the commission. The sections of the Act of 1913 that related to the commission's continuing jurisdiction—section 25, subdivision (d), and section 82, subdivision (b)—could be harmonized only by construing the general terms of section 25 as limited by the more restrictive language of section 82. But the broad grant of continuing jurisdiction as conferred by the general terms of subdivision (d) of section 20 of the present act is not to be thus limited by the more particular reference in that section to the commission's right 'to review, grant or regrant, diminish, increase or terminate' any award upon the ground 'that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated.' True, subdivision (d) of section 20 of the present act is, to a large extent, a re-embodiment, mutatis mutandis, of subdivision (d) of section 25 and subdivision (b) of section 82 of the Act of 1913, the provisions of these two sections of the Act of 1913 being embodied, with but few, but important, changes, in subdivision (d) of section 20 of the Act of 1917. But though subdivision (d) of section 20 of the Act of 1917 is largely a re-embodiment of subdivision (d) of section 25 and subdivision (b) of section 82 of the Act of 1913, still subdivision (d) of section 20 of the present act is vastly different from a mere re-enactment of the corresponding provisions of the Act of 1913. The present act, in subdivision (d) of section 20, declares, in general terms, that at any time within 245 weeks from the date of the injury the commission 'shall have continuing jurisdiction over its orders, decisions and awards * * * and may at any time, upon notice and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it, upon good cause appearing therefor.' This general grant, in itself unlimited save as to the time within which the power may be exercised, is followed by a more particular provision, namely, a particular reference to the power of the commission to review, grant or regrant, diminish, increase or terminate any award 'upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated.' But the language of this more specific or particular reference to the exercise of the commission's 'continuing jurisdiction,' so far from limiting the preceding general grant of power, implies the very opposite. The use of the word 'including,' in the phrase 'such power *including* the right to review,' etc., indicates that the power that the commission may exercise under its grant of continuing jurisdiction is more than the mere power to 'review, grant or regrant, diminish, increase or terminate' an award on the ground that the disability has 'recurred, increased, diminished or terminated.' 'Including' is not a word of limitation. Rather, it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language that precedes it. Fraser v. Bentel, 161 Cal. 394, 119 P. 509, Ann. Cas. 1913b, 1062; In re Goetz, 71 App. Div. 272, 75 N. Y. S. 750. As here employed, the word 'including' is used to express the idea that the specific power to review, grant or regrant, diminish, increase, or terminate an award upon the ground that the disability has recurred, increased, diminished or terminated—a particular power specifically referred to in the section of the present act—is but a part of the larger and more comprehensive power conferred by the more general language of the immediately preceding clause of the section. One of the definitions of 'include,' as given by Webster, is: To comprehend or comprise, as a genus the species, *the whole a part*, an argument or reason the inference; to contain; to embrace.

"For these reasons we conclude that the particular power conferred by that clause of subdivision (d) of section 20 which begins with the words 'such power, *including* the right to review' is but a part of, and not a limitation upon, the larger, and more general power granted by the clause which confers upon the commission 'continuing jurisdiction' or power 'to rescind, alter or amend any * * * order, decision or award made by it, good cause appearing therefor.'"

True, in denying a petition for hearing in this court, any intimation of an opinion as to the correctness of the construction placed upon the language of section 20 (d) of the Act of 1917 as to the continuing jurisdiction of the commission was reserved. The decision was fully supported on other grounds. But on further consideration we are satisfied that the construction placed upon the enactment of 1917 by the District Court of Appeal is in harmony with the spirit and intent of our Workmen's Compensation Laws as contemplated by the Constitution of the state and the attitude of the Legislature. Indeed, such construction reflects the obvious meaning of the language of the statute. To hold otherwise would be to amend the act by judicial interpretation.

[2-4] It is our conclusion, therefore, that the continuing jurisdiction of the commission as provided by section 20 (d) of the Act of 1917 is not limited to the consideration of changes in the physical condition of the workman, but is extended to the right to rescind, alter or amend the orders, decisions, or awards upon good cause appearing therefor. What constitutes "good cause" depends largely upon the circumstances of each case. The term is relative. It may be assumed that the determination of the commission as to what constitutes "good cause," while entitled to great weight, would not be conclusive. Certainly it may be said, so far as the facts in the present case are concerned, that the mistake or inadvertence of the commission in giving the injured workman, Slate, a rating of 25 per cent. permanent disability, when as matter of law on the undisputed facts he was entitled to a rating of 100 per cent. permanent disability, would constitute "good cause" for the exercise of continuing jurisdiction of the commission. In fact, the demands of justice would seem to require that the compen-

sation be so increased under the circumstances here shown.

It is earnestly insisted by the petitioner that to extend the continuing jurisdiction of the commission to include the power to "rescind, alter or amend" any "order, decision or award made by it upon good cause appearing therefor," except when a change in the physical condition of the employee is shown, is to do violence to the doctrine of res adjudicata, which it is claimed the Legislature plainly intended to ingraft upon the Workmen's Compensation Act by the provisions thereof relating to rehearings before the commission. The contention is predicated on the terms of sections 64 and 65 of the act. Section 64 in subsection (a) (St. 1917, p. 873) provides that any party or person aggrieved by any final order, decision, award, rule, or regulation of the commission may apply to the commission for a rehearing thereon. Subdivision (b) provides that:

> "No cause of action arising out of any such final order, decision or award shall accrue in any court to any person until and unless such person shall have made application for such rehearing, and such application shall have been granted or denied."

Subdivision (c) provides that:

> "Such application shall set forth specifically and in full detail the grounds upon which the applicant considers said final order, decision, award, rule or regulation is unjust or unlawful, and every issue to be considered by the commission. * * * The applicant for such hearing shall be deemed to have finally waived all objections, irregularities and illegalities concerning the matter upon which such rehearing is sought other than those set forth in the application for such rehearing."

Subdivisions (d) and (e) (St. 1917, p. 874) relate largely to procedural matters on the rehearing. Subdivision (f) provides that:

> "If after such rehearing and a consideration of all the facts, including those arising since the making of the order, decision or award involved, the commission shall be of the opinion that the original order, decision or award, or any part thereof, is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same."

Parenthetically it may here be observed that if the argument of the petitioners with reference to the construction of the phrase in section 20 (d) of the present act, namely, "including the right to review, grant or regrant, diminish, increase or terminate, * * * any compensation awarded," be applied to the phrase in subdivision (f) of section 64 of the act, namely, "including those [facts] arising since the making of the order, decision or award"—and we perceive no reason why the same argument might not properly be applied to both—it would inevitably follow that the power of the commission on rehearing would be confined to a consideration of those facts only as had arisen since the making of the original order, decision, or award, and would exclude from further consideration the facts arising prior thereto. Such a conclusion would not bear the semblance of reason, as the obvious purpose of the rehearing is to enable the commission to re-examine all the facts and circumstances occurring prior to the order, decision, or award—and not only the facts, but also the law in the premises.

Reverting to the further terms of the act governing rehearings, it is provided in subdivision (a) of section 65 that:

> "At any time within twenty days after the service of any final order or decision of the commission awarding or denying compensation, or arising out of or incidental thereto, any party or parties aggrieved thereby may apply for such rehearing upon one or more of the following grounds and upon no other grounds."

The specific allowable grounds for rehearing are next set out and are as follows:

> "(1) That the commission acted without or in excess of its powers. (2) That the order, decision, or award was procured by fraud. (3) That the evidence does not justify the findings of fact. (4) That the applicant has discovered new evidence, material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing. (5) That the findings of fact do not support the order, decision or award."

It is then provided in subdivision (b) that:

> "Nothing contained in this section shall, however, be construed to limit the grant of continuing jurisdiction contained in subsection (d) of section twenty of this act."

[5] In view of the foregoing provisions of sections 64 and 65 it is argued by the petitioners that since the employee in the present proceeding made no application for a rehearing before the commission, and by that means did not seek to correct the award and obtain the lawful rating on his total permanent disability, he not only became estopped from seeking redress in the courts, but the power of the commission to act in the premises was exhausted. It is clear from the terms of subdivision (b) of section 64 that the employee, Slate, was barred from resorting to the courts for redress by his failure to apply for a rehearing, but from that fact it would not follow that the commission was estopped from exercising its continuing jurisdiction when invoked by the employee or on the commission's own motion. We find no provision of the act which operates as an estoppel as against the commission to exercise its continuing jurisdiction within the stated time, either as to the changed condition of the injured employee or as to the other matters, law or fact, which would constitute "good cause" for the exercise thereof.

[6-8] The principles involved in the doctrine of res adjudicata are incorporated in the Code of Civil Procedure (section 1908 et

seq.), but those sections of the Code are merely declaratory of the common-law rules. Ferrea v. Chabot, 63 Cal. 564, 567. Since by the Workmen's Compensation Law the injured employee has been deprived of the rules of the common law as weapons of offense to obtain redress for injuries sustained by him, it would seem to be in harmony with the spirit, purpose, and intent of such laws not to permit (except where, in the furtherance of the proper administration of the law, it should be done) common-law rules to be invoked by his adversary as weapons of defense to defeat his claim. See Brooks v. A. A. Davis & Co., 124 Okl. 140, 254 P. 68, 70. The doctrine of res adjudicata rests in estoppel. The act in question imposes an estoppel against the employee as to any recourse to the courts, unless he applies for a rehearing before the commission. But when we have in mind the question of the power of the commission, the purpose and intent of the law is to vest in the commission complete control of controversies between employer and employee, subject to the rules and regulations provided by the legislative branch. Resort to and interference by the courts may take place only in accordance with such rules and regulations. It is not to be assumed that the commission will abuse its powers. If it should do so, the Legislature in the act itself has provided adequate means for a check through the instrumentality of the courts.

There is nothing novel in vesting in a commission, such as our Industrial Accident Commission, the power to correct its mistakes both as to the law and the facts after it has once acted and in the furtherance of justice as between the parties. The United States government and all but four of the states have enacted Workmen's Compensation Laws. By act of Congress compensation for injuries to civil employees of the United States has been provided for. The commission appointed to administer the law is given power to modify prior awards by ending, increasing, or diminishing the compensation, or, if compensation has been once refused, to award compensation as the equities of each case may require. 39 U. S. Stat. at Large, 742, 749, §§ 37, 38 (5 USCA §§ 787, 788). In the states of Pennsylvania, Texas, Colorado, Kansas, and the Territory of Hawaii the commission may review its prior awards because of changed conditions, and may rescind, alter, or amend the same upon equitable grounds, such as mistake, fraud, coercion, undue influence, or gross inadequacy or excessiveness in the prior award. In the states of New York, Massachusetts, Maryland, Ohio, Oklahoma, Utah, and West Virginia the commission or administrative body may modify its prior awards within the compensation period as in its opinion may be justified. In Delaware, Georgia, Idaho, Indiana, Kentucky, Missouri, Nebraska, South Dakota, Vermont, and Virginia the continuing jurisdiction of the commission would seem to be limited by the wording of the statute to the power to modify a prior award on account only of a change of conditions. That is, in these ten states there is no specific provision of the statute authorizing the commission to rescind, alter, or amend prior awards on equitable grounds. The court in at least one of those states, however, has construed this grant of power to include the right on the part of the commission to set aside a prior award on such grounds. Vodopich v. Trojan Min. Co., 43 S. D. 540, 180 N. W. 965. In Minnesota the commission is authorized to modify its prior awards for cause. North Dakota has substantially the same provision. In Wisconsin the single ground of "mistake" is specified. In Wyoming the continuing jurisdiction is merely to terminate the award when the employee has fully recovered.

Generally, it may be said that a survey of the Workmen's Compensation Laws in the several jurisdictions discloses that the idea of continuing jurisdiction has been put into almost universal practice. The vesting of power in the commission to change its awards on account of the changed conditions of the injured employee is a common statutory provision, and placing within the discretion of the commission the power to modify prior awards on equitable grounds is not uncommon.

The petitioners point out that in many states where continuing jurisdiction is vested in the commission to correct its mistakes or modify its awards on equitable grounds, there is no provision for a rehearing. This may be conceded, but it does not therefore follow that such continuing jurisdiction may not properly be granted the commission when a rehearing is also provided for. In Colorado both are provided for and are made effective. Employers' Mut. Ins. Corp. v. Industrial Commission of Colorado, 78 Colo. 501, 242 P. 988; State Compensation Ins. Fund v. Industrial Commission of Colorado, 80 Colo. 130, 249 P. 653.

It is earnestly insisted by the petitioners that this court and the District Courts of Appeal, since the adoption of the 1917 Act, have adhered to the Georgia Casualty Company Case and have foreclosed the respondents herein as to their present contentions. The cases of McBride v. Industrial Acc. Com., 182 Cal. 407, 187 P. 1050; National Engineering Corp. v. Industrial Acc. Com., 193 Cal. 422, 225 P. 2; Hogeburg v. Industrial Acc. Com., 73 Cal. Dec. 593; Northern Redwood Co. v. Industrial Acc. Com., 44 Cal. App. 61, 185 P. 991; Grand Union Hotel v. Industrial Acc. Com., 67 Cal. App. 123, 226 P. 76; and Benton v. Industrial Acc. Com., 74 Cal. App. 411, 240 P. 1021—are particularly referred to and relied upon.

In the foregoing cases varying situations of fact were presented. In the McBride Case the commission had reserved its award for medical, surgical, and hospital treatment pending the procuring of vouchers and necessary information for a supplemental award. In denying a petition for rehearing the application for writ of review, this court very correctly stated that the Georgia Casualty Case, which was relied on by the petitioner, was not in point on the question presented. The National Engineering Corporation Case was one involving a changed condition in the disability of the employee and this circumstance, it was held, distinguished the case from the Georgia Casualty Company Case. It it unnecessary to mention chronologically or otherwise the many orders of the commission in the Hogeburg Case which it was contended operated as res adjudicata and prevented a reopening of the case by the commission after the 20-day period. It is sufficient to say, as was pointed out in the opinion in that case, that the prior orders were not on the merits and therefore did not operate as a bar to a rehearing of the case on the ground of changed disability. The rule of the Georgia Casualty Company Case was referred to with apparent approval, but what was said on that subject was not necessary to the decision and the change in the statute after the decision in the Georgia Casualty Company Case was not commented upon. In the Northern Redwood Lumber Company Case the District Court of Appeal considered that it was bound by the Georgia Casualty Company Case in interpreting section 20 (d) of the 1917 Act without, however, noting the change in the language of the section. The Grand Union Hotel Case involved a change in the physical condition of the employee during the period between the submission of the case to the commission and the date of the award. The court held that the date of submission was controlling and not the date of the award, and that the Georgia Casualty Company Case would not govern because the point there decided was not involved. In the Benton Case the District Court of Appeal followed its own case in Hindes v. Industrial Accident Commission, 73 Cal. App. 726, 239 P. 339, which in turn was based on the Georgia Casualty Company Case with apparently no consideration given to the amended statute.

It is thus seen that of the seven cases which it is contended by petitioners finally establish the meaning to be given to the language of section 20 (d) of the 1917 Act, one, the Georgia Casualty Company Case, interpreted the provisions of the 1913 Act; and the only two in point of the other six cases, the Northern Redwood Lumber Company Case and the Benton Case, followed the interpretation of the 1913 Act in the Georgia Casualty Case without noting the change in phraseology in the 1917 Act nor considering what, if any, change of meaning it effected. In fact, no case cited or found in our research, with the exception of the Kennedy Case, has recognized that there has been a change in the wording of the section. When the conclusion is once reached that the 1917 Legislature accomplished a material change in the effect of the law governing the continuing jurisdiction of the commission, and such a conclusion cannot be avoided, the inappropriateness of following the Georgia Casualty Company Case as controlling authority in the construction of the later law is apparent. It is not contended by any party to this proceeding that the Georgia Casualty Company Case was not correctly decided on the then existing law. Nor do we now question the soundness of its conclusions. What we do hold is that that case and the other cases which follow it and rely upon it cannot serve as controlling precedents for the proper interpretation of the subsequent and different legislation.

The petitioners urge, as an additional reason why the award involved herein should be annulled, that the Liptak Case was wrongly decided and they suggest that, should it be deemed advisable now so to declare, it would then become unnecessary at this time to determine the broader question of the scope of the continuing jurisdiction of the commission under the 1917 statute. Whatever may be the arguments for and against the correctness in point of law or the wisdom of the decision in the Liptak Case, it is enough to say that the decision in that case is only collateral to the paramount question of jurisdiction in the case at bar. If the economic result of the law as declared in the Liptak Case has been to place one-eyed men in a disfavored class from the employer's standpoint, the remedy in their favor should be sought from the Legislature which has plenary power in the premises.

Finally, it is contended by petitioners that the effect of judicial approval of the extension of the continuing jurisdiction of the commission to questions of equitable and kindred cognizance would result in consequences to insurance carriers never heretofore contemplated. It is stated that the petitioner insurance carrier has set aside no reserve in anticipation of the exercise of such power by the commission and is therefore unprepared to meet such an unexpected emergency. It is further stated that, if the continuing jurisdiction contended for by the commission is recognized and exercised, it will be impossible to write insurance covering compensation hazards in this state. No difficulty seems to have been encountered in covering such hazards in the light of the long exercise by the commission of its continuing power to increase awards during the 245 weeks on account of change in the physical condition of the employee. Without investigating the subject we venture the assertion that in the many jurisdictions where the continuing jurisdiction of the commission extends as well to a consideration of equitable grounds in the modification of prior awards, insurance companies are engaged in assuming the hazards of industrial compensation. Furthermore, the petitioners would seem to assume that the exercise by the commission of its broader powers would necessarily result in the increase of such hazards. We think not. Without doubt the commission will be called upon in many cases by the employer and the insurance carrier as well as by the employee to alter, amend, or rescind an award for mistake, fraud, etc., as the right and justice of the case may require. It cannot be assumed that the mere possession of power to act would result in the exercise of that power in favor of one class of litigants as against another.

The net result of the recognition of the continuing jurisdiction of the commission over controversies pending before it for the full period provided by the Legislature will make for the final adjustment of such controversies by the tribunal established by the people of the state for that particular purpose and in a manner in harmony with the spirit and purpose of the Workmen's Compensation Law. The desirability of repose in controversies before the commission by lapse of time, so earnestly urged by the petitioners, is fully appreciated. But it is for the Legislature, and not for the courts, to say how long the determination of a controversy involving an industrial accident shall remain in the breast of the commission before the same shall be barred by lapse of time. Assuming the existence of the power in the commission, the period of 245 weeks is not now questioned as a proper legislative declaration of the time within which the power may be exercised.

The award is affirmed.

We concur:
WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

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203 Cal. 493

BROWN v. FEATHER RIVER LUMBER CO.
(Sac. 3902.)

Supreme Court of California. March 1, 1928.

1. Railroads ⚷282(15)—Complaint alleging conductor of logging train, with employer's knowledge, invited deceased to ride stated cause of action for death when train was wrecked, because showing deceased was invitee.

Allegations to effect that conductors of logging railroad were in habit of permitting persons to ride upon trains as a convenience, and that such acts and conduct on their part were known to defendant's managing agents, and that conductor acting in course of his authority expressly invited deceased to ride on train, which was wrecked, and deceased killed, *held* sufficient to submit to jury question as to whether defendant's managing agents had not expressly authorized or ratified conductor's conduct in extending invitation to deceased so as to raise an issue of fact for jury as to whether or not deceased was an implied invitee of defendant, and hence sustaining of demurrer to complaint was error.

2. Railroads ⚷276(2)—Railroad invitee is entitled only to degree of care commensurate with character of train.

Where one is riding railroad train as an invitee, he is entitled only to degree of care commensurate with character of train.

In Bank.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Belfield Brown against the Feather River Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Wm. C. Ring and Faucett & Ring, all of Los Angeles, for appellant.

L. H. Hughes, of Quincy, and Price & Hawkins, of Reno, Nev., for respondent.

PRESTON, J. [1] Plaintiff sues defendant for the death of his son, a minor of the age of 18 years, basing his cause of action upon allegations of negligence with respect to the management and operation of a logging railroad upon which deceased was riding at the time of his death. We are here concerned solely with the sufficiency as a pleading of the second amended complaint, to which the court below sustained a demurrer without leave to amend. Said second amended complaint, hereinafter referred to as "complaint," alleges:

"That on the 28th day of May, 1922, and long prior thereto, at the county of Plumas, state of California, defendant was engaged in the business of cutting timber and manufacturing lumber and, in this connection, was operating a sawmill and railroad, which said railroad was used by said defendant to haul or convey timber to said mill by means of a locomotive or engine, together with railroad cars, operated on said railroad.

"Said defendant maintained a camp, or small town, wherein employees working at said lumber business resided.

"That on said 28th day of May, 1922, and long prior thereto, those residing in said camp or town were permitted by the defendant's agents and servants, to wit, defendant's conductors in charge of and operating said train, to ride upon said train, as convenience in going up and down said tracks, and were so permitted to ride without hire.

"That defendant's said conductor's acts and conduct in permitting those residing in said

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

camp or town to ride on said trains, as aforesaid, was well known to defendant's managing agents and superintendent, and said managing agents and superintendent ratified said act and conduct of defendant's said conductors in permitting those living in said camp or town to ride upon said trains, as aforesaid, and acquiesced therein.

"That on or about said 28th day of May, 1922, one Delmar Brown, a minor of the age of 18 years, the son of the plaintiff herein, was residing at said camp or town so maintained by said defendant and was an employee of said defendant, although said Delmar Brown, deceased, was not engaged in work on said 28th day of May, 1922, nor engaged in any line or scope of employment of defendant, but was walking along said track or railroad in pursuit of his own recreation or pleasure, and had reached a point about 5 miles distant from said camp or town, at which said time and place defendant's said train was standing on its said railroad, and was about to start up and proceed down said track in the direction of said camp or town, whereupon defendant's conductor in charge of and operating said train, while acting in the line and scope of his authority, invited said deceased to board said train for the purpose of riding down to said camp or town and directed the deceased to take a position on the rear of the tender of said engine of said train, pursuant to which directions of said conductor deceased took a position on the rear of said tender. Defendant's said engine was so connected with said train of cars as to be moving or proceeding backward in such manner as to place said tender in front of said engine and train, and the portion of said tender upon which deceased was riding under the direction of said conductor was directly in front of said moving train as it proceeded in the manner above alleged.

"Immediately after said deceased had taken his said position on said tender, said train started up and proceeded down said track to a point about 3½ miles from said camp or town and while rounding a curve on said railroad said engine ran off of said railroad and plunged down an embankment, whereupon deceased was hurled from said tender to the ground and instantly killed.

"Said deceased was a good and dutiful son, and with the exception of the short space of about 2 weeks, at which time said deceased was residing in defendant's said camp or town, was residing with the plaintiff herein, at Lindsay, Cal. * * *

"The roadbed from the point where said deceased boarded said train to the point of its destination, to wit, said camp or town, was soft, uneven, and unsecure; the iron track or rails along said roadbed and over which said train was passing on its way to said camp or town were loose and unsecure; the ties upon which said rails or track were laid were broken, weak, and unsecure and the rails were not securely fastened thereto and the train, while passing over and along said track, was liable to be overturned or derailed and the position occupied by the deceased at said time was a position of great danger and peril, all of which was known to defendant.

"Deceased was not familiar with said roadbed and the danger attending his position upon said tender and at the time the deceased believed his said position was a safe place to ride.

"That all of said injuries and damage aforesaid were caused by and were an approximate consequence of the negligence of defendant's said conductor in placing said deceased on the tender of said engine and starting and operating said train along said track while said plaintiff was occupying said position."

Count 2 of the complaint is predicated upon an allegation that the negligence pleaded in count 1 was willful and wanton, and count 3 upon an allegation of willful and wanton negligence in permitting the deceased to occupy a position on the tender of the engine of defendant's train.

It will thus be readily seen that the pleading before us presents the complex question of determining whether, under the allegations thereof, deceased was a passenger, invitee (express or implied), licensee, or trespasser upon defendant's logging train. It is clear that defendant was not at the time a common carrier of passengers in the ordinary acceptation of that term. It clearly appears also that enough is alleged to raise an issue of fact for the jury as to whether or not deceased was an implied invitee of defendant. In other words, the allegations to the effect that the conductors of defendant railroad were in the habit of permitting persons to ride upon the trains as a convenience in going up and down said tracks, and that such acts and conduct on their part were known to the managing agents of defendant, and that the conductor acting in the course of his authority expressly invited deceased to ride on said train, were sufficient to submit to the jury the question as to whether said managing agents of defendant had not expressly authorized or ratified the conduct of its said conductor in extending said invitation to deceased. Apparently the pleader in this case had studied closely the principles of law governing the situation, and the complaint was drawn by him in the light of these authorities.

After a careful review of the authorities, many of which are not cited in the briefs, we hold that the principles announced in the case of Lawrence v. Kaul Lumber Co., 171 Ala. 300, 55 So. 111, are applicable here. Inasmuch as that case is practically a parallel of the case at bar and discusses all principles here involved, we shall quote from it at length. Defendant there, as here, was not a common carrier of passengers, but had built and was operating from its logging camp to the main line a short railroad designed for use in its logging and lumber business. A custom had arisen of allowing its hands and employees to ride to and fro on its freight trains for their own convenience, which permission in time was extended apparently to all persons who sought the privilege. Deceased had been hired by defendant to cut ties on its lands at so much a tie and at his discretion. While riding on a logging train, following the above custom, he was killed by derailment of the train on account of the condition of the roadbed. In considering the various rulings on demurrers to the complaint and pleas, the court said:

> "To constitute one a 'passenger' who is riding on a train, it is well settled that it is not necessary that the carrier should be a common carrier, nor that the train or car should be used or adapted primarily for carrying passengers. Birmingham R., L. & P. Co. v. Adams, 146 Ala. 267, 272, 40 So. 385, 119 Am. St. Rep. 27. It is also well settled that the person transported is none the less a passenger, because he pays nothing for his carriage, or because he rides for his own convenience solely, by the courtesy of, and absolutely without profit to, the carrier. 5 A. & E. Ency. Law, 507; 1 Ann. Cas. 451, note; Indiana Traction Co. v. Klentschy, 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869; Harvey v. Deep River Logging Co. (1907) 49 Or. 583, 90 P. 501, 12 L. R. A. (N. S.) 131. The essential requirement seems to be only that the passenger is accepted as such—that is, for transportation by the carrier; the trust and confidence thereby induced, on considerations of public policy, imposing upon the carrier the duty to reasonably safeguard, and not negligently injure, the person so carried. In some of its applications, this rule is undoubtedly a harsh one, and the results sometimes seem scarcely consistent with reason and justice.
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> "When, however, the passenger chooses to be transported on a train, not adapted to passenger service, such as a freight or a logging train, while he does not waive the carrier's duty of due care with respect to his safety, he does waive all such precautions, whether in equipment or operation, which are inconsistent with the ordinary use and conduct of such a train, and cannot expect the carrier to change or adapt his service to the extraordinary requirements of a common carrier of passengers. In other words, he assumes the risk of injury from such accidents as are incident to such trains when equipped and operated in the usual way. Southern Ry. Co. v. Crowder, 130 Ala. 256, 263, 30 So. 592; Harvey v. Deep River Logging Co., 49 Or. 583, 90 P. 501, 12 L. R. A. (N. S.) 131.
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> "But, if the carrier is not a common carrier of passengers, and has not expressly contracted to carry in the particular case, a person entering upon its train and taking passage thereon might be, under various circumstances, either a passenger, a licensee, or a trespasser. If his presence is without the knowledge and consent of any one in charge of the train, he is but a trespasser. If on the invitation, or with the knowledge and acquiescense, of such an agent, not authorized nor shared in by his principal—the carrier itself, or its alter ego—such person would be but a licensee. McCauley v. Tenn. Co., 93 Ala. 360, 9 So. 611; Files v. Boston, etc., R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411. If on the invitation, express or implied, of the carrier or its alter ego manager, or of any authorized agent, such person would be a passenger. Id.; Harvey v. Deep River Logging Co. (1907) 49 Or. 583, 90 P. 501, 12 L. R. A. (N. S.) 131. * * *
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> "It is to be noted that 'invitation,' in the sense in which it is here used in these pleas, and as commonly used and defined by law writers in this connection, is a term of considerable breadth, and includes, not only express invitation, but the invitation that may be implied from custom, usage, or conduct on the part of the carrier, or of its servants, if notorious or actually known to the carrier or its alter ego. A. G. S. Ry. Co. v. Godfrey, 156 Ala. 202, 218, 47 So. 185, 130 Am. St. Rep. 76; Brown v. Scarboro, 97 Ala. 316, 322, 323, 12 So. 289. Upon this question of implied invitation, based on the known custom or usage of the defendant or its agents, much pertinent testimony was introduced on the trial, and this issue as made by the pleadings was one of fact for the jury to determine."

A case also in point is Harvey v. Deep River Logging Co., 49 Or. 583, 90 P. 501, 12 L. R. A. (N. S.) 131, cited in the above quotations. There defendant, engaged in the logging business, operated, as part of its appliances, a logging steam railroad, but it was not engaged in the passenger business and neither charged nor received fares of persons carried. Yet the court held that if the carriage of a person on one of its trucks was with its implied consent, which might be found from evidence tending to show not only that defendant's manager had actual knowledge that the persons in charge of its trains were in the habit of permitting persons to ride thereon, but also that such practice was so open, notorious, and continuous that it was hardly probable that it could have been without his knowledge, defendant owed him the duty of not injuring him by its negligence, and so was liable for his injury from collision of the train with another train negligently permitted on the road at the time.

In the case of Hodge v. Sycamore Coal Co., 82 W. Va. 106, 95 S. E. 808, plaintiff was riding gratuitously on a truck or hand car maintained and operated by defendant coal mining company to haul its express matter over a spur track of a railway company, leading from the main line to its coal mine, with the consent of its general manager having control of the operation of such car. The court held that she was a passenger and not a trespasser or mere licensee, and that such company owed her the duty to use reasonable care for her safety, and affirmed the judgment awarding her damages for a personal injury caused by collision of defendant's said hand car or truck on which she was riding with a train of cars. The court said:

> "These facts and circumstances establish between plaintiff and defendant the relation of passenger and private carrier, and defendant was bound to exercise such reasonable care for plaintiff's safety as is usually employed by prudent persons engaged in the same business, or business similar in character. Shoemaker v. Kingsbury, 12 Wall. 369, 20 L. Ed. 432, and 4 R. C. L. § 593. The truck was not designed for the accommodation of passengers, and defendant did not solicit their patronage or hold itself out as a public carrier, and plaintiff assumed the ordinary risks incident to the mode of travel. * * * Even if no express agreement by the superintendent to carry her were proved, plain-

> tiff could not be regarded as a trespasser or mere licensee in view of other facts and circumstances clearly proved. Defendant, thru its acting agents, knew of the prevailing custom of carrying passengers to and from the junction, and there is no evidence of any rule of the company forbidding the practice. The existence of the custom, with knowledge thereof by defendant and no rule forbidding the practice, is sufficient to establish the relation of carrier and passenger. However, it is not denied that plaintiff was being carried pursuant to an understanding or agreement had with defendant's general superintendent the evening before the accident. Payment of fare or an agreement for compensation was not necessary in order to constitute plaintiff a passenger."

A case very similar and to the same effect is Whitehead v. St. L., etc., Ry. Co., 99 Mo. 363, 11 S. W. 751, 6 L. R. A. 409. See, also, a case similar in fact and holdings which arose in California, Albion Lumber Co. v. De Nobra (C. C. A.) 72 F. 739, 741. Many other cases could be cited supporting these views. Measuring the complaint in this action by the principles above announced, there can be no question that count one states a cause of action which, if sustained by the evidence, would warrant a jury in finding that deceased was on defendant's train as an invitee and not as a licensee or trespasser.

The case of Campbell v. Duluth & Northeastern, etc., Co., 107 Minn. 358, 120 N. W. 375, 22 L. R. A. (N. S.) 190, relied upon by respondent, is not at variance with the principles hereinabove announced. In fact, it is in complete harmony with them, to this effect:

> "All that is required of such roads is the exercise of the highest care under the circumstances. The passenger must take such roads as he finds them. A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances."

The complaint in this action alleges that the defendant did not exercise the care that it should have exercised under the particular circumstances.

Purple v. Union Pacific (C. C. A.) 114 F. 123, 57 L. R. A. 700, and cases of that type are not in point because there plaintiff was riding on a train prohibited from carrying passengers by the rules of the company, and plaintiff knew or should have known of such rules. We have no such state of facts before us. The case of Lemasters v. Southern Pacific Co., 131 Cal. 105, 63 P. 128, is not applicable for the same reason, for there "it was against the rules of defendant for persons to ride upon this board, and deceased was acquainted with that fact."

[2] While deceased, if an invitee, was only entitled to the degree of care commensurate with the character of the railroad train on which he was riding, nevertheless, there is no allegation of the complaint from which contributory negligence as a matter of law appears. It does not appear that the position assumed by the deceased was necessarily more hazardous than other places on the train, nor that the assumption of this position, as distinguished from any other position he might have taken, in any way specially contributed to the accident. Nor does it appear that the assumption of this position at the invitation of the conductor was in excess of the conductor's express and implied authority. The most that can be said is that in accepting an invitation to ride upon said train he knew or should have known of the differences between such transportation and the ordinary passenger train, and the duty of defendant would thereby be correspondingly less. But there is no allegation that he did any act, after so taking the position thereon assigned to him, which in any way contributed proximately or otherwise to the accident causing his death. Cases, therefore, where the affirmative negligent act of deceased brought him in contact with a railroad train, are not in point and not applicable here. This observation applies to cases such as Lynn v. Goodwin, 170 Cal. 113, 148 P. 927, L. R. A. 1915E, 588; Pope v. Halpern, 193 Cal. 176, 223 P. 470; and Young v. S. P. Co., 189 Cal. 746, 210 P. 259.

These views render it unnecessary to discuss the doctrine of last clear chance, nor is it necessary to discuss causes of action two and three predicated upon willful and wanton negligence, the rule in this respect not being in doubt. The complaint states a cause of action.

Judgment reversed, with directions to court below to overrule demurrer.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

203 Cal. 502

NEIL v. FEATHER RIVER LUMBER CO.
(Sac. 3903.)

Supreme Court of California. March 1, 1928.

Railroads ⚷282(1)—Complaint alleging conductor of logging train with employer's knowledge invited plaintiff to ride stated cause of action as showing plaintiff was invitee.

Allegations of complaint to effect that conductors of defendant logging railroad were in habit of permitting persons to ride upon trains of railroad as a convenience, that such acts and conduct on their part were known to defendant's managing agents, and that conductor acting in course of his authority expressly invited plaintiff to ride on his train, which was wrecked, and plaintiff injured, *held* sufficient to submit to jury question whether defendant's managing agents had not expressly authorized or ratified conduct of its conductor in extending such invitation to plaintiff so as to raise an issue of fact for jury whether plaintiff was riding as an express or implied invitee of defendant, and hence sustaining demurrer to complaint was error.

In Bank.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Edward R. Neil against the Feather River Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

William C. Ring and Faucett & Ring, all of Los Angeles, for appellant.

L. H. Hughes, of Quincy, McLaughlin & McLaughlin, of Sacramento, and Price & Hawkins, of Reno, Nev., for respondent.

PRESTON, J. Plaintiff sues to recover damages for the alleged negligence of defendant with respect to the management and operation of a logging railroad upon which he was riding when the locomotive jumped the track, hurling him from the tender to the ground and severely injuring him. We are concerned solely with the sufficiency as a pleading of the second amended complaint, to which the court below sustained a demurrer without leave to amend.

This case was heard and considered with the companion case of Brown v. Feather River Lumber Co., a Corporation, this day decided, 265 P. 203, wherein plaintiff sought damages for the wrongful death of his son arising from the same accident here involved. The allegations of the second amended complaint in that case, except as to the extent of resultant bodily harm, are practically identical with the allegations of the second amended complaint in the instant case, and reference may be made to said decision for a statement in detail thereof.

We reiterate the holding there made, to-wit, that the allegations of the pleading are sufficient to raise an issue of fact for the jury as to whether or not plaintiff was riding as an express or implied invitee of defendant. In other words, the allegations to the effect that the conductors of defendant railroad were in the habit of permitting persons to ride upon the trains of said company as a convenience in going up and down said tracks, that such acts and conduct on their part were known to the managing agents of defendant, and that the conductor acting in the course of his authority expressly invited plaintiff to ride on said train, were sufficient to submit to the jury the question as to whether said managing agents of defendant had not expressly authorized or ratified the conduct of its said conductor in extending said invitation to plaintiff. Lawrence v. Kaul Lumber Co., 171 Ala. 300, 55 So. 111; Brown v. Feather River Lumber Co., supra, and cases therein cited. There can be no question that count 1 states a cause of action which, if sustained by the evidence, would warrant a jury in finding that plaintiff was on defendant's train as an invitee and not a licensee or trespasser, and it is unnecessary to discuss causes of action 2 and 3, predicated upon willful and wanton negligence, the rule in that respect not being in doubt.

In short, the complaint states a cause of action and upon the same grounds, and for all the reasons set forth in said case of Brown v. Feather River Lumber Co., supra, the judgment herein is reversed, with directions to the court below to overrule the demurrer.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

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203 Cal. 465

MOORE v. FIDELITY & CASUALTY CO. OF NEW YORK. (S. F. 11500.)★

Supreme Court of California. Feb. 29, 1928.

Rehearing Denied March 29, 1928.

1. Insurance ⚷455—Blood poisoning of nurse through flying streptococcic germs held from "bodily injury" within accident policy.

The introduction of streptococcic germs into and their action on the tissues of the human system, through the flying of the germs, is a "bodily injury" within a policy insuring a graduate nurse against such injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bodily Injury.]

2. Insurance ⚷455—Blood poisoning from flying streptococcic held sustained through "accidental means" within policy.

Blood poisoning of nurse through streptococcic germs flying from patient is sustained

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★Rehearing denied.

through "accidental means" within an accident policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accidental Means.]

3. Insurance ⚷665(5)—Finding of blood poisoning of insured nurse being sustained through accidental means held sustained by evidence.

Finding of blood poisoning contracted by insured nurse from patient being sustained through accidental means *held* sustained by the evidence.

Shenk, J., and Waste, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Fannie Moore against the Fidelity & Casualty Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed. Superseding opinion in 258 P. 375.

Rehearing denied; WASTE, C. J., and SHENK, J., voting for a rehearing.

Chickering & Gregory, of San Francisco, for appellant.

W. C. Sharpsteen, and Hartley F. Peart, both of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff in an action instituted by her for the recovery of the sum of $5,000 alleged by her to be due from the defendant upon a policy of accident insurance issued by it to one Mary Evelyn Moore, deceased, and of which policy the plaintiff, mother of said deceased, was the beneficiary. Mary Evelyn Moore was a graduate nurse, having graduated from the University of California Medical School and Hospital on February 11, 1919, and having practiced her profession as such nurse until the time of her death, on February 6, 1922. On November 17, 1920, there was issued to her by the defendant herein the accident insurance policy upon which the plaintiff seeks recovery. Said policy was in the form required by the statutes of California (Stats. 1917, p. 957), which prescribe a standard form for such policies and require a brief description of the nature of the policy to be clearly printed upon the first page thereof. The policy in question accordingly contained in clear type upon its first page the statement that it was a "Business Women's Disability Policy," and this was followed by a brief statement as to the bodily injuries the holder was to be insured against. It was therein provided that the holder of the policy was to be insured against "bodily injury sustained through accidental means and resulting in disability, dismemberment, loss of sight, or death." The body of the policy contained certain limitations upon the foregoing provision which are not necessary to be noted here. In her application for such policy, the assured was required to state and did state her occupation to be that of a "private nurse (graduate)" and also to set forth the place of her location and the duties of her occupation, as well as the facts relating to her age, habits of life, state of health, etc. In the body of the policy it is expressly stated that it is issued in consideration of the statements made in the said application, a copy of which is indorsed upon and made a part of the policy. The assured's occupation is also expressly stated in the policy as being that of a "private nurse (graduate)," and the duties of her occupation are described as being "nurse, not of the insane." The assured's occupation is also therein stated as being "classified by the company as 'preferred.'" The policy further provides that "blood poisoning resulting directly from a bodily injury shall be deemed to be included in said term 'bodily injury.'"

The meaning of the designation "graduate nurse" is to be found in the terms of the Statutes of 1913, p. 613, which is entitled:

> "An act to promote the better education of nurses and the better care of the sick in the state of California, to provide for and regulate the examination and registration of graduate nurses," etc.

In section 4 of said act a graduate nurse who is eligible for examination and registration as a registered nurse is one who shall—

> "furnish satisfactory evidence of having been graduated from an accredited training school for nurses. An accredited training school for nurses within the meaning of this act is hereby defined to be a school for the training of nurses attached to or operated in connection with a hospital or hospitals giving a general training and a systematic theoretical and practical course of instruction covering a period of at least three years."

In view of the foregoing terms of the assured's application for this policy and of the terms of the policy itself, which define it as a "Business Women's Disability Policy," and of the several designations of the assured's occupation as being that of a graduate nurse, and of the statutory definition of that term, it may not be here contended that the insurer in issuing to the insured said policy did not intend to insure her against the occupational risks of her profession as a graduate nurse and were not fully aware of the hazards of her particular calling.

The only limitation placed upon the liability of the insurer arising out of these occupational hazards was that the injuries occurring in the course of such occupation should be "bodily injuries" and that these should be sustained "through accidental means" in order to give rise to such liability. The foregoing are important considerations, for the reasons, first, that what are to be considered as "bodily injuries," as the term is used in said policy, must be interpreted in the light of the occupation of the assured, and, second, that what are "accidental means" must also be interpreted in the light of said occupation and of the peculiar risks or hazards which are the incidents of its exercise; and in the light also of the safeguards with which modern science has surrounded the care of the sick in hospitals through the use of the expert skill and precautionary knowledge of physicians and nurses in the present day and age. The insurer issuing this policy to the insured, knowing that her occupation was that of a graduate nurse, must be presumed to have known the nature, character, incidents, and hazard of such occupation, and to have had these in mind in the use of the terms employed in its policy, and, if there was any branch of such occupation which was considered extrahazardous, it should have been excluded from the coverage of the contract. Yoch v. Home Mutual Ins. Co., 111 Cal. 503, 44 P. 189, 34 L. R. A. 857; Sims v. State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311; Dudley v. Preferred, etc., Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; Interstate, etc., Ass'n v. Lester (C. C. A.) 257 F. 225.

The insurer in fact did exclude from the protection of its policy certain specific bodily injuries by the terms of article 18 thereof, reading as follows:

> "This policy does not cover any bodily injury fatal or nonfatal—(1) resulting from fighting or from any military or naval service; (2) received by the assured while or in consequence of being or having been under the influence of or affected by intoxicants; (3) intentionally inflicted upon the assured by herself; (4) inflicted upon the assured while participating in, or in consequence of having participated in aeronautics."

It also apparently excluded whatever duties the assured in her occupation as a graduate nurse should undertake in the way of nursing the insane. It must therefore be presumed that the insurer had in mind in the issuance of this policy the fact that one of the ordinary hazards to which a graduate nurse would be exposed in the exercise of her calling was that of exposure to the possibility of infection in the care of patients afflicted with communicable disorders, and that it intended that she should be insured against this hazard by its failure to include it among the risks against which it did not undertake to insure. It may be further said in this very connection that the insurer, after setting forth in its policy the foregoing exceptions, expressly classified the assured's occupation as "preferred," and by the fact of so doing indicated that it did not consider the ordinary hazards of her occupation other than those expressly excepted as being beyond the protection of its policy, since to hold otherwise would be practically to hold that the assured, while pursuing her vocation, was to be given no protection at all.

[1] With respect to the term "bodily injuries" as employed in this policy, we are somewhat enlightened as to the meaning which the parties thereto assigned to it by the clause therein which provides that "blood poisoning resulting from a bodily injury shall be deemed to be included in said term"; but, even without the aid of that provision, we are of the opinion that in the light of the authorities there can be little if any doubt that infection caused by contact with the germs of a communicable disease constitutes a "bodily injury" within the usual meaning of that term as the same is employed in compensation laws and insurance policies. In the case of San Francisco v. Industrial Accident Commission, 183 Cal. 273, 191 P. 26, it was held that influenza contracted by a hospital steward from patients in the course of his employment was a bodily injury. So also in the case of Horton v. Travelers, etc., Co., 45 Cal. App. 462, 187 P. 1070, it was decided that streptococcic germs introduced into the mouth of a patient by means of polluted dental instruments, causing blood poisoning, was a bodily injury within the meaning of that term as used in an accident insurance policy similar to that involved in the instant case. So also it has been held in not a few cases that typhoid fever germs introduced into the system through the drinking of polluted water constituted a bodily injury within the meaning generally of policies of accident insurance. Ætna, etc., Co. v. Portland, etc (C. C. A.) 229 F. 552, L. R. A. 1916D, 1027; Christ v. Pacific etc. Co., 312 Ill. 525, 144 N. E. 161, 35 A. L. R. 730. From the standpoint of pure reason, whether bodily injury which produces a weakening or disintegration of the physical system is caused by flying germs or by flying shrapnel or by a poisoned arrow or by the sting of an insect is only a matter of degree as to the size or quality of the missile or instrumentality inflicting the injury.

[2] As to the term "accidental means" as used in such policies, the authorities also shed light upon its signification. In the case of Horton v. Travelers' Ins. Co., supra, the term "accidental means" is held to be descriptive of "means which produce effects which are not their usual and probable consequences." In the case of Richards v. Travlers' Ins. Co., 89 Cal. 170, 26 P. 762, 23 Am. St. Rep. 455, the term "accident" is defined as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." In the case of Rock v. Travelers' Ins. Co., 172 Cal 462, 465, 156 P. 1029, 1030 (L. R. A. 1916E, 1196), it was pointed out by this court that the accident policy in that case did not

insure against accidental death, but against death through accidental means; the court saying:

> "It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death."

The case of State v. Allison (C. C. A.) 269 F. 93, 14 A. L. R. 412, while not identical with this one as to the nature of the bodily injury inflicted, is quite apposite in its discussion as to the meaning to be attributed to the term "accidental means." The assured in that case was killed in battle in France. His policy insured him against death resulting from bodily injury sustained and effected directly through external violent and *accidental means.* The only exceptions in the policy were "murder or suicide, sane or insane not included." The court, in holding that the assured came to his death by external and violent means which were to be regarded as "accidental means," as far as he was concerned, said:

> "Experience convincingly teaches that the hazards incident to many lawful employments other than war are such that it is to be expected that some of those engaged therein will be injured or killed. If an accident policy contains no provision excepting such hazards, and by chance, without the insured's design, consent, or co-operation, he is injured or killed as a result of a hazard incident to his occupation, his injury or death properly may be said to have been caused by accidental means. While it was to be expected that some of the soldiers engaged in the military operation in which the insured was engaged when he was killed would be injured or killed, it is not to be denied that it was by chance that Lieut. Allison's person was in the path of the piece of shrapnel which caused his death. He would not have been injured or killed by that missile, but for the accidental or fortuitous circumstance that his person happened to be in its path. It was chance which determined that he was the soldier who was the victim of that stray missile. * * * Whether the injury or death of a particular soldier is a consequence of his participation in a battle ordinarily depends on his happening to be or not to be in the path of a missile of war. It cannot well be said that the wounding or killing of any particular soldier belonging to a force going into battle is so far a natural and to be expected consequence of his so being exposed to danger as to prevent a casualty happening to him properly being regarded as within the category of accidents."

When these several but harmonious definitions of the foregoing phrase are considered, it will at once be apparent that the term "accidental means" depends for its application upon the facts of each particular case; since what would be an unusual or improbable consequence, an unexpected or unforeseen occurrence in one set of circumstances in which the assured might be placed, would be but the usual, the expected, and in all human probability the foreseen consequence affecting the assured in another set of circumstances. This reasoning has especial application to accident insurance, and particularly to the sort of occupational accident insurance with which we are concerned in the instant case; for it must be apparent that, while the result of the exposure of the ordinary or unsafeguarded individual to the infection of a virulent, communicable disorder would have as its usual and expected consequence infection and the contraction of the disorder, such would not be at all, or at most, the unusual, improbable and unexpected consequence of the exposure of the experienced and safeguarded physician or nurse in a modern hospital to the same disorder. The insurer in the instant case, in the acceptance of this risk and the issuance of this policy to the insured, knowing the occupation in which she was and was to be engaged, must be held to have contracted with the foregoing facts, grounded in human experience, in view; and hence to have contemplated as embraced within the phrase "accidental means" the possible hazard of infection from such contagious or communicable disorders as it might fall to the lot of this graduate nurse to treat in the usual course of her calling. In point of fact, were the rule of interpretation of this clause in accident policies, that insisted upon by the appellant herein, the elements of skill, watchfulness, and the use of preventives against contagion which in modern hospitals render infection, especially among physicians and nurses, a rare and unusual occurrence, would only serve to defeat a recovery upon such a policy by furnishing evidence that the hazard of infection was in every such case expected and foreseen. The result would inevitably be that physicians, hospital attendants, and nurses would be beyond the pale of protection under the terms of accident policies such as is presented in the case at bar.

[3] Having thus cleared the way for a review of the circumstances of the particular case as educed at the trial, we find the following to be the practically undisputed facts of the instant case: The assured, Mary Evelyn Moore, was, at the time of the issuance to her of this accident policy, a graduate nurse who, for the period of three years prior to February 4, 1922, had been actively engaged in the practice of her profession. At the time of her engagement on the above date to attend one Walter J. Hesse, a patient in the University of California Hospital, as a day nurse, she was, according to the testimony of the physicians and other persons who knew her, "a large, robust, and very healthy looking woman" of the age of 30 years, and was one who "made the impression of being exceptionally strong and having a good physique." She was thus ex-

ceptionally qualified to resist infection from communicable disorders. As to her habitudes as a nurse, with respect to precautions taken by her to avoid infection in the treatment of patients committed to her charge, her roommate, Mrs. Allen, who was also a nurse and was frequently associated with her in the nursing of patients, testified that—

> "She was extremely careful, and often on cases she didn't know even to be infectious she would go to the dressing room and gargle her throat every little while. She took these precautions more frequently than I would and many of the other nurses; more frequently than I thought was really necessary. It was her habit to do that."

Dr. Lisser testified:

> "She had nursed a number of my cases during this period of two years that I testified to that I knew her as a nurse. From my observation in the two years she nursed for me from time to time she certainly observed the usual precautions so as to protect her own health when in attendance upon patients where carelessness on her part might affect herself."

The foregoing testimony was uncontradicted, and would seem to be sufficient to justify the inference that, in the exercise of her duties in the care of the patients intrusted to her on that and the following days, she made use of those precautions to which she was habituated in order to avoid injury from infection to herself. The patient, as it later appeared, was suffering from a streptococcic infection scientifically known as streptococcus hemalyticus, and popularly known as blood poisoning. This infectious disorder according to the testimony of the physicians, is fairly common, and can be communicated from an infected person through inhalation by another of the infected organisms exhaled by the infected person. The attendance of the nurse upon her patient began in the morning of the day of her employment. There is no evidence as to just when she became informed of the dangerous nature of her patient's disorder, but there is evidence that the physician in charge of the case was not sure that it was a case of streptococcic infection until late in the afternoon of that day, when the laboratory reports were received. It cannot in reason be assumed that the nurse would know more or be informed earlier than the physician as to the dangerous nature of the case, or that she was or would have been put upon notice of the need of extraordinary precautions for her own safety prior to the time late in the afternoon of the first day when Dr. Berwick, upon receiving the laboratory tests and being thus for the first time definitely informed of the danger of infection, instructed her to take precautions to protect herself from becoming infected. There is evidence in the record that on the evening of that day the insured told her roommate that "she was afraid of this case that she was on, the Hesse case, and she was complaining of a chill, and she was afraid of it." This evidence only tends to show that at some time during this first day she had caught the infection, and the probabilities would seem to be that it was prior to the time late in the afternoon when she was for the first time informed by the physicians as to the dangerous and infectious nature of her patient's malady.

There is certain other evidence in the case which has an important bearing upon the question as to whether the insured's contraction of this infectious disease was the expected or unexpected, the usual or unusual, consequence of her exposure to infection. This evidence shows that during this first day of the patient's admission to the hospital numbers of persons came and went through the room in which he was lying, and that none of these, with the exception only of this nurse, contracted his disorder. The physicians in charge of the case, the relations and friends of the patient, his brother, the brother-in-law of his sister, her sister-in-law and her husband, a friend and her daughter, and last but not least the sister, and also the fiancee of the patient, who were with him day and night, the former of whom "sat close enough to him to hold his hand," and the latter of whom hung over him almost constantly, kissing and fondling him, until finally warned by the physician to desist—the fact that none of these persons who, with the exception of the physicians were safeguarded by no precautions, and who exercised none of the nurse's habitual and expert care in the avoidance of infection, did not become infected, furnishes cogent evidence tending to show that the danger of infection was not the usual or probable or expected consequence of exposure to the patient's communicable disorder, but was, especially in the case of this careful, skillful, experienced, and unusually cautious nurse an altogether unexpected and unusual consequence—a casualty in fact from the direct effect of which she came to her death. There is also present in the record the evidence of the physician in charge that the patient was subject to sudden, unexpected, and explosive fits of coughing during which the patient was delirious, and during which the germs of his disease would be propelled into the face of any one who might be bending over him. Both the patient and the nurse are dead, and we have no means of knowing under just what conditions or at what moment the faithful nurse received into her system the germs which caused her infection; but, since the only assault which the appellant herein makes upon the judgment of the trial court is that the findings upon which it is based are not supported by the evidence, we are entitled to indulge in every reasonable inference which may be drawn from the uncontradicted evidence in the case in support of the findings and judgment of the trial court; and from the facts as above set forth showing that the assured was an educated, experienced, skilled, and habitually an unusually careful nurse, and from the fact she was not informed by the physicians in charge as to the virulent nature of her patient's disorder until late in the afternoon of her first day's attendance upon him, and from the fact that the patient was subject to sudden, unexpected, spasmodic, and explosive fits of coughing, which would propel the germs of his disease into the face of one who might at the time be ministering to him in his delirious and semiconscious condition, we are of the opinion that the inference is a reasonable one to be drawn from such evidence that it was in some such unexpected paroxysm of the patient that the germs carrying infection were communicated to the assured, notwithstanding her professional and habitual precautions.

The appellant herein assails the doctrine declared in the case of Horton v. Travelers', etc., Co., supra, in so far as it is decided therein that the introduction into and action of disease-bearing bacteria upon, the tissues of the human system constitutes a bodily injury within the meaning of that term as used in accident insurance policies. We are, however, satisfied with the scientific and legal correctness of the doctrine declared in that case and of the exact application thereof to the facts of the case at bar. The appellant also makes the contention that the fact that the deceased nurse did not wear a gauze mask while in attendance upon her patient negatives the implied finding of the trial court that the nurse properly performed her functions as a careful and skillful nurse; but upon this matter the evidence is quite in conflict as to whether the wearing of a gauze mask affords any substantial protection to doctors and nurses in cases of communicable disorders; and, this, being so, the findings and judgment of the trial tribunal ought not for that reason be disturbed.

We have carefully examined the cases cited by the appellant in support of its contention that injuries sustained by physicians and nurses from contact with infectious diseases are not to be held to have been sustained by "accidental means," but we find among these no case wherein recovery upon facts at all similar to those herein presented was denied, unless it appeared as a basis for such denial, either that the policy expressly exempted the insurer from liability for bodily injuries happening either directly or indirectly in consequence of disease, or in which the terms "external" and "violent" as applied to injuries, and which are omitted from the present policy, were embraced in the policies there under review, and were not met by the proofs. An example of the first of the foregoing class of cases cited by the appellant is the case of Bacon v. United States etc. Ass'n, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748; and an example of the other class which the appellant also relies upon are the cases of Smith v. Travelers', etc., Co., 219 Mass. 147, 106 N. E. 607, L. R. A. 1915B, 872, and Zack v. Fidelity, etc., Co. (Mo. App.) 272 S. W. 995. The only exception we have noted to these inapplicable citations is that of the case of Ramsey v. Fidelity, etc., Co., 143 Tenn. 42, 223 S. W. 842, 13 A. L. R 651, which it is conceded is in direct conflict with the Horton Case. While in the foregoing opinion we have not undertaken to expressly cite and comment upon all of the cases cited by respective counsel in their several briefs, we feel that we have fairly covered and considered the main and controlling questions at issue upon this appeal.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

SHENK, J. I dissent. The only question in this case is whether the insured came to her death as the result of bodily injury suffered through accidental means. The terms of the policy in this respect are plain and unambiguous. This policy, however, is dual in its engagements. It is a business women's disability policy, and as such is subject to the construction placed upon it by the main opinion as having been issued by the insurer with full knowledge of the hazards of the occupation of the insured. In its other aspect the policy is an ordinary contract for indemnity for death resulting from bodily injury suffered through accidental means. It is with this second aspect of the policy that the court is now concerned. Whether the insurance company knew or did not know of the hazards of the insured's employment is of no consequence (in the absence of fraud or concealment, which are not involved here), so long as the insured came to her death as a result of bodily injury suffered through accidental means. The main opinion, it seems to me, has confused these two plainly separable and independent phases of the policy.

I cannot agree that the entrance of a germ into the human body, unaccompanied by any abrasion or traumatic condition or physical interposition, and causing sickness and death, is a bodily injury as contemplated by the insurance policy involved in this case. The language of the policy is not unique, but follows generally the language of standard health and accident policies. The effect of the opinion in this respect is that a disease-bearing germ introduced into the respiratory tract by inhalation by any one while in a public conveyance, on a public street, in a place of public amusement, in his own home, in fact, in any place where human beings are closely enough in contact to be within the zone of contagion and unaccompanied by any abrasion or trauma or physical interposition, is a bodily injury. In my opinion this holding is introducing into the realm of accident insurance a false quantity not contemplated by the insurer or insured, and by judicial fiat has converted the accident insurance contract into one of health insurance if the insured survive, and into one of life insurance in case of death. If such had been the law during the days of the influenza epidemic following the close of the World War, it is not difficult to imagine what would have happened to accident insurance companies. Claims for indemnity on account of death from that and other contagious diseases under accident insurance policies have not been made for the reason that such an application of the term "bodily injury" was never intended. This novel application of the term has not been made in this state, nor, in my opinion, in any other jurisdiction where the point was directly involved.

The case of Horton v. Travelers' Ins. Co., 45 Cal. App. 462, 187 P. 1070, did not go to the length accredited to it in the main opinion. That case involved the sufficiency of the complaint on a policy almost identical with the present one, wherein it was alleged that by the unintentional use of infected dental instruments, virulent disease-bearing germs were introduced into the system of the insured. A natural and ordinary result of the use of dental instruments is an abrasion of some of the tissues of the oral cavity, and such use is always accompanied by some manual interposition. The allegations of the complaint in that case must have been considered in the light of a matter of such common experience.

Nor does the case of San Francisco v. Industrial Acc. Com., 183 Cal. 273, 191 P. 26, support the construction placed on the term "bodily injury" by the main opinion. In that case it was decided that the definition of the term "injury" by the Legislature in section 3 of the Workmen's Compensation Act, as adopted in 1917 (Stats. 1917, p. 833), was a definition justifiable under the constitutional provision providing for workmen's compensation. The Legislature defined the term as follows:

> "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment."

To hold that the special statutory definition of the term "injury," made for the purpose of putting into effect the workmen's compensation provision of our Constitution, should be applied to the term "bodily injury" as used in accident policies, is, in my opinion, unwarranted.

Furthermore, as to the particular facts in this case, I am unable to agree that in the contraction of the disease by the insured there was that element of unexpectedness and surprise essential to prove death by "accidental means." The term "accident," as used in similar policies, has been given a definition in this state that is uniform and without substantial deviation. The term is defined as "a casualty—something out of the usual course of events, but which happens suddenly and unexpectedly and without any design of the person injured." Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 P. 762, 23 Am. St. Rep. 455; Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 P. 1175; Southwestern Surety Ins. Co. v. Pillsbury, 172 Cal. 768, 158 P. 762; Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 189 P. 835, 14 A. L. R. 784. It must be borne in mind that the policy here in question does not insure against accidental death, but against death through accidental means. "A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death." Rock v. Travelers' Ins. Co., 172 Cal. 462, 465, 156 P. 1029, 1030 (L. R. A. 1916E, 1196). An unbroken line of cases to this same effect is found in this state.

In the present case the means through which the fatal malady was contracted by the insured was neither unusual nor unexpected. There was no element of surprise in coming in contact with the virulent organisms. In fact, such contact was foreseen and expected. The insured knew and realized the dangers incident to the performance of her duties as an attending nurse and by gargling, washing her hands, etc., took precautions to guard against the effect of the exposure. The fact that others similarly exposed did not contract the disease is not sufficient to prove that the insured contracted the same by accidental means. If the other persons present in the room from time to time had contracted the malady, there would have been no element of surprise or unexpectedness or of the unusual in so contracting the same, for they were all advised and warned of the danger to them by reason of their presence in the room. That such other persons did not fall a prey to what was all expected and anticipated contact with the germs would show no more than that their resistance was greater than that of the assured. Effect must be given to the plain language of the policy and a distinction made between the result to the insured and the means by which that result was brought about. It may be said that the result to the assured, namely, illness and death, was unexpected and unintentional; but that is far from saying that the means that produced the illness and subsequent death were unexpected, unusual, or not anticipated. If the insured had suffered an accident or disability by illness from any cause and had survived, indemnity for the same would have accrued under the disability terms of the policy. But to say that, because this disability was provided for in contemplation of her occupation as a nurse, therefore a death benefit would accrue when death was the result of an occupational hazard is entirely to disregard the separate and independent terms of the policy relating to indemnity for death as the result of bodily injury through accidental means.

I concur: WASTE, C. J.

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203 Cal. 613

In re KELPSCH'S ESTATE.

BECKNER et al. v. KELPSCH et al.

(L. A. 9713.)

Supreme Court of California. March 13, 1928.

1. Husband and wife 🔑264, 273(1)—Evidence held to support conclusion that property was community property, so that surviving husband was entitled to half (Civ. Code, § 164).

Evidence *held* sufficient to support conclusion that property in inventory of estate of deceased wife was community property, so that half belonged to surviving husband, notwithstanding Civ. Code, § 164, where husband and wife at time of marriage each had a few hundred dollars with which first investments were made.

2. Executors and administrators 🔑507(1)—Probate court, on settlement of final accounts, may determine validity of claim of representative of estate made in individual capacity.

Where title to property is claimed by representative of an estate in his individual capacity, superior court, sitting in probate, is vested with jurisdiction of determining validity of such claim, on settlement of final accounts of such representative.

3. Husband and wife 🔑265½—Surviving husband held not estopped to claim that property reported in inventory was community property.

Surviving husband *held* not to have estopped himself to claim, in petition for probate, and in petition for distribution, interest in property reported in inventory of estate of deceased wife on theory that it was community property.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Christine M. Kelpsch, deceased, Joseph A. Kelpsch, executor, and Ellen C. Moline, formerly Ellen C. Johnson, executrix. From an order settling the account and directing distribution, Mrs. Inger A. Beckner and others appeal. Order affirmed.

Superseding opinion in 258 P. 118.

Henshaw, Black & Lyders and Eric Lyders, all of San Francisco, and Rush & McCormick, of Los Angeles, for appellants.

Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, for respondents.

PRESTON, J. This is an appeal by certain legatees from the order settling final account and directing final distribution of the estate of Christine M. Kelpsch, deceased. There is no dispute as to the account itself. The dispute is as to the terms of the decree of distribution. The court held one-half of the estate to be community property and to belong to the husband, Joseph A. Kelpsch; he and Ellen C. Moline, née Johnson, being, respectively, executor and executrix under said will. The effect of this holding is to give appellants as legatees only one-half of what they would otherwise receive from said estate.

The issue presented, therefore, to the court below was as to the character of the property reported in the proceedings in said estate, and this appeal is controlled by the settlement of the single question as to whether sufficient evidence may be found to justify the conclusion of the trial court that the entire property reported by the personal representatives of the deceased was the community property of her husband and herself. Or it may be stated in another way: Is there sufficient evidence to warrant the conclusion of the trial court that one half only of the property so reported belonged to said decedent, the other half being the property of the husband?

It may be said here that the only witnesses who testified upon this subject were the husband and the executrix, who was extremely favorable to his claims. But since counsel is so earnest in his presentation of the matter, some of the pertinent facts shown will be recited.

For about 27 years next prior to her death, the decedent and Joseph A. Kelpsch were wife and husband, and except during the last 4 or 5 years of her life they resided in Chicago. Decedent was about 10 years older than her spouse. She had been a dressmaker. About the time of their marriage he became an architect and builder. At that time she had $600 and he $400. They bought a city lot in Chicago, and in about six months he had erected a dwelling thereon in which they lived for about 2 years, when the property was sold. This process of buying, building, and selling in said city occurred three or four times, always on a profitable basis, until, when they removed to California they had outstanding on property formerly owned and improved by them several mortgages securing sums of money aggregating several thousand dollars. The deeds and mortgages, the husband states, were all in their joint names. The deeds were not introduced in evidence, and appellants strenuously objected to secondary evidence on this point, but enough appears to warrant the court in concluding that such was the fact.

It is true that deposits of money were always in the name of deceased, but the husband says that was because she was the best manager and not because the property was hers nor did he make a gift of his interest therein to her. She, so the testimony shows, spoke of their relation as a partnership, she managing in part and her husband doing the building and managing in other departments of their various enterprises. The Chicago property was all liquidated prior to death of the wife, and there remained only certain uncollected mortgages. In California, through their joint efforts, a contract of purchase was made of some real property, the husband paying part and the wife paying part of the down payment, and each contributing to the periodical installments to be met thereunder. The husband says this contract was in their joint names and such statement is not disproved.

There was some evidence that the husband and wife were living apart during the later years of her life, but the evidence showed that her ill health was a partial excuse at least for this. Their mutual respect continued, and they consulted with each other and worked together as before.

[1] Adding to this the testimony that the deposits were in her name for safe-keeping and because she was the better manager of the two, but that they were not intended as a present or gift to her, how can we say as a matter of law that the court was not warranted in concluding that the whole estate was community property? The fact that each of them had at their marriage a few hundred dollars as separate property is not controlling as by mere verbal agreement these sums could have been transmuted into community property. The interpretation contended for by appellants denies to the husband all interest of every kind in the property. No reasonable deduction of that kind would be warranted as it is certain that he intended to retain some kind of an interest in the property. It certainly cannot be supposed that a man would work a lifetime for one with whom he was living in strained relations. The fact that all the property was returned as a part of the estate of decedent is not controlling for as a part of said report is the contemporaneous claim that the whole of the estate is community property.

Neither do the presumptions under section 164 of the Civil Code create more than a situation which at most would but compel the conclusion that a conflict in the evidence, was present.

[2] Appellants assert that the court, sitting in probate, was not clothed with jurisdiction to hear and determine this issue. To uphold this assertion would produce a strange result for appellants invoked the jurisdiction of the court and several times during the trial conceded this to be the sole issue they desired to have determined. But since the decision in the case of Bauer v. Bauer (Cal. Sup.) 256 P. 820, this question is not in doubt. It is there stated:

> "It has, however, been held that when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Estate of Fulton, 188 Cal. 489, 205 P. 681; 2 Woerner's American Law of Administration (3d Ed.) note, p. 1007; 3 Woerner's American Law of Administration, p. 1769."

The husband claims one-half the property, asserting a right in existence prior to his qualifications as executor. But if it were a right accruing after he became such representative that would be all the more reason why jurisdiction would lie in the probate court. The fact that in the Bauer Case the personal representative had possession of the property before appointment and in this case the property was in the possession of the decedent at her death constitutes no reason for declaring a distinction.

[3] Again it is proper to note that, although reporting the whole property in the inventory of said estate, nevertheless therein, and in the petition for probate and petition for distribution, the husband claimed it to be community property of the marriage, and in the latter document he expressly tendered the issue by appropriate allegations to which appellants joined issue. Thus there is no ground for the contention that the husband estopped himself to claim an interest in said property. The most that can be said of the situation here presented is that the wife may have thought she had the right to dispose of all the property, and from this it can be argued that one-half of the property was all she expected her husband to receive, but this observation does not change the legal effect of her act.

The order appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; LANGDON, J.

STANLEY v. BEDFORD et al. (L. A. 9135.)*

Supreme Court of California. March 9, 1928.
Hearing granted in Bank. April 6, 1928.

1. Execution ⊂=222(1)—Judgment creditor levying on automobile was not required to serve 30 days' notice on conditional seller not filing third party claim (Code Civ. Proc. §§ 689, 689b).

Where, after sheriff's levy under execution on judgment debtor's automobile, seller of car holding lien under conditional sales contract failed to file third party claim as provided by Code Civ. Proc. § 689, judgment creditor was not required, under section 689b, to cause sheriff to serve demand upon the conditional seller for a detailed statement of its claim and then wait 30 days before making sale under the levy.

2. Execution ⊂=184—Failure to file third party claim before execution sale relieves sheriff from liability to claimant for conversion (Code Civ. Proc. §§ 689–689b).

Failure to file third party claim under Code Civ. Proc. § 689, prior to sale under execution, excludes claimant from privilege of 30-day notice of claim provided for by sections 689a, 689b, and relieves sheriff from all liability for converting property, regardless of strength of title of claimant.

3. Estoppel ⊂=91(1)—Assignees of conditional seller, who instructed buyer's judgment creditor to proceed with execution, held estopped from attacking sale or claiming excess over balance due (Code Civ. Proc. §§ 689–689b).

Where judgment creditor levying on debtor's automobile offered to pay amount due to conditional seller thereof, but was told to pay it to the sheriff and proceed under execution, no third party claim being filed under Code Civ. Proc. §§ 689–689b, conditional seller and its assignees were estopped after sale to claim any excess over balance due on contract or to attack title and right to possession of purchaser at sale, where judgment creditor paid amount due to sheriff and amount was subsequently deposited with county treasurer to conditional seller's order.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by H. L. Stanley against Henry Bedford and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Paul C. Hill, of Los Angeles, for appellant.

Clark & Law and E. Llewellyn Overholt, all of Los Angeles, for respondents.

PRESTON, J. Plaintiff, having previously obtained a judgment against one Laura C. Booth, sued out an execution thereon and the sheriff levied the same on July 9, 1925, upon a Cadillac victoria coupé in her possession. No third party claim was filed as provided for in section 689 of the Code of Civil Procedure, nor was there filed "a verified written claim containing a detailed statement thereof" as provided for in section 689b of said Code. However, upon learning elsewhere that a conditional sale contract existed between defendant Don Lee, Inc., a corporation, and the debtor, plaintiff, on July 21st, applied to said seller for information respecting it, and was told that said company held a claim for a balance of $172.16, $25 of which was on account of balance due on the purchase price and the remainder for interest and repairs. Plaintiff offered to pay this amount, but was told to pay it to the sheriff and to proceed in the regular way under the execution; that no third party claim would be filed, as the company was not interested in the question of who got the car; further, that the attorney for the judgment debtor had requested the company to demand possession of the car, which request had been refused. Accordingly, on said day, plaintiff, acting through his attorney, gave his check to the sheriff for said sum of $172.16, with instructions that it be delivered to Don Lee, Inc.

On the next day, no third party claim having been filed, the sale was held, and plaintiff became the purchaser thereat and received possession of the car. On that day also Don Lee, Inc., was informed of the deposit of the check and of the sale, whereupon plaintiff was told by said company that it had transferred the conditional sale contract to one Clausen and disclaimed any right to the money. Three days later, and on July 25, 1925, the money was deposited with the county treasurer and a warrant issued payable to Don Lee, Inc., for said amount, which check apparently has never been accepted by the company, although it seems that said warrant is still available to it or its assignee.

Following the judicial sale, the defendants Bedford and Moss, apparently acting for Clausen, who in turn was probably the agent of the judgment debtor, Laura C. Booth, forcibly deprived plaintiff of possession of the car and turned it over to Clausen. Plaintiff thereupon brought this action for possession of the car and damages for its detention and claimed delivery of the property which, upon the execution of a redelivery bond, was returned to the possession of the defendant Clausen. The court below, after announcing views favorable to plaintiff, later made findings in favor of defendants and gave judgment accordingly.

[1, 2] We can see no merit whatever in respondents' position. It is their claim that Don Lee, Inc., was not required to file a third party claim under section 689 of the Code of Civil Procedure, but plaintiff, knowing of the contract held by said company retaining title to the car, was required under section 689b to cause the sheriff to serve a demand upon said company for a detailed statement of its claim and then wait 30 days, unless the company complied sooner with the request, before a sale of the property was made.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★ Appeal dismissed without costs April 9, 1928.

Respondents have not properly interpreted these sections of the Code. The sheriff is freed from liability to third parties unless prior to sale a third party claim is filed. This is a statutory requirement which, if not complied with, will effectually prevent a successful claim of conversion against the sheriff, whatever may be the strength of the title of such party to the property seized by the officer. Cortelyou v. Baker, 182 Cal. 168, 169, 187 P. 417; Arena v. Bank of Italy, 194 Cal. 195, 228 P. 441. The necessity for filing this claim in a case of conditional sale or any other contract retaining title, when possession of property is in another, is as imperative as a claim of title under any other state of facts.

Antedating the enactment of sections 689a and 689b, a case of a third party claim founded on a conditional sale contract may be found in the case of Vermont Marble Co. v. Brow, 109 Cal. 236, 41 P. 1031, 50 Am. St. Rep. 37. The evident purpose of enacting sections 689a and 689b was to provide a summary method of satisfying the claim of the party retaining the legal title, while subjecting the property right of the holder of the equitable title to the just claims of his judgment creditor. Said sections do not provide for dispensing with a third party claim, but require, as a part of such claim, the rendering of a detailed statement showing the exact debt due on such contract. The right to file a third party claim was expressly waived, yet respondents assert that Don Lee, Inc., or its assignee, was entitled to the benefit of section 689b as follows:

> "* * * In case the seller fails to render his claim for thirty days following the personal service upon him by the levying officer of a written demand therefor, which service must be attested [to] by the officer's certificate thereof, filed before the sale with the papers of the action wherein the attachment or execution was issued, then the title shall pass to the buyer and the property may be sold as in this chapter provided, free of all lien or claim of the seller."

This provision was intended to apply only in a case where a sufficient claim under section 689 was made, but was defective or otherwise insufficient to give the required or true amount necessary to be paid to unite the legal and equitable title in the judgment debtor.

Section 689 of the Code of Civil Procedure is general in its application, and its integrity is left unimpaired by the two subsections, they being, as stated, only supplementary thereto to enable the interest of the equitable owner to be reached the more easily by the judgment creditor.

[3] Respondents claim that all these three Code sections are only for the protection of the sheriff against claims of third parties and have nothing to do with the rights of Don Lee, Inc., or its assignee against the plaintiff. There is merit in this suggestion, especially inasmuch as plaintiff is both the judgment creditor and the purchaser, but we cannot see that this observation will avail respondents anything under the facts of this case. For, with full knowledge of the levy and prior to assignment of the contract, Don Lee, Inc., was tendered the amount due it. The sum was later, and before the sale, deposited with the sheriff as directed by it. Still later the money was placed in the county treasury to its order, where it still remains. It declined to declare a forfeiture of the contract or to resume possession of the car or to make a third party claim. What right has Don Lee, Inc., or its assignee, under these facts to question the title or right of possession in plaintiff? The plainest rules of estoppel prevent it or its assignee from claiming more than the balance due upon its nonforfeited and nonforfeitable sales contract. This amount has been tendered and is now available for them.

The whole case would seem clearly to be an effort on the part of the judgment debtor, acting through secret agents, to get her car free of the claims of her judgment creditor and thus accomplish indirectly what she could not think of doing directly.

Contrary to the findings of fact and conclusions of law made by the court below, this court does now make herein its findings of fact and conclusions of law as follows:

(1) Defendant D. R. Roberts, served as John Doe herein, was duly served with process, but has failed to answer herein, and his default has been duly and regularly entered according to law.

(2) Neither the defendant Earl Moss, nor any of the other defendants known by fictitious names, have been served with summons.

(3) Defendants Henry Bedford, Walter B. Clausen, and Don Lee, Inc., a corporation, are the only defendants against whom any relief is sought herein.

(4) On the 24th day of July, 1925, at the county of Los Angeles, state of California, plaintiff was, and now is, the owner and entitled to the possession of the following described personal property, to wit: One Cadillac victoria coupé engine No. 61V16702, California 1925 license No. 932-830.

(5) Said property was on said day of the value of $1,500.

(6) Said defendants Henry Bedford, Walter B. Clausen, and Don Lee, Inc., a corporation, on said day, at the county of Los Angeles, state of California, without the consent of plaintiff, wrongfully took possession of said property from said plaintiff, and now retain possession of it, claiming to be the owners thereof.

(7) Before the commencement of this action, to wit, on the 28th day of July, 1925, at the place aforesaid, plaintiff demanded possession of said personal property, but to de-

liver the possession thereof the defendants refused and still refuse.

(8) Defendants still unlawfully withhold and detain the said property from the possession of plaintiff to his damage, which the complaint fixes at $2,500.

(9) The said property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff.

As conclusions of law from the foregoing findings of fact, the said cause of action should be dismissed as to all defendants other than the said defendants Henry Bedford, Walter B. Clausen, and Don Lee, Inc., a corporation; plaintiff should have and recover judgment against the said defendants last named, and each of them, for the return of said property or its value in the event a return thereof cannot be had, together with damages for its detention, not exceeding the amount sued for, which said damages shall include the depreciation on said property since the unlawful taking thereof.

The findings of fact of the court below, being as a matter of law contrary to the undisputed evidence, and the conclusions of law therefrom erroneous, the judgment of the court below is hereby reversed, and the cause remanded, with directions to said court to enter judgment for the plaintiff against the defendants Henry Bedford, Walter B. Clausen, and Don Lee, Inc., a corporation, for the return of said property, or its value, in the event a return thereof cannot be had, together with damages for its detention and costs of suit in court below and on appeal; said undetermined issues to be disposed of upon the record as made, together with such further facts as the court may in its discretion lawfully admit in evidence to complete the findings of fact and conclusions of law necessary for the judgment herein directed.

We concur: CURTIS, J.; SEAWELL, J.

In Bank.

WASTE, C. J. Good cause appearing, it is ordered that the judgment heretofore entered in the above-entitled cause is hereby vacated and set aside, and the cause is placed on the Los Angeles bank calendar for June 5, 1928, at 10 o'clock a. m., for argument as to the power of this court to make findings of fact contrary to, or in addition to, those made by the trial court, and reverse the judgment, and upon such reversal to give or direct a different judgment.

All present concur.

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203 Cal. 583

IRVINE et al. v. MacGREGOR et al.

(L. A. 9272.)

Supreme Court of California. March 9, 1928.

1. Mines and minerals 🔑79(3)—Lessors held entitled to half of oil produced from first well in paying quantities up to $5,000, as additional royalty (Civ. Code, §§ 1635–1655).

Where oil lease provided that, in addition to royalty of one-sixth, lessees should pay lessors $5,000 "derived from the sale of one-half of the first oil produced from the well first completed," and "that the payment of the said sum * * * is wholly contingent upon the discovery and production of oil in paying quantities," *held*, that, under Civ. Code, §§ 1635–1655, lessors were entitled to additional royalty of one-half of oil produced in paying quantities from first well, not to exceed $5,000, though well produced less than $10,000.

2. Appeal and error 🔑1033(8)—Trusts 🔑265—Judgment for lessors against trustees for additional royalties due under oil lease, limiting trustees' liability to corpus of trust, held proper (Civ. Code, § 2267).

Where oil lease entitled lessors to additional royalties derived from one-half of oil produced in paying quantities from first well, not exceeding $5,000, and lessees assigned lease to trustees for syndicate, *held*, that, under Civ. Code, § 2267, court had jurisdiction to enter judgment for lessors against trustees, limited to property of trust estate, and trustees could not attack provision limiting liability since it was for their protection.

3. Mines and minerals 🔑74—Lessors entitled to additional royalties could sue assignees of lease therefor, though not parties to assignment.

Where under lease of oil properties lessors were entitled to an additional royalty or bonus payable from first oil produced, lessors could maintain action therefor against trustees of syndicate to which leases were assigned with full knowledge on part of trustees of lessors' claims, though lessors were not parties to assignment.

Department 1.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Milton B. Irvine and others against D. G. MacGregor and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

I. Henry Harris, of Los Angeles, for appellants.

A. E. Garten and Joseph M. Maltby, both of Long Beach, for respondents.

PRESTON, J. This is an appeal from judgment in favor of plaintiffs in an action to recover an alleged sum of money due them as an additional royalty or bonus under the provisions of an oil lease.

[1] Plaintiffs, owners of certain real property, entered into a written agreement with defendants MacGregor and Simmel, leasing their land to these parties for oil drilling purposes. About two weeks later said lease was assigned by the last-mentioned defendants to defendants Lewis, Underwood, and MacGregor as trustees for "MacGregor Syndicate No. 1."

The provision of the lease under which recovery is sought reads as follows:

> "Additional Rental: In addition to the said royalty of one-sixth to be paid by the said lessees to the said lessors in the manner aforesaid, the lessees shall pay and deliver to the lessors the sum of $5,000 * * * derived from the sale of one-half of the first oil produced from the well first completed upon said described premises. That the payment of the said sum of $5,000 is wholly contingent upon the discovery and production of oil in paying quantities from the first well drilled to completion and production on said premises."

In this connection the court found, and such finding is accepted as correct for the purposes of this appeal:

> "That there was produced and sold from an oil well on said premises oil in the sum of $8,421.62, one-half of which, or $4,210.81, is due plaintiffs as bonus, to which must be added the one-sixth landowners' royalty, or $1,408.60, a total due plaintiffs of $5,619.41; that plaintiffs have received on account $1,091; * * * that defendants are entitled to further credits * * * in the total sum of $782.38, leaving a balance due and owing plaintiffs $3,847.03."

Accordingly judgment in the sum stated went for plaintiffs, and defendants have appealed therefrom.

It is the contention of appellants that the above-quoted paragraph of the lease is sufficiently clear to admit of but one construction; namely, that if the lessees obtained a first well that produced at least $10,000 worth of oil, but not otherwise, they would share such production with the lessors to the extent of paying them $5,000 from the proceeds of sale thereof. This, however, is not what the clause states. It states that the $5,000 payment shall be wholly contingent, not upon the production of at least $10,000 worth of oil, but "upon the discovery and production of oil in paying quantities." It cannot be denied that under the evidence and findings there was sufficient proof of production of oil in paying quantities from said first well. In other words, the limitation in the provision is in favor of the lessees, making them liable, in addition to the one-sixth royalty, for only half of the first oil produced up to the sum of $5,000, and no more. Inasmuch as half of the first oil produced amounted to less than said maximum figure of $5,000, they were liable only for such sum as it did amount to, to wit, the sum of $4,210.81. In accord with familiar principles of interpretation, oil leases are construed according to their reasonable common-sense meaning. Sections 1635-1655, Civ. Code. The above construction receives strong support in testimony given to the effect that the $1,091 was paid plaintiffs on account of said one-half bonus, or additional rental, thus clearly indicating that appellants recognized their obligation to make this payment.

[2] The evidence showed that such sums as were claimed by the lessors were on deposit to the credit of MacGregor Syndicate No. 1. The trial court accordingly found:

> "That plaintiff is entitled to judgment in said sum against D. G. MacGregor, L. C. Simmel, and against D. G. MacGregor, R. C. Lewis, and S. H. Underwood, as trustees of the MacGregor Syndicate No. 1, and against their successors as trustees of said syndicate, and liability of said trustees is limited to the property of the trust estate."

Pursuant to this finding, the judgment limited the liability of said trustees to the corpus of the trust estate.

Appellants urge that the court was without jurisdiction to enter judgment against the trust estate, limiting the liability of the trustees to the corpus of the trust, for, they contend, trustees are liable directly and personally for their acts, and they, and not the trust estate or beneficiaries, are bound by a judgment.

Numerous cases uphold the right to follow money into a trust fund or any other fund into which it may have fallen. Noble v. Noble, 198 Cal. 129, 43 A. L. R. 1235, and cases there cited; Smith v. Farmers', etc., Bank, 2 Cal. App. 377, 84 P. 348. Trust property is bound by the acts of the trustees within the scope of their authority. Civ. Code, § 2267.

Furthermore, appellants are in no position to attack the provision of the judgment limiting their liability to the corpus of the trust estate, for such provision plainly has for its purpose their protection. They may not now take advantage of it and attempt to hide behind the trusteeship, avoiding liability on the plea that MacGregor Syndicate, as a trust, is not a party to or capable of being a party to this action. Said trustees could not accept the benefits of the original lease for the trust estate and yet deny their authority to meet this obligation from funds of the trust.

[3] The assignment of lease was executed and accepted by them subject to all conditions, rights, and privileges of the original instrument, and subject to the provisions of the trust, and said money was received and deposited to the account of MacGregor Syndicate with full knowledge on the part of said trustees of plaintiffs' claims thereto. Therefore the fact that plaintiffs were not parties to the assignment of lease or to the instrument of trust cannot avail appellants. An action of this character "may be successfully maintained even though not founded upon allegations showing an express privity of contract between the parties. This is so upon the theory that if one of the parties has received money due and owing to the other under circumstances which make it his duty to surrender the money to the rightful owner, the law will imply the promise to do so, and thereby create the requisite contractual privity." Freitas v. Freitas, 31 Cal. App. 19, 20, 159 P. 613. See, also, to the same effect, Kreutz v. Livingston, 15 Cal. 344.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

203 Cal. 578

THOMPSON et al. v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 9249.)

Supreme Court of California. March 9, 1928.

1. Life estates 🔑8—Statute of limitations against ejectment action by reversioners against railroad claiming under life tenant began to run at death of life tenant (Code Civ. Proc. § 338, subd. 2).

Where railroad acquired land from life tenant in deed, making no mention of life estate, statute of limitations (Code Civ. Proc. § 338, subd. 2), against action in ejectment by reversioners against railroad, began to run at death of life tenant, and not at date of railway's entry, since claim is founded on right of possession.

2. Ejectment 🔑86(1)—Railway's entry by consent of life tenant raises no presumption that it intends to despoil estate of remainderman.

Where entry of railway company on land is by consent of life tenant, no presumption can arise that it intends to despoil estate of remainderman.

3. Life estates 🔑23—Railway, making entry with tracks by consent of life tenant, acquires no greater estate than life tenant could convey.

Entry of railway company with its tracks by consent of life tenant does not constitute permanent taking of lands so occupied, since railway is limited to estate which life tenant could convey.

4. Remainders 🔑17(2)—Statute, authorizing remainderman's action for injury to inheritance, held inapplicable to action against railroad entering land by consent of life tenant (Civ. Code, § 826).

Civ. Code, § 826, authorizing remainderman to maintain action for injury to inheritance, is inapplicable to action of ejectment against railroad entering land by consent of life tenant, since there is no conclusive presumption that, if tracks were removed on falling in of life estate, injury would result to inheritance.

5. Remainders 🔑17(2)—Remainderman's statutory right to maintain action for injury to inheritance is permissive only (Civ. Code, § 826).

Assertion by remainderman under Civ. Code, § 826, of right to maintain action for injury to inheritance, notwithstanding intervening estate, is permissive only, and not compulsory.

Department One.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action in ejectment by Martha Porter Thompson and husband against the Pacific Electric Railway Company and others. From judgment of nonsuit, plaintiffs appeal. Reversed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and R. E. Wedekind, all of Los Angeles, for respondents.

PRESTON, J. This is an appeal by plaintiffs from a judgment of nonsuit entered after both sides had concluded the introduction of their evidence. The single issue presented is the plea of the statute of limitations, subdivision 2 of section 338 of the Code of Civil Procedure.

[1] Respondents' statement of the facts and of the question involved is accurate and as follows:

"September 22, 1917—Eloise Wright Porter was granted a life estate in the property in question, with the reversion in plaintiffs' predecessors.

"November 4, 1919—Eloise Wright Porter deeded parcel 1 to the defendant. This deed made no mention of any life estate.

"November 7, 1919—Eloise Wright Porter deeded parcel 2 to the defendant. This deed made no mention of any life estate.

"January, February, and March, 1920—The defendant constructed and put into operation a railroad line over parcels 1 and 2, and has continuously operated said line, carrying freight and passengers thereover, as part of its system, in interstate and intrastate commerce, since said date.

"August 1, 1922—Eloise Wright Porter died.

"August 14, 1924—The plaintiffs began this action.

"The plaintiffs are reversioners and the owners of the fee-simple title to parcels 1 and 2, the property here in litigation.

"The sole question in this case is whether the statute of limitations began to run against the reversioners at the date of the entry by the railroad or at the date of the death of the life tenant."

Appellants state their position in these words:

"Plaintiffs' right to the possession of parcels 1 and 2 matured only upon the termination of Eloise Wright Porter's life estate, and with it ripened into maturity their cause of action against the railroad company for continuing to use and occupy parcels 1 and 2 beyond the period limited by their grant."

Respondents counter with this statement of their position:

"But appellants' action here did not depend on the right to possession. Therein is the distinction. Appellants had no right to possession after the railroad was constructed. The only action they ever had was for damages."

Again respondents assert:

"True, the life tenant had given her assent to the use contemplated, but in going in under that assent the railroad necessarily trespassed on the rights of the reversioners and necessarily injured at that time their inheritance. * * * It took the life estate rightfully under the deeds from the life tenant, but it occupied the fee without right. It appropriated the inheritance at that time, and permanently ousted the reversioners from their possibility of a reversion. * * * The railway got only the life estate by the deeds from the life tenant, but it took the inheritance of these reversioners outright."

We think appellants are clearly right, and that respondents overcapitalize the rule of public policy operating to shield the railway from an action in ejectment and continue it in possession of the property of another. Appellants' claims are founded upon the right of possession, and they are denied that specific relief, and relegated to compensation in damages only by reason of the public convenience, but this is far from giving respondents the right to antedate the falling in of the life estate with the claim of trespass or waste. This case is ruled by such cases as Pryor v. Winter, 147 Cal. 554, 559, 82 P. 202, 204 (109 Am. St. Rep. 162), where it is said:

> "It would be strange, indeed, if during the life of the particular tenant a remainderman could be compelled to lose his estate on account of another's possession which he would be utterly helpless to interrupt."

And Akley v. Bassett, 189 Cal. 625, 643, 209 P. 576, 583, where it is said:

> "It is true that the possession of respondent's father, the tenant for life, was not adverse to her as remainderman. Such life tenant could not, by his dealings with the life estate, make his, or his grantee's possession, adverse to respondent, so as to start the statute of limitations against her during the life estate (Pryor v. Winter, 147 Cal. 554, 559, 82 P. 202, 109 Am. St. Rep. 162; McMurtry v. Fairley, 194 Mo. 502, 510, 91 S. W. 902); but, after such life estate terminated, the possession, unless in some way qualified, did become adverse and the statute of limitations began to run at that time (Mann v. Mann, 141 Cal. 326, 330, 74 P. 995)."

Also the recent case of Newport v. Hatton. 195 Cal. 132, 144, 231 P. 987, 991, where it is said:

> "Mrs. Newport, as life tenant, could not, by her dealings with the life estate, make her own or a grantee's possession adverse to that of the remaindermen so as to start the statute of limitations against them during the life estate."

Unlimited authority may also be found in other states supporting these views. In the case of Bartlow v. Chicago, etc., Co., 243 Ill. 332, 90 N. E. 721, a condemnation proceeding and payment to the holder of the life estate in the land involved vested in the railway company a right of way as against the holder of the life estate, and the company thereby acquired right to possession of a right of way during her life. Appellant railway company, in suit for partition of the land, relied upon statutes of limitation of 20 and 7 years. The court held that, until death of the holder of the life estate, appellees had no right to possession of the premises, and could not maintain an action therefor; that the statute of limitations, therefore, did not run against them.

This question is discussed at length in the case of Webster v. Pittsburgh, etc., Co., 78 Ohio St. 87, 84 N. E. 592, 15 L. R. A. (N. S.) 1154. The court held that action not to be barred by the statute of limitations of 21 years, as said statute did not begin to run until death of the life tenant, and further held that ejectment proceedings were proper.

Holding that the plaintiff and his representatives could institute proceedings to recover possession of the property involved at any time after the death of the life tenant and before the running of the statute of limitations, the court in the case of Cassem v. Prindle, 258 Ill. 11, 101 N. E. 241, said:

> "The remainderman has no right of action for the possession until the death of the life tenant, and the statute of limitations will not begin to run until the right of action accrues."

To the same effect see Westcott v. Meeker, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947; also Bohrer v. Davis, 94 Neb. 367, 143 N. W. 209, L. R. A. 1918D, 430, Ann. Cas. 1915A, 992, where it is said:

> "The universal rule of law is that the statute of limitations does not begin to run against a right of action until that right exists. The party who has the right of action has the full period of the statute in which to enforce it. The remainderman has no right of possession until the particular estate is terminated. He has no right of action which depends upon the right of possession until he is entitled to the possession."

In the case of Hauser v. Murray, 256 Mo. 58, 85, 165 S. W. 376, 384, it is said:

> "The plea of the statute of limitations is interposed as a defense. * * * We are of the opinion that the general rule is applicable, and that neither she (holding as a life tenant) nor any grantee of the estate could claim adversely to the remaindermen, and that the statute of limitations did not begin to run against them until her death."

See, to the same effect, Rogers v. Ogburn, 116 Ark. 233, 172 S. W. 867; Ratterman v. Apperson, 141 Ky. 821, 133 S. W. 1005; Rich v. Victoria, etc., Co. (C. C. A.) 147 F. 380.

[2, 3] We see no force in the statement found as dictum in the case of Gordon v. Cadwalader, 172 Cal. 254, 156 P. 471. While the unauthorized or forcible entry of a railway company might possibly be trespass upon the remainder interest as well as upon the life tenancy, yet, where the entry is by consent of the life tenant, no presumption can arise that the railway company intends to despoil the estate of the remainderman. To so hold in this case would be to impute bad faith to respondents and knowledge thereof to appellants. This observation also disposes of the cases holding that entry of a railway company with its tracks constitutes a permanent taking of the lands so occupied. This cannot apply to an independent estate to be subsequently enjoyed where the entry is by consent of the life tenant, whose authority, being limited, limits the railway company

to the estate which the life tenant could convey.

[4, 5] Neither is there any applicability here of section 826 of the Civil Code to the effect that a remainderman, notwithstanding the intervening estate, may maintain an action for injury to the inheritance. There is no conclusive presumption that, if the tracks are removed or abandoned on the falling in of the life estate, and injury has resulted to the inheritance. Besides, the asserting of this right of action is permissive only and not compulsory.

Appellants' right of action arose on the death of the life tenant, and the suit was instituted within the time allowed by statute reckoned from this event.

The judgment is reversed.

We concur: CURTIS, J.; SEAWELL, J.

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203 Cal. 550

PATTERSON et ux. v. MARCUS.
(S. F. 12091.)

Supreme Court of California. March 7, 1928.

1. **Physicians and surgeons 🔑15—Mistake in diagnosis renders physician liable only where due to his failure to exercise ordinary care, diligence, and skill.**

Mere proof that physician made wrong diagnosis does not support recovery for malpractice, unless mistake was due to failure to exercise ordinary care, diligence, and skill; physician's responsibility in making diagnosis being no greater than in prescribing treatment.

2. **Physicians and surgeons 🔑14(4)—Physician impliedly contracts that he possesses learning and skill possessed by others of his profession, and will apply it in exercise of ordinary care.**

Physician impliedly contracts with patient that he possesses that reasonable degree of learning and skill possessed by other members of his profession, and that he will exercise reasonable and ordinary care and skill in the application of that learning.

3. **Physicians and surgeons 🔑18(8)—What constitutes proper practice by physician is solely question for expert testimony.**

Question as to what is or is not proper practice for a physician is uniformly a question for expert testimony, and can only be so established in malpractice suit.

4. **Physicians and surgeons 🔑15—Physician's mistaken diagnosis of enlarged condition in abdominal region of woman as pregnancy held not actionable negligence, where proper means of determining pregnancy was not shown.**

Physician's mistake in diagnosis of enlarged condition in woman's abdominal region as pregnancy, on account of which he advised against extraction of ulcerated wisdom tooth, *held* not actionable negligence, rendering physician liable in malpractice suit, on ground that true condition was abdominal tumor, where it was not shown by expert testimony what method or means, in exercise of ordinary care, should have been employed to determine presence or absence of pregnancy.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Action by Andrew Patterson and wife against Herman Marcus. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Charles F. Hanlon and Walter H. Robinson, both of San Francisco, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

SHENK, J. The trial court granted a motion for a nonsuit and entered judgment accordingly. The plaintiffs, husband and wife, have appealed. The plaintiff husband is joined because of the marital relationship.

The defendant is a regularly licensed and practicing physician and surgeon. On March 4, 1921, the plaintiff, Rose Patterson, was suffering from a swelling in her face. She consulted the defendant for medical examination and treatment. The defendant correctly diagnosed the cause of the swelling as an ulcerated wisdom tooth, which, under ordinary conditions, could be removed and relief thereby afforded. If, however, the patient be a pregnant woman, it was in evidence and undisputed that the extraction of an ulcerated tooth is dangerous to both mother and child, and this was known to the defendant when he was so consulted. The enlarged condition of Mrs. Patterson in the abdominal region aroused the suspicions of the defendant, and he inquired of her if she were pregnant. She replied that she did not know. She was 34 years of age at the time, had been married for several years to her present husband, and had two children by a former husband. Upon further inquiry by the defendant, she stated that her menstrual flow had been scant, and that on several mornings shortly theretofore she had experienced nausea. The defendant examined her with a speculum, pronounced her four or five months pregnant, and advised against the extraction of the tooth. He sought to relieve his patient by an incision and draining the abscessed area. Numerous treatments failed to afford the necessary relief, and the patient suffered much pain. Upon the advice of the defendant, she consulted his own dentist, who refused to extract the tooth when he learned that defendant had pronounced the patient pregnant. She remained under the care of the defendant and received frequent examinations. Measurements disclosed a gradual enlargement of the abdominal swelling. By listening, the defendant thought at times that he discerned life in the supposed fœtus, and at times he was doubtful. Examinations continued, usually once a week, and sometimes oftener. Mrs. Patterson finally consulted another dentist, who extracted the tooth. About June 20th, after a more extended examination, the defendant concluded that his patient was not pregnant, but was suffering from an ovarian cyst or abdominal tumor. When so advised by the defendant, with an offer of treatment for that trouble, Mrs. Patterson refused to proceed under the further care of the defendant, consulted another physician, who administered treatment and drained a gallon of liquid from the abdominal swelling. This physician testified that the distention of the abdomen made internal examination difficult. The deposition of a nurse who attended Mrs. Patterson during a portion of the time in question was introduced in evidence. The nurse testified that, when she was in attendance on Mrs. Patterson, the latter had all the symptoms of pregnancy; that she had pain in the abdominal region, had a nauseated feeling, and was unable to walk without aid; and that she gave the witness the impression that she was pregnant and about to become a mother.

[1, 2] This action was brought on the theory of negligent diagnosis and care on the part of the defendant, resulting in loss of time, expense, and suffering on the part of the plaintiffs from March until June. The record presents a case of mistaken diagnosis by a reputable physician, without the incidents of carelessness or unskillfulness necessary to constitute actionable negligence. There is an entire absence of evidence that the treatment prescribed on the original diagnosis was improper. A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment. See Brewer v. Ring, 177 N. C. 476, 99 S. E. 358, 364. When due care, diligence, judgment, and skill are exercised, a mere failure to diagnose correctly does not render a physician liable. Jaeger v. Stratton, 170 Wis. 579, 176 N. W. 61. A mistake in diagnosis in the present case was alleged and proved, and is conceded to have taken place. But it was not only necessary for the plaintiffs to prove such mistake, but also that the mistake was due to failure to exercise ordinary care, diligence, and skill in making the diagnosis. Schumacher v. Murray Hospital, 58 Mont. 447, 193 P. 397, 403. Mere proof that the diagnosis was wrong would not support a verdict. Edwards v. Uland, 193 Ind. 376, 140 N. E. 546, 548. It has been held in this state that the implied contract on the part of the physician is that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will exercise reasonable and ordinary care and skill in the application of that learning to accomplish the purpose for which he is employed. Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128.

[3, 4] As to what is or is not the proper practice is uniformly a question for experts, and can be established only by their testimony. Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642; Houghton v. Dickson, supra. There was in the present case no expert evidence as to what method or means, in the exercise of ordinary care and skill, should have been employed to determine the presence or absence of pregnancy. On the record presented, it is reasonable to conclude, in harmony with the holding of the trial court, that there was no showing of negligence on the part of the defendant in making the mistaken diagnosis, having in mind the standards of proof required.

The judgment is therefore affirmed.

We concur: RICHARDS, J.; LANGDON, J.

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203 Cal. 553

ARNOLD v. HOPKINS, County Assessor, et al. (CITY OF PASADENA, Intervener).★

(S. F. 12764.)

Supreme Court of California. March 8, 1928.

Rehearing Denied April 5, 1928.

1. Statutes 🔑184, 225—Courts, in construing laws, should consider former law, evil to be remedied, and proposed remedy.

Courts, in the course of construing laws, have the duty of considering the former law, the evil to be remedied, and the proposed remedy.

2. Taxation 🔑37, 40(7)—Political Code as to taxing notes, stock, bonds, credits, or mortgages, pursuant to constitutional authorization, held invalid for failure to provide equitable distribution, or guarantee equality in rates or furnish proper rate (Pol. Code, § 3627a, as added by St. 1925, p. 13, § 3; Const. art. 13, § 12½).

Pol. Code, § 3627a, as added by St. 1925, p. 13, § 3, enacted pursuant to Const. art. 13, § 12½, authorizing imposition of state tax on notes, debentures, shares of capital stock, bonds, solvent credits, or mortgages, in lieu of all other property taxes, *held* invalid for failure to provide for an equitable distribution of such taxes or to guarantee that rates should not exceed those imposed on other property or furnish a proper rate of taxation.

3. Taxation 🔑37—Constitutional provision, authorizing state taxation of notes, debentures, stock, bonds, credits, and mortgages, required equitable distribution to county, municipality, and district; "or" (Const. art. 13, § 12½).

Provision of Const. art. 13, § 12½, authorizing the Legislature to tax notes, debentures, stock, bonds, credits, and mortgages, *held* to re-

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★Rehearing denied.

quire an equitable distribution of such taxes imposed to county, municipality, and district in which property is taxed; use of word "or" between municipality and district being construed to mean "and," under rule authorizing courts to construe such words in light of context and reasons underlying legislation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

4. Taxation 🔑1—Benefits of taxation should be directly received by those directly concerned in bearing burdens of taxation.

In so far as practicable, the benefits of taxation should be directly received by those who are most directly concerned in bearing the burden of taxation.

5. Statutes 🔑219—Official statement to voters under election laws as to meaning and effect of measures proposed is to be considered by courts.

Though official statement to voters under election laws as to meaning and effect of measures proposed to them for adoption is not controlling on courts, it is nevertheless a factor to be taken into account in effort on part of judicial tribunals to ascertain intent of Legislature in framing and people in adopting such measures.

6. Taxation 🔑37—Law authorizing state tax on notes, debentures, stock, bonds, credits, and mortgages held invalid for failure to provide for equitable distribution of taxes as required by Constitution (Const. art. 13, § 12½; St. 1927, p. 399, § 2, amending Pol. Code, § 3627a, as added by St. 1925, p. 13, § 3).

St. 1927, p. 399, § 2, amending Pol. Code, § 3627a, as added by St. 1925, p. 13, § 3, providing for state taxation of notes, debentures, shares of capital stock, bonds, solvent credits, and mortgages, in lieu of other taxes pursuant to authority of Const. art. 13, § 12½, *held* invalid for failure to provide for an equitable distribution of such taxes, as required by such constitutional provision.

Langdon and Curtis, JJ., dissenting in part.

In Bank.

Original application for mandamus by Dorothy M. Arnold against Ed W. Hopkins, as Assessor of the County of Los Angeles, and others, wherein the City of Pasadena intervened. Writ granted in part, and in part denied.

R. C. McAllaster, City Atty., of Pasadena, for intervener.

W. S. Burnett, of Santa Barbara, U. S. Webb, Atty. Gen., Frank L. Guerena, Deputy Atty. Gen., and Overton, Lyman & Plumb, of Los Angeles, amici curiæ, for California State Ass'n Finance Co.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, and O'Melveny, Tuller & Myers, of Los Angeles, amici curiæ, for Investment Bankers' Ass'n of America, California Group.

Everett W. Mattoon, Co. Counsel, W. Sumner Holbrook, Jr., Deputy Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, all of Los Angeles, for respondents.

RICHARDS, J. The questions involved in this proceeding are presented upon the application of the petitioner herein for the issuance of a writ of mandate directing the respondents herein to desist from doing a certain series of official acts looking to the preparation, printing, and procuring of certain statements and other printed forms and blanks which are to issue preparatory to the assessment and collection of taxes for the current year upon certain kinds of taxable property to be hereinafter described, and which acts it is alleged the respondents are preparing and threatening to do in conformity with the terms of a certain statute which the petitioner avers to be unconstitutional and void; and that by said writ this court shall further command the respondents in their several official capacities to do and perform said official acts in conformity with another statute which the petition avers to be in full force and effect. The respondents rest their opposition to the issuance of said writ upon their return, which only puts in question the sufficiency of the applicant's petition. An intervention has been presented herein on behalf of the city of Pasadena, which sets forth no new or issuable facts, but supports the position of the applicant herein. Certain amici curiæ have also filed briefs in support of the position taken by the respondents herein, as to which of said statutory enactments is in operation; while, on the other hand, the Attorney General of the state of California has appeared herein to present views both orally, and by briefs hereinafter to be commented upon. The constitutional amendment thus referred to is the amendment to section 12½ of article 13 of the state Constitution, which was adopted by the people at the general election in 1924, and which reads as follows:

> "The Legislature, subject to section one of article four shall have power to provide for the assessment, levy and collection of taxes upon all notes, debentures, shares of capital stock, bonds, solvent credits or mortgages, not exempt from taxation under the provisions of this Constitution, in a manner, at a rate or rates or in proportion to value different from any other property in this state subject to taxation; taxes imposed by any act of the Legislature adopted pursuant to the powers hereby conferred shall be in lieu of all other property taxes, state, county, municipal or district, upon such property. The Legislature shall provide for an equitable distribution of such taxes to the county, municipality or district in which such property is taxed; provided, that the rate or rates of taxation of such securities, and penalties, shall not exceed those assessed or imposed upon other property in this state not exempt from taxation, and that when the same shall have been fixed by the Legislature, they shall not be altered except by vote of two-thirds of all the

members elected to each of the two houses voting in favor thereof."

The Legislature of 1925, purporting to act in compliance with the mandate of the foregoing amendment to the Constitution, added to the Political Code section 3627a thereof, which reads as follows:

> "The assessor of each county, city and county, city, district, or other political subdivision, shall assess notes, debentures, shares of capital stock, bonds, solvent credits, and mortgages or deeds of trust, which are taxable to the owner thereof under provisions of the laws of this state other than this section and section three thousand six hundred twenty-seven of this Code, at seven per cent. of the full cash value thereof; provided, that the taxpayer shall have included such property in the annual statement, under oath, made and delivered to the assessor as required by law; provided, however, that as to such property so included in such annual statement that may be made as of the first Monday of March, 1926, if any such property so disclosed shall have escaped assessment for the last preceding year and shall have been then in the ownership or under the control of the same person so including such property in such annual statement, the provisions of section three thousand six hundred forty-nine of the Political Code shall not apply; and provided, further, that in the event of failure or refusal to file such annual statement such property shall be assessed at its full cash value, except as provided in section three thousand six hundred twenty-seven of this Code. In determining the full cash value of the properties hereinbefore enumerated in this section, the assessor shall not take into account the existence of any custom or common method, if any, of assessing any other class or classes of property at less than the full cash value thereof." Stats. 1925, p. 13, § 3.

In the year 1927 the Legislature undertook to amend the foregoing section of the Political Code by an enactment (Stats. 1927, p. 399, § 2), which reads as follows:

> "Each county or city and county shall tax notes, debentures, shares of capital stock, bonds, solvent credits and mortgages or deeds of trust, which are taxable to the owner thereof under the provisions of the laws of the state, at a rate of one and forty-five hundredths per centum of the full cash value thereof; provided, that the taxpayer shall have included such property in the annual statement under oath made and delivered to the assessor as required by law; provided, that in the event of failure or refusal to file such annual statement such property shall be assessed at double its full cash value. The taxes so collected shall be deposited in the general fund of the county or city and county in which such property is taxed."

It is the contention of the petitioner herein that the foregoing amendment to section 3627a of the Political Code is a valid enactment, but that the respondents herein are proceeding to ignore the same, and to do, or threaten to do, the official acts above referred to in conformity with the terms of the original section enacted in 1925, and which the applicant alleges has been superseded by the amendment of 1927. The respondents, the intervener, and their supporting amici curiæ insist that the enactment of 1925 is valid, and its attempted amendment in 1927 void.

[1] This would seem to be a case calling in a peculiar sense for the application of that cardinal cannon of interpretation which requires courts in the course of construing laws to consider: (1) The former law; (2) the evil to be remedied; and (3) the proposed remedy. We shall accordingly first consider the state of the former law governing the assessment and collection of taxes upon these forms of personal property, which are referred to both in the constitutional amendment above quoted and in each of the statutory enactments which have been passed since its adoption.

The Constitution of 1879, in section 1, art. 13 thereof, provided that:

> "All property in the state * * * not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. * * * The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

This section of the Constitution was amended from time to time, either internally or by the incorporation of subsections into the article itself, the purpose of such amendments being chiefly to create certain exemptions from the general terms of the section up to the year 1910, during which period all property subject to taxation was assessed, and the local, as well as state, taxes, collected thereon in the several counties, cities and counties, municipalities, and districts wherein such property was situated. The state board of equalization and the boards of supervisors of the several counties of the state, in the capacity of county boards of equalization provided for in section 9 of article 13 of the Constitution, equalized the valuation of taxable property, the former for state, and the latter for local, taxation. The state Legislature during the same period, in various enactments not necessary here to be enumerated, provided for the details of the plan of assessment and taxation thus in vogue during that time. The Constitution also contained the provisions (Const. art. 1, § 11) that "all laws of a general nature shall have a uniform operation." In the year 1910, however, a radical change of policy was adopted by the people and engrafted on the Constitution, by the terms of which embodied in section 14 of article 13 thereof certain enumerated properties, such as railroads, street railways, express companies, gas and electric companies, insurance companies, telegraph and telephone companies, banks, and numerous other forms of property not practicably subjectable to local evaluation were to be assessed, and the taxes collected thereon by the state directly and at rates or bases of taxation different from that provided for in ad valorem taxation; and the taxes derived therefrom paid into the state treasury, and applied to the expenses incident to the operation and activities of the state government.

All other property, excepting what had thus been taken out of the sphere of local taxation, continued to be assessed and taxed as before this change became effective, and the moneys derived from such local taxation were distributed to the local and subordinate subdivisions of the state permitted to assess, levy, and collect such taxes under the statutes which remained in force. In the meantime experience had shown that whatever the difficulties, obstacles, and inequalities encountered by tax officials in the assessment, levy, and collection of taxes upon property in proportion to its value, these were accentuated in the endeavor of these officials to discover and adequately subject to taxation certain kinds of personal property which, from its nature, was susceptible of being sequestered and concealed by the owners thereof with a view to escaping taxation, or of which the assessable value, also, from the nature thereof, was difficult of ascertainment. These forms of elusive property were, generally speaking, notes, solvent credits, bonds, debentures, shares of stock, and like properties sometimes characterized as "intangibles." Of recent years, the amount and variety of forms of these so-called intangible properties have vastly increased, with the result that the extent to which properties of the foregoing classes were either evading taxation or, when found, were being subjected to inordinate and unjust burdens, had grown to be a real evil in the structure and operation of our state laws affecting and providing for local taxation. It was precisely this evil which required remedial legislation, but it was an evil which legislation could not fully reach and remedy without a change in the state Constitution, and in those provisions thereof above referred to which provided for the uniform taxation of all property in proportion to its value. It was, in order to invest the state Legislature with powers elastic enough to reach and remedy both phases of this growing inequality in the taxation of these so-called intangibles, that the amendment embodied in section 12½ of article 13 of the Constitution was finally adopted by the people in 1924, and in which it was undertaken to enumerate the classes of such properties over which the Legislature was to exercise the elastic control with which by said constitutional amendment it was sought to be invested. When we therefore read this amendment to the Constitution in the light of the history of state and local taxation which preceded it, its objects and its limitations appear plain. In the matter of the method to be by it selected for the assessment, levy, and collection of taxes upon the kinds of property enumerated in said amendment, the Legislature was to be given a free hand. It could provide for the assessment, levy, and collection of such taxes by the state, or by any subordinate branch or agency thereof it might see fit to select. It might invest the same state officials and agencies with the power and the machinery for the assessment, levy, and collection of the taxes upon these particular properties which had already been intrusted with the collection of taxes from properties directly and solely subjected to state taxation under the provisions of section 14 of article 13 of the Constitution already in full operation and effect. It might commit the assessment, levy, and collection of these taxes to counties and cities and counties. It might even call into being a special form of commission or agency for the assessment, levy, and collection of these taxes, if the Legislature in its wisdom saw fit so to do. There were, however, certain important limitations imposed upon the Legislature in its exercise of the foregoing powers.

[2] These limitations may be clarified by reading together the following clauses of said amendment, which are apparently interrelated: First, "the Legislature * * * shall have the power to provide for the assessment, levy, and collection of taxes upon all notes," etc.; second, "taxes imposed by any act of the Legislature adopted pursuant to the powers hereby conferred shall be in lieu of all other property taxes, state, county, municipal or district, upon such property"; third, "the Legislature shall provide for an equitable distribution of such taxes to the county, municipality or district in which such property is taxed"; fourth, "the rate or rates of taxation of such securities and penalties shall not exceed those assessed or imposed upon other property in the state not exempt from taxation"; fifth, "when the same shall have been fixed by the Legislature they shall not be altered except by vote of two-thirds of all the members elcted to each of the two houses voting in favor thereof." When these provisions of this amendment are thus read together, they would seem to compel the conclusion that the duty imposed upon the Legislature thereby was that of providing a law covering the entire field of taxation of the forms of property designated therein, and embracing in its express provisions the valuation, the rate or rates of taxation, and the equitable distribution of the taxes to be derived from the burden thus to be laid upon such properties. For the Legislature in attempted compliance with the foregoing provisions of said amendment to merely fix a basis of assessment for such properties, but to go no farther, would not suffice to meet the requirement that the taxes imposed at such valuation should be in lieu of all other property taxes, state, county, municipal, or district upon such property, for the reason that to merely fix a basis of assessment is

not to impose taxes; while to leave the imposition of the rate or rates of taxation inferentially to the counties, municipalities, or districts theretofore imposing such taxes at rates fixed by each of these can by no process of reasoning amount to the imposition of taxes by "an act of the Legislature pursuant to the powers hereby conferred" which shall be "in lieu of all such former and local taxation." Nor would the mere fixation of a basis of assessment suffice to comply with the requirement that "the Legislature shall provide for an equitable distribution of such taxes"; nor would it suffice to furnish the guarantee contained in the proviso that "the rate or rates of taxation of such securities and penalties shall not exceed those imposed upon other property in this state not exempt from taxation"; nor would it furnish to succeeding Legislatures a "rate or rates" of taxation of such securities which such succeeding Legislatures could not alter, except by a two-thirds vote of the members thereof. It would seem, therefore, to follow that the act of the Legislature of 1925, by its mere fixing of a basis of assessment of the properties enumerated therein, fails to meet the other foregoing requirements of this amendment to the Constitution, and must therefore, and for the reasons above set forth, be held to be invalid.

The Legislature of 1927 undertook to replace the act of 1925 with another and radically different scheme of taxation, and in so doing in some part undertook to provide by legislative action both for a basis of taxation of the classes of property designated in the foregoing amendment to the Constitution and for a rate of taxation. As to the former, the basis of assessment of such properties was to be "the full cash value thereof." As to the latter, the rate fixed by the Legislature was to be "one and forty-five hundredths per centum" of such cash value. Thus far the Legislature correctly interpreted its powers and duties in so far as the fixation of a basis of assessment and also of a rate of taxation upon such properties are concerned; and in so doing also complied with the terms of said amendment requiring that the taxes thus assessed and at the rate thus imposed should be "in lieu of all other property taxes, state, county, municipal or district, upon such property." But in thus complying with the act in the foregoing respects the Legislature of 1927 apparently overlooked or misconceived one of the most vital requirements of the aforesaid amendment to the Constitution, viz., that requiring that "the Legislature shall provide for an equitable distribution of such taxes to the county, municipality or district in which such property is taxed."

In considering the reasons which impel us to this conclusion, we are met at the outset with the obstacle arising out of the use by the framers of the foregoing constitutional amendment of the word "or" in the above-quoted clause thereof, and which, if strictly construed to mean "or" instead of "and," would seem to give to the Legislature power to repose the funds derived from the taxation of these so-called intangibles in any one of the local entities named in the Constitution, and that such disposition of these funds would constitute "an equitable distribution" thereof.

[3] We are unable, however, to so interpret the intent of the framers of the constitutional amendment, for the following reasons, which seem to our minds to be controlling: In the first place, the use or misuse of the words "or" and "and" interchangeably in legislation has been the subject of frequent animadversion on the part of courts; so much so, in fact, that the solution of the question as to whether the framers of a law intended, whichever of these words was used, to mean "or" or "and" has come to depend almost wholly upon the context in which one or the other of these words appears and the reasons underlying the legislation, and which would be conserved by the use of disjunctive or conjunctive forms of speech, regardless of the particular word employed. This was made plain by this court in the case of Washburn v. Lyons, 97 Cal. 314, 32 P. 310, wherein the word "and" in a statute was construed to mean "or"; and was quite clearly stated and argued with much citation of authority in the case of Abbey v. Board of Directors, etc., 58 Cal. App. 757, 209 P. 709, wherein the word "or" was construed to mean "and" in order to carry out the legislative intent. Applying the foregoing rule of interpretation to the clause in question, and viewing it by its context in the constitutional amendment, and also by the aid of those other principles of interpretation which should be our guide in ascertaining the meaning of laws, we are satisfied that the word "or" must be given the meaning of "and" in the clause in said amendment immediately under inspection. Viewed first from its context, it is difficult to perceive how the phrase "equitable distribution" of taxes imposed upon property located within counties, municipalities, and districts, all of which have heretofore been tax-imposing and tax-distributing entities, could be accomplished by the giving of this entire tax, when collected, to one of these entities without some provision for the direct sharing of these particular taxes with each of the other of such entities. It is argued with some degree of plausibility that, since the several counties of the state embrace all its territory, and hence include within their boundaries all municipalities and all districts, the act of 1927 in providing for the assessment and levy of the taxes to be derived from these particular forms of property by the counties, and in providing that such taxes, when collected, should go into the general funds of each county, to be thence disbursed for those general county purposes for which moneys

placed in such general funds are available, the provisions of the act of 1927 which place all of such taxes in the county treasury satisfies the constitutional requirements as to the equitable distribution thereof. It is true that by such distribution every part of the county affected thereby receives some benefit, but this benefit is of necessity an indirect one, in so far as these particular funds are concerned. To say, for example, to the city of Pasadena, which is an intervener herein, that the sum of $53,661.62, which was received by that municipality during its last fiscal year from its taxation of these intangibles located within its boundaries, and which it had applied to purely local purposes, shall be levied and collected by the county, and shall go into the general fund of the county, and that the only benefit which the municipality will derive from this particular tax upon its local properties is to be in the form to which the general funds of the county of which it is a part are to be devoted, is to do nothing more nor less than when it asks for bread to give it a stone; since it is obvious that Pasadena and all the other municipalities of all the other counties of California, when deprived of the moneys which the local taxation of these forms of local property have heretofore supplied, and which taxes they have heretofore been able to apply to local improvements and benefits, must be put to the alternative of either foregoing such benefits or of laying heavier burdens in the way of taxation upon other local taxable property in order to continue to afford them.

When, however, we look beyond the context of this clause in the constitutional amendment to determine whether the word "or" in the clause under inspection means "and," and whether, if it does so, the requirement as to equitable distribution contained therein means the direct distribution upon some equitable basis to be devised by the Legislature of the very taxes derived from these particular forms of property, we find abundant reasons why said word "or" should be so interpreted, and why the Legislature of 1927 should have provided for such distribution among the political entities thus conjoined in the act of 1927 here under review. In the first place, there was no crying evil in the former method of permitting the local distribution of taxes upon these local properties, excepting only the difficulty of bringing them out of hiding, due to the fact that they were being overtaxed under the methods of valuation and duplicated taxation then in vogue.

[4] On the contrary, it is a sound principle of taxation, and one wholly in accord with the fundamental maxims of popular government, which prescribes that, in so far as practicable, the benefits of taxation should be directly received by those who are most directly concerned in bearing the burdens of taxation. This principle had already been recognized, and in a measure applied to the subject of the taxation of certain other forms of property in the amendment which added section 14 to article 13 of the state Constitution in the year 1910, and which, while working a revolution in the entire method of taxing the forms of property affected thereby, was still careful to provide for compensation to local subdivisions of the state for losses which they would sustain through the outworking of the plan of taxation then put in force.

Under the provisions of subdivision (f) of section 14 of article 13 of the Constitution as adopted in 1910 the state was required thereafter and up to the year 1918 to reimburse "any and all counties which sustain loss of revenue by the withdrawal of railroad property from county taxation"; and by the same subdivision it was further provided that "the Legislature shall provide for reimbursement from the general funds of any county to districts therein where loss is occasioned in such districts by the withdrawal from local taxation of property taxed for state purposes only."

The Legislature in the year 1911 adopted statutes effectuating these constitutional requirements, and as to the latter of them its action may be found in section 3671(b) of the Political Code. This state of the law must have been in the minds of the framers of section 12½ of article 13 of the Constitution when they submitted it to the people for adoption in 1922 and again in 1924, since we find it to be the fact the sponsors of this amendment to the Constitution as it was presented to the people for adoption in the year 1922 in substantially its present form, and who had been members of the Legislature which had framed and proposed it, expressly assured the electors that "this proposed amendment specifically provides that the taxes raised by the state on this type of property shall not go to the general fund of the state, but will be distributed to the municipalities and counties where they are owned. This brings definite advantage to the separate localities."

[5] The amendment failed of adoption that year, but was again, and by the succeeding Legislature, submitted to the people for adoption, and again the sponsors thereof, who were also members of the Legislature, repeated the foregoing assurance in exact terms to the voters, who adopted the amendment. While the official statement to voters under our election laws as to the meaning and effect of measures proposed to them for adoption is not by any means controlling upon the courts, it is nevertheless a factor to be taken into account in the effort on the part of judicial tribunals to ascertain the intent of the Legislature in framing and the people in adopting such measures. Yosemite L. Co. v. Ind. Acc. Comm., 187 Cal. 774, 781, 204 P. 226, 20 A. L. R. 994; Fay v. District Court of Appeal (Cal. Sup.) 254 P. 896.

It is hardly conceivable that the electors resident in municipalities and important and populous districts would have voted to adopt this amendment to the Constitution had they been informed by its sponsors that the benefits theretofore directly accruing to their immediate localities from the taxation of these forms of property therein could be wholly taken away by the Legislature operating under the powers and limitations of this amendment, and that their only recompense for such loss would come through the disbursement of these particular taxes for general county purposes by means of their deposit, when collected, in the general fund of the county.

[6] Whatever benefit might thus accrue to these localities by such means would be at best an indirect benefit, and could not reasonably be held to amount to "an equitable distribution of *such taxes*" to the locality "in which such property is taxed." We are therefore constrained to hold that the act of 1927, by its failure to provide for such equitable distribution of the taxes upon these designated forms of property to the county, municipality, and district in which such property is taxed, has not been framed in compliance with the requirements and limitations of said amendment to the Constitution, and is for that reason invalid.

The attitude of the Attorney General of the state of California toward the questions raised in the instant proceeding requires no further comment than that which has been accorded to these questions in the foregoing portions of this opinion.

In so far as the petitioner herein seeks to have a writ issued directing the respondents herein to refrain from the assessment, levy, and collection of taxes upon the aforesaid properties under the provisions of the act of 1925, her application is to that extent granted; and, in so far as the petitioner herein seeks to have a writ issued requiring the respondents herein to proceed with the assessment, levy, and collection of taxes upon said properties under the provisions of the act of 1927, her application therefor is denied.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

LANGDON, J. (concurring and dissenting). I concur in that portion of the majority opinion which holds that the enactment of 1925 is unconstitutional and void. I dissent from that portion of the majority opinion which holds that the 1927 enactment is unconstitutional and void. I think the 1927 enactment, fairly construed, meets the requirements of section 12½ of article 13 of the Constitution of California, if that section is interpreted in accordance with its express and unequivocal language.

The majority opinion concedes that the 1927 statute is valid, if it meets the following requirement of the said constitutional amendment: "That the Legislature shall provide for an equitable distribution of such taxes to the county, municipality *or* district in which the property is taxed." The majority opinion also amits that, if the word "or" in the above-quoted clause is construed to mean what it says, and not to mean "and" (what it does not say), that the Legislature would have power to distribute the funds derived from taxation of the so-caled intangibles to any one of the legal entities named in the said constitutional amendment, and the only remaining question for this court, according to my view, would be as to the equity of the distribution actually made. In other words, to declare the 1927 enactment unconstitutional, it is necessary to change the express wording of the constitutional amendment in question by substituting the word "and" for the word "or." There is nothing in the context to justify this change in language and meaning, and nothing to show that the word "or" was inadvertently or inaccurately used. On the contrary, in view of the fact that the word "or" was used in a similar constitutional amendment which was proposed and defeated in 1922, it would seem that the word "or" was designedly selected. Under the circumstances, it would seem to be a stretching of the judicial prerogative to substitute language in constitutional enactments, even in the interest of holding subsequent legislation valid, and to use such means to hold legislative enactments invalid seems to be a violation of well settled rules of construction. Statutes should never be declared unconstitutional if they can be sustained as valid. The language of neither constitutional nor statutory pronouncements should be distorted or changed by judicial interpretation when no ambiguity or uncertainty appears upon the face thereof. The majority opinion, with reference to the 1927 statute, seems to me to violate both of these fundamental rules for judicial interpretation.

By retaining the plain, simple wording of the constitutional amendment under discussion, instead of substituting other language therefor, it would seem that the Legislature in the 1927 statute has done exactly what it was authorized to do. The only remaining inquiry, then, would be as to whether or not an equitable distribution has been arrived at by the legislative enactment. I am in accord with counsel in his position that, since the several counties of the state embrace all its territory and hence include within their boundaries all municipalities and all districts, the act of 1927 in providing for the assessment and levy of the taxes to be derived from these particular forms of property by the counties, and in providing that such taxes when collected should go into the general funds of each county to be thence disbursed for those general county purposes for which moneys placed in such general funds are available, makes an equitable distribution of said tax fund, which is thus available for the use and benefit of all the people in the county in which the property taxed is situated.

I concur: CURTIS, J.

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203 Cal. 587

PEOPLE v. FERLIN. (Cr. 2977.) ★

Supreme Court of California. March 12, 1928.
Rehearing Denied April 9, 1928.

1. Arson 🔑9—To constitute arson, it is not necessary that person other than accused have ownership in building fired (Pen. Code, §§ 447, 452).

To justify a conviction of arson under Pen. Code, §§ 447, 452, it is not necessary that a person other than accused have ownership in building fired, it being sufficient, if at time of burning, another person was rightfully in possession or actually occupying building or part thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Arson.]

2. Arson 🔑37(1)—Evidence held to support conviction for arson (Pen. Code, §§ 447, 452).

Evidence *held* sufficient to support conviction for arson, in violation of Pen. Code, §§ 447, 452, where there was testimony showing that defendant, either individually or with assistance of another, willfully ignited store building with intent to destroy it.

3. Arson 🔑37(1)—Evidence held to support conviction for burning insured property (Pen. Code, § 548).

Evidence *held* sufficient to support conviction for burning insured property, in violation of Pen. Code, § 548, where testimony tended to show that defendant, either individually or with assistance of another, ignited insured property with intent to destroy it.

4. Homicide 🔑253(6)—Evidence held not to support conviction for murder committed in perpetration of arson (Pen. Code, § 189).

Evidence *held* insufficient to support conviction for murder committed in perpetration of, or attempt to perpetrate, arson, in violation of Pen. Code, § 189, where death resulted from burns received in building which defendant and deceased had caused to be burned.

5. Criminal law 🔑1156(1)—Appellate court will not disturb order granting new trial, unless record discloses manifest abuse of discretion.

Appellate court will not disturb order granting new trial in criminal case, unless record discloses manifest abuse of legal discretion, which trial court is required to exercise in disposition of such motion.

6. Jury 🔑131(3)—Juror cannot be examined on voir dire solely to lay foundation for peremptory challenge.

Juror may not be examined on voir dire as to membership in named secret organization solely for purpose of laying foundation for exercise of peremptory challenge.

7. Criminal law 🔑438—In prosecution for murder committed in perpetration of arson, deceased's photograph, taken after death, held admissible to show extent, degree, and character of burns.

In prosecution for murder committed in perpetration of arson, admission of photograph of deceased, taken after death, *held* not error, where it was identified by deceased's father and two doctors, who testified that it correctly showed extent, degree, and character of burns which caused death.

8. Arson 🔑31—In prosecution for arson, testimony that lessee rebuilt after fire held inadmissible, notwithstanding contention that premises were destroyed to secure lessee's removal.

In prosecution for arson, in which it was claimed that premises were destroyed to secure removal of lessee, testimony that lessee had rebuilt on property subsequent to fire *held* inadmissible.

9. Criminal law 🔑427(3)—Admitting evidence of conversations with coconspirator, in defendant's absence, relative to negotiations to burn property, held proper, even in advance of other proof of conspiracy.

In prosecution for arson and burning insured property, admission of evidence of conversations with defendant's partner in crime, in defendant's absence, showing negotiations for burning of property, *held* not error, even in advance of proof by independent evidence of conspiracy between them.

10. Criminal law 🔑423(2)—Conversations in defendant's absence with his partner in alleged arson held not inadmissible as hearsay.

In prosecution for arson, conversations with defendant's partner in crime, in defendant's absence, *held* not inadmissible as hearsay, since declarations of conspirator in furtherance of common design are binding on, and admissible against, coconspirator.

11. Criminal law 🔑423(1)—Acts and declarations of conspirator in furtherance of common design are binding on, and admissible against, coconspirator.

Acts and declarations of a conspirator in furtherance of common design are binding on, and admissible in evidence against, a coconspirator.

12. Criminal law 🔑1169(5)—Admission of conversations in defendant's absence with partner in crime, if error, held harmless, in view of instructions to disregard.

In prosecution for arson, admission of conversations, in defendant's absence, with his partner in crime, if error, *held* not prejudicial, where court instructed jury to disregard evidence of such conversations; it being presumed that jury heeded court's instruction.

13. Criminal law 🔑1144(15)—On appeal, presumption is that jury heeded instructions to disregard inadmissible evidence.

Where court instructed jury to disregard evidence of conversations out of presence of defendant, it is presumed on appeal that jury

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

exercised its jurisdiction soundly, and heeded instructions.

14. Criminal law 🔑1036(1)—In absence of seasonable objection, defendant could not complain of evidence that deceased was seen walking with defendant's minor stepson on morning preceding fire.

In prosecution for arson, for murder, and for burning insured property, in absence of seasonable objection, defendant could not on appeal assign as error admission of testimony that deceased was seen walking with defendant's minor stepson on morning preceding the fire.

15. Criminal law 🔑696(7)—Motion to strike all of witness' testimony held properly denied, where some of it was competent.

Motion to strike from record all of witness' testimony given on direct examination because incompetent, irrelevant, and immaterial, *held* properly denied, where it could not be said that all of witness' testimony was subject to motion to strike on grounds stated.

16. Criminal law 🔑742(2)—In prosecution for arson and burning insured property, refusal to instruct that certain witness was accomplice held error under evidence.

In prosecution for arson and burning insured property, refusal of instruction that certain witness was accomplice, *held* error under evidence.

17. Criminal law 🔑742(2)—Where testimony was undisputed that witness was an accomplice, trial court should have so instructed jury.

Where question as to whether or not witness was an accomplice under evidence was not seriously disputed on trial of prosecution for arson and burning insured property, it was duty of trial court to instruct jury as matter of law that witness was an accomplice of defendant.

18. Criminal law 🔑829(10)—Error in refusing to instruct that witness was accomplice held not prejudicial, in view of instructions defining accomplice and requiring corroboration.

In prosecution for arson and burning insured property, error in refusing to instruct that certain witness was accomplice *held* not prejudicial, in view of instructions correctly stating definition of accomplice, and requiring accomplice's testimony to be corroborated.

19. Criminal law 🔑775(2)—Alibi instruction, authorizing acquittal, if defendant, who had accomplice, was not present at scene of crime of arson and burning insured property, held properly refused.

In prosecution for arson and burning insured property, alibi instruction, intimating that absence from scene of crime would justify acquittal, *held* properly refused, in view of evidence that defendant had accomplice.

20. Criminal law 🔑814(1)—In arson case, refusal to instruct that imprisonment in state prison suspends right to defend civil actions for damages held proper, notwithstanding pending action against defendant.

In prosecution for arson and burning insured property, refusal to instruct that imprisonment in state prison suspends all civil rights, including right to prosecute and defend all civil actions for damages, *held* proper, notwithstanding that suit for damages had theretofore been instituted by defendant's lessee.

21. Criminal law 🔑1216(2)—Sentences for arson and burning insured property must run consecutively, and not concurrently (Pen. Code, § 669).

Where defendant was convicted of arson and of burning insured property before sentence was pronounced on him for either, sentences must operate consecutively and not concurrently, in view of Pen. Code, § 669.

22. Criminal law 🔑991(3)—Sentences fixing exact term of imprisonment for second degree arson and burning insured property held improper (Pen. Code, § 1168).

Sentences of 25 years for arson in second degree and 10 years for burning insured property *held* improper, in view of indeterminate sentence law (Pen. Code, § 1168), divesting trial court of any discretion in fixing exact term.

23. Criminal law 🔑991(1)—Error in sentence for burning insured property in allowing it to run concurrently with sentence for arson will not alter effect of judgment (Pen. Code, § 669).

Where defendant was convicted of arson and of burning insured property, error in sentence for latter in allowing it to run concurrently with former *held* not to vitiate or alter its effect, in view of Pen. Code, § 669.

In Bank.

Appeals from Superior Court, Los Angeles County; Lacy D. Jennings, Judge.

George Ferlin was convicted of arson, of destruction of insured property, and of murder, and he appeals from the conviction of arson and of destruction of insured property, while the People appeal from orders granting a new trial on the charge of murder, and directing that terms of imprisonment be concurrent. Judgment on defendant's appeal modified, and, as modified, affirmed. Order granting new trial on the murder charge affirmed.

Superseding former opinion in 257 P. 857.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

Homer C. Mills, of Los Angeles, for respondent.

LANGDON, J. The defendant, George Ferlin, was charged in an information filed in the county of Los Angeles, with the crimes of arson, murder, and the destruction of insured property. After trial, the jury returned verdicts finding him guilty as charged in each of the three counts of the information. The verdict finding the defendant guilty of murder carried with it a recommendation that he be imprisoned in the state prison for life. This latter verdict was returned, notwithstanding the fact that the trial court had theretofore advised the jury, as provided in section 1118 of the Penal Code, to acquit the defendant on the charge of murder. A motion for new trial was thereafter addressed by the defendant to each count of the information. The motion was denied as to counts 1 and 3, and granted as to count 2; the latter count charging the defendant with murder. Judgments were accordingly entered by the trial court directing that the defendant be incarcerated in the state prison for a period of 25 years for arson and 10 years for burning insured property. In the latter judgment it was indicated that the two sentences were to run concurrently.

The defendant has appealed from each of said judgments and from the order denying his motion for a new trial on each of the charges contained in counts 1 and 3 of the information. There is also presented herein an appeal on behalf of the people from the order of the lower court granting the defendant's motion for a new trial on the murder charge, and from that part of the judgment entered upon the verdict finding the defendant guilty of burning insured property, which directs that the sentence thereunder run concurrently with the sentence entered upon the verdict finding the defendant guilty of arson. A synoptical statement of some of the evidence adduced upon the trial will materially assist in a proper understanding of the innumerable assignments of error upon which the respective appeals are founded.

Doctors F. R. Webb and D. E. Stewart testified substantially that they had examined the deceased, Walter Skala, a boy about 21 years of age, and found that his death had resulted from burns of the third degree, which were described as burns actually destroying the tissue on the surface of the body.

Carl W. Pirl testified that during the month of August, 1925, he had operated a gasoline service station in the county of Los Angeles; that on August 3, 1925, the defendant purchased of him 26 gallons of low-grade gasoline; that 6 gallons of said quantity were placed in the gasoline tank attached to the defendant's automobile, and that the remaining 20 gallons were transported by the defendant in four 5-gallon cans; that prior to the date of said purchase the defendant had never taken gasoline away in 5-gallon containers; that on the day preceding the purchase of this gasoline the defendant had indicated to him that he would require a large quantity of gasoline with which to wash some old motors, and suggested to the witness that, "if anybody should ask me how much gasoline he bought, I wasn't to tell them anything"; that this admonition was apparently prompted by the fact that defendant said that other vendors of gasoline wanted his business; that he recognized a can shown him, by the faucet or spigot at the bottom, as one of the cans employed by the defendant to carry away a portion of the 20 gallons of gasoline purchased.

Fred W. Brown testified that he had a 5-year lease from the defendant on a grocery store and butcher shop located at 1681 East Manchester street, in the town of Graham, Los Angeles county; that his lease would not expire for approximately 2½ years; that on the day preceding the fire, which occurred about 3 or 4 o'clock on the morning of August 4, 1925, he had placed on a shelf in his storeroom certain aprons and rags recently returned from the laundry; that, after the fire, he found these materials on the floor saturated with either gasoline or oil; that he also found four 5-gallon cans in his storeroom subsequent to the fire, and that two of said cans contained some gasoline; that he recognized a can shown him with a faucet or spigot at the bottom thereof as one of the cans he had found in his storeroom; that the east wall of the building had been blown out and up against the railway posts; that on two separate occasions within four months preceding the fire the defendant had conversed with him concerning the witness' lease; that upon the first of these occasions the defendant said he thought he had a buyer for the premises, whereupon he offered the witness $2,300 for his lease; that the defendant upon the latter occasion offered him $1,000 for the lease; that on the day preceding the fire he noticed the defendant had removed certain electrical fixtures from his store, which adjoined the witness' store, to the lot or yard at the rear of the premises; that he had not seen the defendant cleaning any motors. On cross-examination, the witness admitted he had stated to the defendant's wife subsequent to the fire that he would do whatever possible "to give the defendant 40 years."

Chester Hill testified that he was 20 years of age; that he knew the defendant and the deceased; that on or about July 28, 1925, the defendant said to him that "he wished the building was burned down in front"; that the witness "in a joking way" stated that he would burn it down for $300, to which the defendant replied, "Well, we will fix it up"; that he had a conversation with the defendant during the afternoon preceding the fire, at which time the defendant stated "he had the gasoline, and that evening would be all right"; that the witness thereupon agreed to burn the building that evening; that he then went to see the deceased, whom he had previously informed of the conversation with the defendant, and the deceased said, "I will be down this evening"; that he (the witness) had on other occasions told the deceased he did not intend to fire the building, and that he was "through with it," whereupon the deceased said, "let me have the job, and I will do it"; that the deceased on several occasions had inquired as to the defendant's readiness; that on the evening of the fire the defendant told the witness the gasoline "was up in the front of the building"—that part of the building under lease to the witness Brown—and suggested that the storeroom to the rear of the butcher shop be fired; that the defendant stated he wanted the property destroyed because "he had a chance to sell his property, but Mr. Brown kept holding out for too much money for the lease"; that the defendant had also referred to the insurance on the premises. On cross-examination, the witness stated that he never intended burning the property or having anything to do therewith; that the defendant had previously said, "I will get the gasoline, and you throw it around, and then light the match"; that he told deceased to make arrangements with the defendant; that during the progress of the fire he and another boy went to the defendant's residence and awakened him; that they then drove in the defendant's car to the scene of the conflagration; that, as far as he knew, the defendant was unaware of any of the conversations had with the deceased; and that the defendant had not authorized him to talk with or to employ the deceased for any purpose.

Floyd G. Austin testified that he drove the witness Hill to the deceased's place of employment on the day preceding the fire, and that said Hill went in to see the deceased.

Ralph Barnes testified that he was employed by the defendant as a plumber's helper; that he slept in the rear of the burned premises, and was awakened by the explosion and some one knocking on his door; that he accompanied the witness Hill to the defendant's home to inform the defendant of the fire; and that, with the defendant and his wife, they returned to the scene of said fire.

Bronson Skala testified that he was a brother of the deceased; that the deceased awakened him about 3 o'clock on the morning of August 4, 1925, by his "hollering"; that he opened the door of his home, and saw the deceased horribly burned; that "his hair was standing straight up, and his shirt and his underwear was burned off to his waist, and his skin was laying over. It was burned"; that he secured a doctor, and had the deceased removed to the White Memorial Hospital, where he died about half past 2 o'clock in the afternoon; that a key shown to him was found in a pocket of the deceased's trousers. On cross-examination, he stated that the deceased said "he got burned in the fire, and he saw two men run out of the place. He ran in * * * was an explosion. He got blew out into the street."

James R. Garrett testified that he operated a restaurant two doors from the witness Brown's store; that he heard an explosion and a scream; that he saw the defendant on the afternoon preceding the fire carrying what appeared to be electrical fixtures from his store to a shed on the rear of the premises.

Ira L. Curtis and William H. Bond, conductor and motorman, respectively, testified substantially that their street car passed the defendant's premises about 3 o'clock on the morning of August 4, 1925; that they saw a bareheaded man about six feet in height standing there, and that his hair was combed pompadour style, and was streaked with gray; that the defendant's hair was more combed back and more gray when they saw him in the sheriff's office prior to the trial than it was at the time of the trial.

William Heldoorn testified that he was a captain in the fire department, and that he attended the fire of the defendant's premises and noticed the odor of gasoline; that he saw some "big 5-gallon cans" in the storeroom back of the butcher shop.

P. C. Miller testified that he was district county fire warden; that he investigated the storeroom to the rear of the butcher shop as soon as the fire had been sufficiently wet down to permit of entry, and found five 5-gallon cans therein, two of which contained some gasoline; that he also found gasoline soaked rags and papers near the door leading from the storeroom to the butcher shop; that he recognized a can shown him with a faucet or spigot on it as one of the cans he had seen in the storeroom.

G. L. Walker, county chemist, testified that he had examined the contents of a can shown him, and found that it contained a low grade of gasoline.

R. E. Rankin, deputy sheriff, testified that a key shown to him had been given to him by the deceased's brother subsequent to the time of the fire, and that it opened a lock taken from the door leading to the defendant's electrical shop; that on the evening of August 4, 1925, in the sheriff's office, the defendant freely and voluntarily stated, in response to interrogatories, that he had purchased gasoline the preceding day, and had carried it away in cans; that he had used it for cleaning old motors and in his business; that he knew the deceased, and that the latter had worked for him at one time; that he had an opportunity to sell the destroyed premises for $20,000, but had unsuccessfully attempted to purchase the witness Brown's lease.

Two policies of insurance covering the destroyed premises, and aggregating $4,300, were introduced in evidence by the people.

The defense produced several witnesses who testified that the witness Hill's general reputation for truth, honesty, and integrity was bad. These witnesses also testified that they had seen the defendant use gasoline in his business for cleaning plumbing and electrical fixtures.

R. E. Williams testified that the defendant had authorized him, in March, 1925, to sell the property for $15,000; that the defendant, at the time, said he could buy the witness Brown's lease in the event a sale was arranged; that he was unable to sell the property; that he thought it to be worth about $8,000.

Mrs. Deamie Ferlin, wife of the defendant, testified that he was 44 years of age, and six feet four inches in height; that on the evening of August 3, 1925, the defendant took his family for an automobile ride, from which they returned home about 10:30; that the defendant slept in the dining room that night with one of their sons; that she awakened the defendant between 3 and 3:30 o'clock in the morning, when the witnesses Hill and Barnes came to their home, and that the four of them drove to the scene of the fire; that the witness Brown told her not to testify in the defendant's favor, and that he had some one who would testify to having seen the defendant at or near the property on the morning of the fire; that the defendant had never combed his hair in a "pompadour" style, and that it was the same color as at the time of the fire.

By stipulation of counsel, the testimony of Dr. Stewart, given at the preliminary examination, was admitted on behalf of the defendant in lieu of recalling the witness. This testimony was to the effect that the deceased had stated to the witness that he was driving past the witness Brown's store when he saw the fire and two men running therefrom, whereupon he ran into the store, and an explosion occurred which blew him into the street. Further outline of the evidence is unnecessary for our consideration of the appeals herein.

[1] Arson is defined as "the willful and malicious burning of a building, with intent to destroy it." Section 447, Pen. Code. To justify a conviction on a charge of arson, it is not necessary that a person other than the accused should have had ownership in the building fired; it is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying, such building, or any part thereof. Section 452, Pen. Code. The crime of burning insured property is defined and denounced in section 548 of the Penal Code, which declares in part:

> "Every person who willfully burns * * * any property which at the time is insured against loss or damage by fire * * * with intent to defraud or prejudice the insurer, whether the same be the property or in the possession of such person or any other person, is punishable by imprisonment in the state prison for not less than one year and not more than ten years."

[2] We find no merit in the defendant's contention that the evidence adduced upon the trial is insufficient to warrant his conviction upon counts 1 and 3 of the information. There was, in our opinion, ample testimony from which the jury might properly conclude that the defendant had, either individually or with the assistance of another, willfully and maliciously ignited the property described in the information with the intent to destroy the same. Whether the conflagration resulted from the direct efforts of the defendant or was the outgrowth of the conduct of another acting for and on behalf of the defendant was a question of fact to be determined by the jury. On this appeal, however, the conclusion of the jury on that point is of little moment, for in either event the defendant is unquestionably guilty, as a principal, of the crime of arson. People v. Creeks, 170 Cal. 368, 149 P. 821; People v. Raber, 168 Cal. 316, 143 P. 317.

[3] Nor do we think the verdict finding the defendant guilty of burning insured property in violation of section 548 of the Penal Code is vulnerable to an objection going to the sufficiency of the evidence to sustain the same. When the evidence addressed to the arson count is considered with that showing the destroyed premises to have been heavily insured at the time of the fire, there can be no question as to the propriety of the verdict finding the defendant guilty as charged in the third count of the information.

[4, 5] In advance of considering the numerous particular assignments of error urged by the defendant, we will turn our attention to the appeal of the people from the order granting to the defendant, upon motion therefor, a new trial on the charge of murder contained in the second count of the information. It is definitely settled that an appellate court will not disturb an order granting a new trial, unless the record discloses a manifest abuse of the legal discretion which the trial court is required to exercise in the disposition of such a motion. People v. Canfield, 173 Cal. 309, 312, 159 P. 1046; People v. Knutte, 111 Cal. 453, 455, 44 P. 166; People v. Flood, 102 Cal. 330, 332, 36 P. 663. In the instant case, the motion for new trial was based, in part, upon subdivision 6 of section 1181 of the Penal Code, which authorizes the court to grant a new trial when the verdict is contrary to law or evidence. It appears from the record herein that the court below granted the defendant's motion upon the ground that under no theory of the evidence had the crime of murder been shown or established as against the defendant. Section 189 of the Penal Code provides in part that:

> "All murder which is * * * committed in the perpetration or attempt to perpetrate arson * * * is murder of the first degree. * * *"

We turn to section 187 of the Penal Code for our definition of murder, and find that murder is the unlawful killing of a human being with malice aforethought. It would not be seriously contended that one accidentally killing himself while engaged in the commission of a felony was guilty of murder. If the defendant herein is guilty of murder because of the accidental killing of his coconspirator, then it must follow that Skala was also guilty of murder, and, if he had recovered from his burns, that he would have been guilty of an attempt to commit murder.

In the case of People v. Garippo, 292 Ill. 293, 127 N. E. 75, four conspirators committed the crime of robbery, and, while carrying out the conspiracy to commit the crime, one of the conspirators was shot, and the defendants—coconspirators—were prosecuted upon the theory that, the killing having taken place during the commission of the crime of robbery, each conspirator was responsible for the death of his coconspirator, although not participating therein. The trial court instructed the jury, in effect, that the killing was chargeable to the conspirators because it occurred during the carrying out of the conspiracy, but the appellate court said:

> "Without doubt there was a common design among these men [defendants] to hold up the drunken man, but this design had nothing whatever to do with the shooting of Scalzitti, and from the evidence the conclusion cannot be reasonably drawn that the plaintiffs in error had a common design of shooting one of their own number, such as would have been necessary in order to charge them with the murder or manslaughter of Scalzitti."

It cannot be said from the record in the instant case that defendant and deceased had a common design that deceased should accidentally kill himself. Such an event was not in furtherance of the conspiracy, but entirely opposed to it.

Other cases in point are: People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Sobieskoda, 235 N. Y. 411, 139 N. E. 558; Butler v. People, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423; Commonwealth v. Moore (Ky.) 88 S. W. 1085, 2 L. R. A. (N. S.) 719; State v. Oxendine et al., 187 N. C. 658, 122 S. E. 568; Commonwealth v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

The Attorney General meets the rule of the foregoing cases by contending that the dying declaration of Skala, introduced in evidence, would justify the jury in concluding that Skala was a stranger to the conspiracy, an innocent outsider, who accidentally met his death as a result of the conspiracy of the defendant and Hill, and that, under such a view of facts, the charge of murder was sustainable. This theory was not the theory of the case in the trial court, and the evidence in support of this view is so slight and so opposed to all the other evidence in the record that, if the jury reached its verdict upon such a finding, the discretion of the trial court was properly exercised in granting a new trial upon the ground that the verdict was against the great weight of the evidence.

It follows that the verdict of the jury finding the defendant guilty under the second count of the indictment was against law and against the evidence, and that the motion of the defendant for a new trial upon that count was properly granted.

[6] We will now direct our attention to the numerous particular assignments of error urged by the defendant in support of a reversal. Upon voir dire examination, the defendant attempted to ascertain of each juror whether he was a member of or affiliated with a named secret organization. Objection was promptly made by the prosecution, which the court sustained. The defendant thereupon explained the purpose of this line of inquiry as being necessary to his intelligent exercise of peremptory challenges. It is now well settled in this state that a juror may not be examined on voir dire solely for the purpose of laying the foundation for the exercise of a peremptory challenge. People v. Edwards, 163 Cal. 752, 754, 127 P. 58. We find no error in the lower court's ruling.

[7] Nor do we think that the trial court erred in admitting, over objection by the defendant, a photograph of the deceased taken after his death. The picture was identified by the deceased's father and by two doctors, who testified that it correctly showed the extent, degree, and character of the burns which caused the death of the deceased. The case of People v. Rogers, 163 Cal. 476, 480, 126 P. 143, disposes of the defendant's contention.

[8] We perceive no error in the court's ruling striking out the answer of the witness Brown to the effect that he had rebuilt on the property subsequent to the fire. It will be recalled that Brown was lessee under the defendant. The stricken testimony was attempted to be elicited, so the defendant asserts, to rebut the prosecution's claim that the premises were destroyed in order to effectively secure the removal of the lessee. We cannot appreciate the relevancy or materiality of this evidence tending to show reconstruction of the premises subsequent to the fire. The assignment is without merit.

[9] It is next urged by the defendant that the trial court erred in admitting over his objection certain conversations which the witness Hill claimed to have had with the deceased. These conversations occurred in the absence of the defendant and, apparently, without his knowledge, and concerned purported negotiations with the deceased for his burning of the defendant's premises. The defendant interposed a two-fold objection to the introduction in evidence of these conversations; it being insisted that there had been no antecedent and independent proof tending to establish a conspiracy between the defendant and the witness Hill, and that such evidence was not admissible for the purpose of establishing one. The testimony was also objected to as being hearsay. It is our opinion, as already indicated, that the jury, upon an examination of the entire evidence in the case, would be warranted in concluding that the plan for the felonious burning of the premises had originated in the mind of the defendant, and had been carried out in con-

cert with another. In the case of People v. Matthew, 68 Cal. App. 95, 107, 228 P. 417, 421, it is declared:

> "It unquestionably is the general rule that proof of the existence of the conspiracy ordinarily should precede proof of the acts or declarations of a co-conspirator made pending the conspiracy and in aid and furtherance of the common design. But the rule in this respect is not absolute and unyielding; and sometimes, for the sake of convenience, evidence of the acts and declarations of an alleged conspirator is admitted before sufficient proof of the conspiracy is given. Thus where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish prima facie, in the opinion of the court, the fact of conspiracy. People v. Fehrenbach, 102 Cal. 394, 36 P. 678; People v. Sing, 42 Cal. App. 397, 183 P. 865."

[10-13] It was not error, therefore, to permit the introduction in evidence of the conversations here complained of in advance of proof by independent evidence of the conspiracy between the defendant and Hill. The order in which the evidence in a case may be admitted is a matter within the sound discretion of the trial court, and we see no abuse of such discretion. People v. Rodley, 131 Cal. 240, 253, 63 P. 351; People v. Fehrenbach (102 Cal. 394, 36 P. 678) supra. Nor do we find any merit in the defendant's contention that the conversations between Hill and the deceased looking to the destruction of the premises were hearsay, and therefore inadmissible. The rule is well established in this state that the acts and declarations of a conspirator, in furtherance of the common design, are binding upon, and admissible in evidence against, a coconspirator. People v. Kauffman, 152 Cal. 331, 334, [92 P. 861]; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; People v. MacPhee, 26 Cal. App. 218, 146 P. 522. In view of this settled rule, it may properly be said that the acts and declarations of the coconspirator Hill, in furtherance of the felonious enterprise, were, in contemplation of law, the acts and declarations of the defendant. People v. Creeks, supra; People v. MacPhee, supra. That these conversations with the deceased were had without the defendant's knowledge does not suggest any variation in the above rule. The apparent purpose of the conversations was the acquisition of an agent through whom the felonious scheme might be consummated. But, aside from what has been said, we do not believe that the defendant was or could have been prejudicially affected by the introduction in evidence of these conversations, even if it be assumed that their admission constituted error upon the part of the trial court. The record discloses that the lower court instructed the jury, at the request of the defendant, to disregard the evidence of any conversations between the witness Hill and the deceased, unless said conversations had taken place in the presence of the defendant. It will be presumed that the jury exercised its jurisdiction soundly, and that they heeded the instructions of the court. People v. Durrant, 116 Cal. 179, 207, 48 P. 75.

We find no error in the several rulings of the court below sustaining objections to certain questions propounded by the defendant during the cross-examination of the witness Hill. The evidence sought to be elicited by the defendant was either irrelevant or not proper cross-examination.

[14, 15] The witness Evans, called by the prosecution, was permitted to testify, without objection by the defendant, that he had seen the deceased walking with the defendant's minor stepson on the morning preceding the fire. It is now urged that the admission of this evidence constituted error. In the absence of a seasonable objection in the court below, the defendant should not now be permitted to assign as error the admission of this testimony. Wood v. Moulton, 146 Cal. 317, 322, 80 P. 92. It is true that the defendant, on cross-examination of the witness, moved to strike from the record *all* of the witness' testimony given on direct examination. This motion was properly denied, and may not serve to relieve the defendant of his failure to seasonably object to the admission of the evidence complained of under this assignment. It cannot be said that "all" of the witness' testimony on direct examination was incompetent, irrelevant, and immaterial, as urged in said motion.

We have examined in detail some fourteen additional assignments of error touching various other rulings of the lower court, and have concluded that an extended discussion thereof would unduly prolong this opinion. Our study of these several assignments of error has disclosed nothing approximating prejudicial error.

[16-18] Complaint is made by the defendant that the lower court erred in refusing to charge the jury, as matter of law, that the witness Hill was an accomplice. It is urged that this question, in view of the evidence in the case, was not a proper one to be submitted to the jury for determination. We are of the opinion that the defendant's contention is meritorious, for the evidence in the case unquestionably points to Hill as an accomplice. Moreover, the conduct of the prosecuting officer throughout the trial strongly indicates that Hill was so regarded. The question as to whether or not the witness Hill was an accomplice, under the evidence, was not seriously disputed upon the trial of the cause. It was the duty of the trial court, therefore, to instruct the jury, as matter of law, that Hill was an accomplice of the defendant. People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L. R. A. (N. S.) 704; People v. Howell, 69

Cal. App. 239, 242, 230 P. 991. However, this error cannot be said to have prejudicially affected the defendant. In People v. McDermott, 75 Cal. App. 718, 243 P. 485, it is declared that:

> "The jury should have been instructed that Sova must be regarded as an accomplice. That question should not have been left to it to determine. However, it must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous instruction given in any way prejudiced any right of the appellant."

Practically an identical situation is presented in the instant case, for the court below in several instructions correctly stated the definition of an accomplice, and likewise informed the jury that the testimony of an accomplice must be corroborated, and that the corroborating evidence must not only tend to show the commission of the offenses charged in the information, but must also tend to connect the defendant therewith.

[19] The defendant's alibi instruction was properly refused, for it erroneously intimated that, if the evidence addressed to the alibi gave rise to a reasonable doubt as to the defendant's presence at the scene of the crime when perpetrated, then a reasonable doubt arose as to his guilt, and he would be entitled to a verdict of acquittal. In our opinion, absolute proof of the defendant's absence from the scene of the crimes would not, under the circumstances of this case, necessarily preclude his conviction thereof. Citation of authority is unnecessary to support this proposition.

[20] As a final contention, the defendant urges that the court erred in refusing to instruct the jury to the effect that imprisonment in a state prison suspends all civil rights, including the right to prosecute and defend all civil actions for damages. The obvious purpose of this instruction was to cause the jury to consider the effect of a conviction upon the defendant's defense of a civil suit for damages theretofore instituted by the lessee Brown. We cannot perceive the pertinency of such civil litigation to the offenses charged in the information. The instruction had no bearing upon the issues raised herein, and was therefore properly denied.

[21] At the commencement of this opinion, we stated that the trial court in its judgment under count 3 charging the burning of insured property, directed that the sentence thereunder run concurrently with the sentence imposed under count 1, charging arson. This direction is assigned as error by the people; it being their contention that these sentences must run consecutively. Section 669 of the Penal Code, at the time the judgment was pronounced, provided that:

> "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment as the case may be."

In the instant case, the defendant was convicted of the offenses charged in counts 1 and 3 before sentence was "pronounced upon him for either." It necessarily follows, in view of the mandatory provisions of section 669 of the Penal Code, that the sentences under counts 1 and 3 must operate consecutively. We have held in Ex parte Kirby, 76 Cal. 514, 18 P. 655, that said Code section "is a mandate to the warden who holds the prisoner in custody, and by it he is informed that the imprisonment on the second conviction must commence at the termination of the first term of imprisonment." The error of the court below is not, therefore, such as to vitiate or alter the effect of the judgment under count 3. However, to avoid any uncertainty in this respect, the judgment under count 3 of the information is amended by striking therefrom the sentence reading: "To run concurrently with sentence in case No. 25876, Count 1." The sentences under counts 1 and 3 will and must operate consecutively, even in the absence of a direction therein to that effect. Ex parte Kirby, supra.

[22, 23] In conclusion, it may be said that the lower court also erred in sentencing the defendant to the state prison for 25 years for arson in the second degree, and 10 years for the offense of burning insured property. These sentences were improper, and without the authority of the trial court to pronounce. The indeterminate sentence law (section 1168, Pen. Code) has divested the trial court of any discretion in fixing the exact term of imprisonment, and has vested such discretion in the board of prison directors within the limits prescribed by the Penal Code. People v. Gonzales, 36 Cal. App. 782, 173 P. 407. This error of the lower court does not, however, nullify the judgments entered under counts 1 and 3. People v. Rossi, 37 Cal. App. 778, 174 P. 916. The judgments pronounced under said two counts are, and each is, hereby modified by striking therefrom that part thereof in which a definite period of imprisonment is provided. People v. Rossi, supra.

The judgments pronounced upon the verdicts finding the defendant guilty of arson in the second degree and of burning insured property are, and each is, hereby affirmed as modified herein. The order denying the defendant's motion for a new trial under counts

1 and 3 of the information is also affirmed. The order granting a new trial upon the charge of murder, contained in count 2 of the information, is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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203 Cal. 604

MICHENER v. HUTTON et al. (L. A. 8281.)

Supreme Court of California. March 13, 1928.

1. Negligence 🔑121(2)—Accident ordinarily not happening if proper care is used affords reasonable evidence without explanation that accident arose from want of proper care; "res ipsa loquitur."

Where accident resulting from thing shown to be under management of defendant or his servants is such as in ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence in absence of explanation by defendant that accident arose from want of proper care; "res ipsa loquitur" maxim merely meaning "The thing, or affair, speaks for itself."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Ipsa Loquitur.]

2. Negligence 🔑121(1), 134(1)—One seeking damages for injuries must establish by preponderance of evidence that negligence has occasioned him loss.

One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that latter's negligence has occasioned him loss.

3. Negligence 🔑121(2)—Defendant has burden of proceeding on showing facts authorizing application of res ipsa loquitur principle.

Where facts are such as to give rise to an inference of negligence from inherent nature and character of act causing injury giving application to the principle of res ipsa loquitur, burden of proceeding is shifted to defendant, and, if he woud escape an adverse finding, he must adduce evidence to meet plaintiff's prima facie case.

4. Negligence 🔑136(6)—Whether defendant has successfully rebutted prima facie case established under doctrine of res ipsa loquitur is for jury.

Where mere proof of happening of accident and circumstances surrounding it give rise to an inference of negligence authorizing application of doctrine of res ipsa loquitur, it is for jury or court sitting without jury to determine from all evidence whether defendant has successfully met and rebutted plaintiff's prima facie case thereby made out.

5. Negligence 🔑121(3)—Res ipsa loquitur held applicable to injury to carpenter from fall of vent pipe installed by plumber without proper packing and caulking.

Where injury to carpenter constructing residence building resulted from fall of vent pipe installed by plumber, who failed to properly pack and caulk the topmost joint at time of installation, doctrine of res ipsa loquitur was peculiarly applicable.

6. Negligence 🔑121(3)—Evidence held to sustain finding that plumber had not rebutted inference of negligence as to injury received by carpenter from fall of vent pipe.

In action for injuries received by plaintiff while engaged as a carpenter resulting from fall of vent pipe after its installation by plumbing contractor, evidence *held* to sustain finding that defendants had failed to rebut inference of negligence created by application of doctrine of res ipsa loquitur.

7. Damages 🔑96—New trial 🔑74—Damages for personal injury is in discretion of jury and trial judge, on motion for new trial.

Amount of damages in a personal injury case is committed, first, to the sound discretion of jury, and next to the discretion of trial judge, on a motion for new trial.

In Bank.

Appeal from Superior Court, Los Angeles County; Harold Lounderback, Judge.

Action by W. H. Michener against C. R. Hutton and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Superseding opinion in 258 P. 707.

James, Pace & Smith and Paul E. Younkin, all of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment entered upon the verdict of a jury awarding damages to the plaintiff in the sum of $2,000 for personal injuries, alleged to have been incurred on September 28, 1922, by reason of the negligence of the defendants. At the time of his injury the plaintiff was engaged as a carpenter in the construction of a residence building in the city of Los Angeles. The defendant Hutton was the plumbing contractor for said building, and the defendant Goekler was his employee. It appears that Goekler on the day preceding the accident had installed a vent pipe extending from the second floor of the building to and through the roof. This pipe was run up in sections, each one of which was bell-shaped on the upper end so that the section next above it rested in the bell-shaped top of the one next below. The testimony discloses that it is usual to pack the joints of such a vertical pipe with oakum or hemp, which is tamped into position and molten lead poured thereon, the latter serving to harden and seal the joint. Among other things, Goekler testified, and without contradiction, that he had properly packed and caulked the several joints of this pipe with the exception of the topmost joint which, though packed, had not been caulked with lead. At 4:30 p. m. on the day preceding the accident Goekler left the job, intending to return a day or two thereafter in order to, among other things, seal this topmost joint with lead. The following day, however, and while said joint remained unleaded, the plaintiff while working on the ground floor of the building was injured as a result of being struck on the shoulder by the top length of said vent pipe which had, in some manner, fallen from the floor above. Being unable, from the very nature of the accident, to account for the cause of the fall of said length of pipe, the plaintiff summoned to his aid the doctrine of res ipsa loquitur, and upon request the trial court's charge to the jury contained two instructions correctly informing the jurors upon said doctrine. The defendants upon this appeal question the propriety, rather than the correctness, of these two instructions, contending that this is not a proper case for the application of the doctrine of res ipsa loquitur. It is further urged that without the aid of said principle the evidence is insufficient to sustain the verdict. Respondent readily concedes that the evidence is insufficient to support the verdict except through the medium of the res ipsa loquitur doctrine, but stoutly maintains that said doctrine is peculiarly pertinent to the facts of the instant case. In view of respondent's concession, it is primarily essential that we determine the propriety of the lower court's action in instructing the jury as it did.

[1] It is elementary that the maxim, "Res ipsa loquitur," translated means simply, "The thing, or affair, speaks for itself." The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.) p. 132, viz.:

> "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care." O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674; Valente v. Sierra Ry. Co., 151 Cal. 534, 539, 91 P. 481; McCurrie v. S. P. Co., 122 Cal. 558, 561, 55 P. 324; Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Dixon v. Pluns, 98 Cal. 384, 388, 33 P. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180.

Of course, to justify the application of this doctrine in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. Examination of the authorities discloses that said rule has found application in many actions instituted against carriers of passengers for injuries incurred from the operation of a car. McCurrie v. S. P. Co., supra; Osgood v. L. A. Traction Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171; Housel v. Pac. Elec. Ry. Co., 167 Cal. 245, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. It has been called into play in actions for injuries sustained by the running away of a horse. Breidenbach v. McCormick Co., 20 Cal. App. 184, 128 P. 423, and authorities there cited. The same is true of actions founded upon the explosion of a boiler (Posey v. Scoville [C. C.] 10 F. 140) or of a powder mill (Judson v. Giant Powder Co., supra). The doctrine has also found frequent application in actions for damages for injuries incurred by reason of being struck by falling objects. In Dixon v. Pluns, supra, the dropping of a mechanic's tool upon the head of a passerby was held sufficient to warrant the application of said principle. In the case of Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530, the falling of a wall of a building was held to give rise to an inference of negligence. And negligence was inferred from the falling of a box of goods in Lyons v. Rosenthal, 11 Hun (N. Y.) 46. The case of Kearney v. London & B. Ry. Co., 6 Q. B. (L. R.) 759, 762, applied the doctrine where the plaintiff had been injured by the falling of a brick from the defendant's bridge. In Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403, the plaintiff's injury was inflicted by the falling of a bar of iron from the defendant's elevated railway. It was held that the maxim was applicable. The case of Sheridan v. Foley, 58 N. J. Law, 230, 33 A. 484, presented facts very similar to those here developed, it appearing that the plaintiff therein while employed in laying a sewer in a building was injured by the falling of a brick, either from a scaffold on which the defendant's employees were engaged in doing the mason work upon said building or from a hod of one of defendant's employees. It is there declared:

> "While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim, 'res ipsa loquitur,' is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care. * * * The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others, who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the ab-

sence of explanation by the defendant, raises a presumption of negligence."

Of course, this latter case is slightly distinguishable from the instant cause in that the agency there inflicting injury was in the immediate custody of the defendant's employees at the time it fell upon the plaintiff. However, we do not understand that the management contemplated by the rule above stated must be shown to have existed at the very moment of the accident. Breidenbach v. McCormick Co., supra. In our case the pipe, the top length of which fell upon respondent, was unquestionably under the management of the appellants at the time of the accident for, as narrated herein, Goekler had yet to caulk with lead the top joint thereof. That the maxim may be applied even when the thing causing injury was not in the immediate custody or management of the defendant or his servants is illustrated in Travers v. Murray, 87 App. Div. 552, 84 N. Y. S. 558, where a chimney had fallen upon and injured the plaintiff therein. For other cases applying said maxim to actions predicated upon injuries inflicted by falling objects see 20 R. C. L. 191, § 158, and note 113 Am. St. Rep. 986, 1010.

[2-4] One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of res ipsa loquitur, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's prima facie case. As stated in Valente v. Sierra Ry. Co., supra, the inference of negligence which arises under some circumstances from the nature of the accident "is simply evidence in the case, having no greater or different effect than the evidence of witnesses showing negligence would have, and in no degree changes the rule as to the burden of proof, in the strict sense of that phrase—viz., the burden of producing a preponderance of evidence. That burden does not shift from side to side in the trial of a case, but constantly remains with the party having the affirmative of the issue, who, in an action for damages for negligence, is the plaintiff." In Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 345, 73 P. 164, 166, it is declared:

> "The negligence could have been established by direct proof of some act which, in its nature, was negligent, or it could have been established, as it was established, prima facie, by the mere proof of the happening of the accident and the circumstances surrounding it, from which the presumption of negligence arose. This presumption is itself evidence in the case, and it does not change the rule as to the burden of proof. It is merely the evidence by which the plaintiffs undertook to establish the fact which they were bound to prove. It still remained the law that, upon the whole evidence, the plaintiffs must have the preponderance in order to succeed."

This phase of the subject is well treated in Gleeson v. Virginia Midland R. R. Co., 140 U. S. 435, 444, 11 S. Ct. 859, 862 (35 L. Ed. 458), wherein it is held:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

It is apparent from these latter authorities that it is for the jury, or the court when sitting without a jury, to determine from all the evidence in the case whether the defendant has successfully met and rebutted the prima facie case made out by the plaintiff in an action wherein the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence. That the inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof, has been announced in numerous cases. The opinion in Maryland Cas. Co. v. Matson Navig. Co., 177 Cal. 610, 613, 171 P. 427, 429, is suggestive of such a conclusion. It is there stated:

> "But conceding, without determining, that this is a proper case for the application of this principle, and that the plaintiff would have had a right to rely upon it, as affording a prima facie showing of negligence, still the defendants would not be prevented from avoiding its application and effect by affirmative proof that it had been in no wise negligent in docking its ship; and the trial court, sitting as a jury and hearing these proofs, would be entitled to find, as it did find, that any inference which might have arisen through the application in the plaintiff's favor of the doctrine of res ipsa loquitur, had been overcome by the defendant's affirmative showing of due care."

In the case of Housel v. Pac. Elec. Ry. Co., supra, it is declared that:

"The presumption that the injury was caused by the negligence of the carrier, which is raised upon the proof by the plaintiff that he was injured while being carried as a passenger, is itself a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence in reference to the negligence, necessitates a verdict in favor of the plaintiff."

After stating that the mere fall of a chimney was sufficient to give rise to an inference of negligence, the opinion in Travers v. Murray, supra, holds that such inference "alone is enough to sustain the verdict, even in face of the attempted explanation on the part of the defendant." In Volkmar v. Manhattan Ry. Co., 134 N. Y. 418, 422, 31 N. E. 870, 871 (30 Am. St. Rep. 678), the plaintiff had been injured by the fall of an iron bolt from defendant's elevated railroad. The defendant, in an attempt to rebut the prima facie case of negligence established by proof of such fact, adduced evidence tending to show that an employee had prior to the accident faithfully discharged his duty of examining and tightening all bolts. In its decision the court declared:

"But, even if this evidence was sufficient to remove the presumption, as held by the general term, the credibility of the witness would still be involved and be a question for the jury. This witness was the defendant's track walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was therefore a person interested, and possibly actuated by a motive to shield himself from blame."

[5, 6] From what has been said herein we conclude that the maxim, "Res ipsa loquitur,' is peculiarly applicable to the instant cause and that the trial court properly gave to the jury the two instructions complained of. In view of the authorities, the implied finding of the jury that the appellants had failed in their attempt to rebut the inference of negligence created by the application of said maxim cannot be said to be without support in the evidence. And this despite the uncontradicted testimony of the appellant Goekler tending to show that the top length of pipe as placed and secured by him could not have fallen upon the respondent. For, as stated in Quock Ting v. U. S., 140 U. S. 417, 420, 11 S. Ct. 733, 734 (35 L. Ed. 501):

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

[7] We find no merit in the appellants' further contention that the damages awarded to the respondent were excessive and "superinduced by erroneous instructions of law." A motion for a new trial was made upon several grounds, among them being "excessive damages, appearing to have been given under the influence of passion or prejudice." This motion was denied by the lower court. It is well settled that the amount of damages in a personal injury case is committed, first, to the sound discretion of the jury, and next to the discretion of the trial judge upon a motion for new trial. Reneau v. Hirsch (Cal. App.) 262 P. 1100. An examination of the record, including the evidence, fails to disclose anything that would suggest an abuse of such discretion. Moreover, the instructions objected to under this assignment are not vulnerable to the attack made upon them. Under no interpretation could they have been construed by the jury as warranting an award of prospective damages for probable future suffering.

For the foregoing reasons, the judgment appealed from is affirmed.

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203 Cal. 569

In re MORGAN'S ESTATE.

TINSLEY v. CASEY et al.

(L. A. 9972.)

Supreme Court of California. March 8, 1928.

1. Appeal and error 🔑110, 782—Appeal from order denying motion for new trial does not lie (Code Civ. Proc. § 939).

Under Code Civ. Proc. § 939, appeal from order denying motion for new trial does not lie but will be dismissed.

2. Executors and administrators 🔑314(12)—Administrator, not being affected by decree of distribution, may not appeal from such decree.

As between parties interested in estate, administrators or executors are not affected by decree of distribution distributing to either or any of said parties, and therefore administrator will not be heard on appeal from such decree, but his appeal will be dismissed.

3. Marriage 🔑40(4)—Presumption that man and woman deporting themselves as husband and wife are married may not be indulged against statute prohibiting miscegenation (Code Civ. Proc. § 1963, subd. 30).

Presumption under Code Civ. Proc. § 1963, subd. 30, that man and woman deporting themselves as husband and wife have entered into lawful contract of marriage may not be indulged in case of white person and mulatto against express statutory inhibition against marriages between white persons and mulattoes, since no presumption can be indulged that this law was violated.

4. Evidence ⚷80(1)—In absence of contrary evidence, court must presume that laws of other states are and were same as laws of forum.

In absence of any evidence to contrary, court must presume that law of state of Mississippi and Louisiana are and were same as laws of forum.

5. Evidence ⚷285—In proceeding for distribution of intestate's estate, decedent's declarations held admissible to prove that she had no relatives (Code Civ. Proc. § 1870, subd. 4).

In proceeding for distribution of intestate decedent's estate in which claimants sought to prove relationship to decedent, declarations of decedent made during her lifetime that she had no relatives *held* admissible in evidence to prove that fact, under Code Civ. Proc. § 1870, subd. 4.

6. Descent and distribution ⚷71(7)—Probate court's finding as to heirship, on conflicting evidence, cannot be disturbed.

Finding of probate court on substantial conflict in evidence on question of heirship because of relationship to intestate decedent cannot be disturbed by Supreme Court.

7. Husband and wife ⚷249—Term "separate property" applies only to property owned by married person in his or her own right during marriage.

Strictly speaking, term "separate property" applies only to property owned by married person in his or her own right during marriage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Separate Property.]

8. Husband and wife ⚷273(1)—Surviving spouse succeeds to community property as his property without its being characterized as either separate or community property.

After dissolution of marriage by death, survivor does not hold property which was formerly community property as community property, but succeeds to it as his or her property without its being characterized as either separate or community property.

9. Husband and wife ⚷274(1)—Decree denying right of daughter, by former marriage, of intestate's predeceased husband to share in distribution without finding whether property was part of community estate must be reversed (Civ. Code, § 1386, subd. 8).

Before probate court could render any decree of distribution either granting or denying petition of daughter by former marriage of intestate decedent's predeceased husband, and who under Civ. Code, § 1386, subd. 8, would be entitled to share in distribution of community property of decedent and such husband, it must determine whether any of decedent's property was at death of petitioner's father the community property of decedent and such father, and, in absence of such finding, the decree, in so far as it denies petition, must be reversed.

Department 1.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Proceeding for the distribution of the estate of Annie Morgan, deceased, on petition of J. H. Shackelford, administrator, on behalf of Susan O. Casey, and opposing petition of M. C. Tinsley. From a decree directing escheat and distribution of the estate, M. C. Tinsley and Susan O. Casey separately appeal. Affirmed in part, and reversed and remanded in part.

E. C. Jennings and Geo. W. Bush, both of Los Angeles, for appellants.

Hugh E. Macbeth and Charles S. Darden, both of Los Angeles, for respondent.

CURTIS, J. Annie Morgan died intestate, leaving an estate consisting of real and personal property situated in the county of Los Angeles and valued at the sum of $5,000 or thereabouts. The appellant Susan O. Casey, claiming to be the half-sister of said deceased and her next of kin, waived her right to be appointed administratrix of her estate, and upon her written renunciation and request one J. H. Shackelford was appointed administrator of her estate. He qualified as such administrator, and after proceedings duly had therein he in due time filed his final account and petition of distribution. In the latter instrument he asked that the whole of said estate be distributed to the said Susan O. Casey, as the sole heir at law of said deceased. After the filing of said petition for distribution and before the hearing thereon the appellant, M. C. Tinsley, filed a second petition for distribution of the estate of said deceased. In her petition the said M. C. Tinsley denied that said Susan O. Casey was the half-sister of the said Annie Morgan, and alleged that the real and personal property owned by said deceased at the time of her death was the community property of the said Annie Morgan and her deceased husband, Ephrian Morgan, who had predeceased the said Annie Morgan; that said M. C. Tinsley was the daughter of said Ephrian Morgan by a former marriage; that Ephrian Morgan died, leaving as his sole heirs at law the said Annie Morgan, his surviving wife, and petitioner, M. C. Tinsley, his daughter; that said Annie Morgan received said property as community property from her deceased spouse, the said Ephrian Morgan; and that after the receipt of said property as aforesaid, the said Annie Morgan died, leaving no issue. The two petitions for distribution came on for hearing upon the allegations contained therein and upon the aswer filed by said Susan O. Casey to the petition of said M. C. Tinsley, in which said Susan O. Casey denied that the property

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of said estate was the community property of Ephrian Morgan, deceased, and alleged that the same was for a valuable consideration sold and conveyed to said Annie Morgan by the said Ephrian Morgan on the 24th day of May, 1917, over four months prior to the death of said Ephrian Morgan. Upon the evidence adduced by the respective parties on this hearing the court found:

> "That Susan O. Casey failed to establish that she was the sister of Annie Morgan, deceased, and that therefore she is not entitled to have the estate distributed to her; that the property of said deceased was her separate property at the time of her death, and that she left no heirs, and that said estate escheats to the state of California for the support of the common schools, and distribution is ordered accordingly."

[1] Pursuant to this finding, the property of said estate was by said decree distributed to the state of California for the support of the common schools of the state. From this decree Susan O. Casey and M. C. Tinsley have each perfected a separate appeal to this court. The appellant, M. C. Tinsley, has also appealed from an order denying her motion for a new trial, but as no appeal lies from an order denying a motion for a new trial, this appeal is dismissed. Section 939, Code Civ. Proc.

[2] The administrator of the estate, J. H. Shackelford, has joined with Susan O. Casey in her appeal. But as between the parties interested in the estate it is the rule that administrators or executors are not affected by a decree of distribution distributing the estate to either or any of said parties, and therefore he will not be heard on appeal from such decree. Estate of Ross, 179 Cal. 358, 182 P. 303; Estate of Ayers, 175 Cal. 187, 165 P. 528. The appeal of the administrator is also dismissed.

We will now consider the appeal of Susan O. Casey. As already stated, her right to the estate of Annie Morgan deceased, is based upon her claim that she was the half-sister of the deceased. The court found that she had failed to establish this claim, and her only point on this appeal is that the evidence fails to support this finding. Or, to put her contention on this appeal in another way, said Susan O. Casey claims that the evidence shows substantially and without conflict that she was the half-sister of the deceased.

The parentage of both the deceased and the appellant Susan O. Casey is obscured by the lapse of time, and the peculiar and somewhat unusual and unsettled conditions prevailing at the time and place of their respective births. Without attempting to set forth the evidence in minute detail, that in behalf of Susan O. Casey tends to show that each of these women had a common father, but different mothers. Their father's name was John McMorris, who was a white man. There is no evidence, however, that John McMorris was ever married to either of the two women, who were the mothers of Annie Morgan and Susan O. Casey, respectively. The deceased, Annie Morgan, was born at Woodville, Miss., on June 15, 1858. Her mother was a mulatto and died when Annie Morgan was about 3 years of age, when she was taken to be raised by the mother of Susan O. Casey. The latter was born at New Orleans, La., December 5, 1864. Her mother was also a mulatto. For some years after her birth she lived with her mother's parents in Woodville, Miss., but when about 11 years of age she was taken by her mother into the latter's home in New Orleans. She was known as Susie McMorris, and Annie Morgan was then known as Annie McMorris. The mother of Susie told her that she and Annie were sisters, and that John McMorris was the father of each of them, but that they had different mothers. They, as girls, were known by their relatives, friends, and intimate acquaintances as sisters. There is at least some evidence in the record that the father, John McMorris, lived with the mother of appellant Susan O. Casey in a home provided by him in New Orleans, and that their relation toward each other was that of husband and wife. During this time Annie Morgan, then a small child, lived with her father and the mother of Mrs. Casey in their New Orleans home, was known as Annie McMorris, and was recognized by McMorris as his child. McMorris during this time often spoke of Susan O. Casey, who was still with her grandparents in Woodville, as his daughter, and sent money to the grandparents to pay for the care and support of Susie. It does not appear that Susie ever lived with her mother while the latter was living with McMorris at New Orleans, which extended over a period of probably 5 years. While it is not entirely clear from the evidence, we think it may be gained therefrom that McMorris left New Orleans and returned to Woodville, Miss., shortly before his death. At some time subsequent thereto, and when Susie McMorris was about 11 years of age, her mother went to Woodville and brought her back to New Orleans, where she lived with her mother and Annie McMorris. The testimony of Mrs. Casey covering this and subsequent periods of her life was substantially as follows:

> "When I was 11 years old she [my mother] came back to Woodville and got me and taken me along, and then Mrs. Morgan and I were reared up from that time on, and we never lived a year apart out of the same. When we were in childhood my name was Susan Oleta McMorris, and her name was Annie McMorris, and we addressed each other as Susie and Annie, and called each other 'sisters' whenever we had occasion to. We were reared up together as two sisters. My mother had taken Annie when she was a little over three years old and had her from that time on. The occasion of my mother taking Mrs. Morgan was because her mother and my mother were chums in their early days, and when her mother died she asked my mother

to take Mrs. Morgan and raise her as her child. This relationship existed until the breath left her body. We lived in New Orleans until she married Mr. Morgan, and then she went to St. Louis, and in August before she was married I came to California, and it wasn't long after that she came out here."

Numerous other witnesses, some of whom knew these two women when they were girls together and before the marriage of either, others whose acquaintance with them covered more recent years, including the last years of Annie Morgan's life, corroborated Mrs. Casey's testimony to the effect that they were known by their friends and acquaintances as sisters, and that they addressed each other as sisters and always acted toward each other as sisters. During the latter years of Mrs. Morgan's life, and after the death of her husband, she appeared to be in needy circumstances, and the evidence shows that Mrs. Casey, out of her meager earnings gained in doing housecleaning and scrubbing, contributed regularly to the support of Mrs. Morgan, both in food and other necessities of life, as well as in money, under the impression, apparently, that the latter was without money or property to support herself. There was also evidence that Annie Morgan, at different and frequent occasions during her whole lifetime, stated to others and habitually admitted that she and the appellant Susan O. Casey were sisters. Whether this evidence was legally sufficient to support the claim of appellant Susan O. Casey that she was entitled to succeed to the estate of Annie Morgan, deceased, by virtue of the fact that she was the half-sister of said deceased, need not, we think, be here decided. Its decision would involve a number of interesting and intricate legal questions, which were evidently not considered by the trial court and which have been the subject of only slight discussion or consideration by the respective parties in their briefs.

[3, 4] It is claimed, however, by appellant Susan O. Casey that while there was no evidence that her father was married either to the mother of Annie Morgan or the mother of appellant Susan O. Casey, yet under the presumptions enumerated in subdivisions 28, 30, 31, and 33 of section 1963 of the Code of Civil Procedure, and particularly under said subdivision 30, "That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage," it might be presumed from the evidence that the father of the appellant was married to one or both of these mothers of the appellants. While a presumption of marriage of a man and woman may be indulged in from their conduct under certain conditions, we do not think we would be warranted in so presuming under the evidence adduced in this particular proceeding. The evidence shows that the father was a white person and that the two women, whom we are asked to presume that he married, were mulattoes. It has been the law of this state from its earliest days, and long before either Annie Morgan or Susan O. Casey was born, that a marriage between a white person and a mulatto was illegal. In the absence of any evidence to the contrary, we must presume that the laws of the state of Mississippi and Louisiana are and were the same. With an express statutory inhibition against a marriage between persons of these two races, no presumption can be indulged in that this law was violated and a marriage entered into between these parties.

Should we assume that the above evidence was sufficient to maintain the claim of appellant Susan O. Casey to have distributed to her the property of said estate, there was on behalf of the appellant, M. C. Tinsley, who had in her petition for distribution denied that the deceased and Susan O. Casey were sisters, evidence adduced for the purpose of disproving this claim of Susan O. Casey. This evidence like that in favor of Susan O. Casey, consisted in the main of declarations of the deceased and of statements purporting to have been made by the said Susan O. Casey, in which she claimed that she was the cousin of the deceased. The appellant, M. C. Tinsley, testified that Annie Morgan had always addressed Mrs. Casey as her cousin. "She never addressed her as sister." "I think my father married Mrs. Morgan in 1901 or 2. She was my stepmother, not my mother. I came to live in Los Angeles in 1906 and lived with them 8 or 9 years. I went up to San Francisco in 1913 to be married. I visited my mother and father about once a year. While I was living with Mrs. Morgan Mrs. Casey came to see my mother very often. She treated her very kind, and always addressed her as 'Sue,' and Mrs. Casey addressed her as 'Annie.' My mother told me they were cousins and she said she had no blood relations on earth. She called her cousin because her mother raised her. My mother told me from the time I entered her household until she died, almost, she had not a relative on earth." A number of other witnesses testified that appellant Mrs. Susan O. Casey introduced Annie Morgan as her cousin, and she was so known for years by many of her friends and acquaintances. Other witnesses testified that they had heard Mrs. Morgan during her lifetime state that she had no relatives on earth. A florist testified that immediately after the death of Annie Morgan the appellant Susan O. Casey came to his place of business and ordered some flowers for Mrs. Morgan's funeral; that on this occasion Mrs. Casey stated that the deceased was her cousin; that she purchased a floral piece and had a ribbon streamer placed thereon bearing the word, "Cousin"; that he wrote a card at the request of Mrs. Casey and sent it with the floral piece and on the card he wrote at Mrs. Casey's direction "My dear Cousin from Susie Casey." Mrs. Casey was called in rebuttal and denied that she had ordered flowers with the word "Cousin" on the streamer and testified that she had never been introduced as Mrs. Morgan's cousin. This evidence, adduced on behalf of the appellant, Tinsley, was undoubtedly legal evidence bearing upon the question of the relationship between the deceased and the appellant Susan O. Casey.

[5, 6] The declarations of Annie Morgan during her lifetime that she had no relations were admissible in evidence to prove that fact. Subdivision 4, § 1870, Code Civ. Proc.; Estate of Friedman, 178 Cal. 27, 172 P. 140; Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313. There was, therefore, a substantial conflict in the evidence as to the claim of appellant that she was related to the deceased as her sister, and the finding of the probate court adverse to said appellant's contention cannot be disturbed by this court.

[7-9] We will now return to the appeal of M. C. Tinsley, the daughter of Ephrian Morgan, deceased, from that portion of the decree of distribution which denied the petition of this appellant to have distributed to her the property of the estate of Annie Morgan, deceased. As already stated, this petition is based upon the claim that said property was the community property of Ephrian Morgan and Annie Morgan; that Ephrian Morgan predeceased Annie Morgan; that Annie Morgan left no issue and died intestate; and that the petitioner, M. C. Tinsley, is the sole surviving child of said Ephrian Morgan, deceased. The court found that the property belonged to the estate of Annie Morgan deceased, was her separate property at the time of her death, and upon this finding denied the petition for distribution of the said M. C. Tinsley. There was no finding as to whether said property was or ever had been the community property of Ephrian and Annie Morgan. It might have been, in a sense, the separate property of Annie Morgan at the time of her death, and still have been the community property of herself and husband during their marriage, although, strictly speaking, the term "separate property" only applies to property owned by a married person in his or her own right during mariage. After the dissolution of the marriage by death, the survivor does not hold the property, which was formerly community property, as community property. It is succeeded to as his or her property without being characterized as either separate or community property. Estate of McCauley, 138 Cal. 546, 71 P. 458; Estate of Davidson, 21 Cal. App. 118, 131 P. 67; 5 Cal. Juris. 284. But assuming that the term "separate property" was used in said finding in its popular sense, as distinguishing the property therein referred to from common or community property, still this finding is not sufficient to support the order or decree adverse to appellant, Tinsley. For, as already observed, this property may have been, in the sense in which we have assumed that this term was used in the finding, the separate property of Annie Morgan at the time of her death, and still have been the community property of Annie Morgan and her predeceased husband at the time of the death of the latter. If it was such community property, then, under the terms of subdivision 8 of section 1386 of the Civil Code, the appellant, Tinsley, would, under the facts shown here, have been entitled to share in its distribution. It is obvious, therefore, before the probate court could render any decree of distribution in the estate of Annie Morgan, deceased, either granting or denying the petition of appellant, Tinsley, that it must determine and find whether any of the property of the estate of Annie Morgan, deceased, was at the death of Ephrian Morgan, deceased, the community property of said Ephrian and Annie Morgan. It follows, therefore, that as the court made no such finding, the decree of distribution, in so far as it purports to deny the petition of appellant, Tinsley, must be reversed.

That portion of said decree of distribution denying the petition of appellant Susan O. Casey is affirmed, and that portion of said decree denying the petition of appellant, M. C. Tinsley, and distributing the whole of the property of the estate of Annie Morgan, deceased, to the state of California, is reversed, and it is directed that this proceeding be remanded to the probate court in and for the county of Los Angeles for the purpose of determining the issues made by the petition of appellant, Tinsley, and the answer thereto.

We concur: PRESTON, J.; SEAWELL, J.

203 Cal. 306

GRAY v. HALL, County Clerk.

(Sac. 4050.)

Supreme Court of California. Feb. 1, 1928.

Rehearing Denied March 1, 1928.

1. Judgment 🔑568—Default judgment, not appealed from, vacated or set aside, held to have full force and effect.

Default judgment entered for failure to answer within 10 days allowed by Code Civ. Proc. § 432, after order overruling demurrer to amended complaint giving plaintiff therein benefit of another judgment obtained by defendant against third person, which was never appealed from, vacated, or set aside, continued in full force and effect.

2. Judgment 🔑106(3)—Generally, default judgment may be taken if defendant fails to file new or amended answer in time allowed after amendment to declaration or complaint changing cause of action or adding new one, although original answer or plea is still on file.

Generally, where plaintiff amends declaration or complaint changing cause of action or adding new one, there is abandonment of original issues, and judgment by default may be taken against defendant if he fails to file new or amended answer within time allowed therefor, although original answer of plea is still on file.

3. Judgment 🔑106(3)—Generally, default judgment may not be taken for failure to file new or amended answer or plea within time allowed, where amendment to declaration or complaint is to formal or immaterial matters.

Generally, default judgment may not be taken against defendant for failure to file new or amended plea within time allowed after amendment to declaration or complaint merely as to formal or immaterial matters not changing cause of action.

4. Judgment 🔑106(3)—Where original plea or answer sets forth sufficient defense to declaration or complaint as amended, default judgment generally may not be taken for failure to file within time allowed new or amended plea or answer after amendment.

Where original plea or answer sets forth sufficient defense to declaration or complaint as amended, default judgment generally may not be taken for failure to file new or amended answer or plea to amended declaration or complaint within time allowed therefor.

5. Judgment 🔑106(3)—Entering default judgment for failure to answer within time allowed amended complaint, substantially same as original, while answer to original complaint was on file, held improper (Code Civ. Proc. §§ 338, 432).

Entry of default judgment for failure within ten days after overruling demurrer allowed by Code Civ. Proc. § 432, to answer amended complaint, alleging substantially identical cause of action as original complaint except for further allegation that cause of action was not barred by three-year period prescribed by section 338, while answer to original complaint was on file, was error.

6. Judgment 🔑501—Erroneous default judgment, not appealed from or vacated, not void on face, held not subject to collateral attack in mandamus proceeding (Code Civ. Proc. § 432).

Although default judgment for failure to answer within ten days after overruling demurrer allowed by Code Civ. Proc. § 432, amended complaint, which was substantially same as original complaint except as to denial of bar by limitations prescribed by section 338, while plea to original answer was on file was erroneous, it was only voidable, not void on face, and, not being appealed from, vacated, or set aside, cannot be attacked in mandamus to require clerk of court to transfer to plaintiff another judgment as required by such default judgment.

7. Judgment 🔑485—Default judgment for failure to answer within time allowed amended complaint, substantially same as original complaint, while answer to original complaint was on file, held not void on face (Code Civ. Proc. § 432).

Although default judgment entered for failure to answer after overruling demurrer within time allowed by Code Civ. Proc. § 432, amended complaint, substantially same as original complaint except for denial that cause of action was barred by limitation prescribed by section 338, while answer to original complaint was on file was erroneous, it was not void on face, being at most only voidable.

8. Judgment 🔑106(3)—Whether defendant should have been permitted to answer amended complaint after overruling his demurrer held within trial court's jurisdiction.

In action to recover secret profits earned by real estate agent, whether defendant should have been permitted to answer, after his demurrer was overruled, amended complaint, not substantially different from original complaint except to deny that cause of action was barred by limitation prescribed by Code Civ. Proc. § 338, was within jurisdiction of superior court trying case, regardless of how it decided question.

9. Appeal and error 🔑870(3)—Erroneous default judgment, not void on face, held final, but not reviewable on appeal after lapse of time therefor (Code Civ. Proc. § 432).

Although default judgment entered for failure to answer after demurrer was overruled within time allowed by Code Civ. Proc. § 432, amended complaint, not substantially different from original complaint, while answer to original complaint was on file was erroneous, it was final, and after lapse of time for appeal cannot be reviewed on appeal.

10. Mandamus 🔑4(1)—Review of erroneous default judgment, not void on face, will not be permitted on application for mandate to require compliance therewith.

Court had jurisdiction to enter default judgment, entered for failure to answer amended complaint, not substantially different from original complaint, while answer to original complaint was on file, even if such action was erroneous, and where judgment was not appealed from or vacated, review thereof will not be permitted on application for writ of mandate to require court clerk to comply with it; such judgment not being void on face, but, at most, voidable.

11. Mandamus 🔑172—In mandamus to require compliance with default judgment, court need only determine whether judgment is void; "collateral attack."

In mandamus to require court clerk to transfer another judgment as required by default judgment, attack on validity of default judgment because it was entered for failure to answer within time allowed under Code Civ. Proc. § 432, after overruling demurrer, amended complaint, substantially same as original complaint, while answer to original complaint was on file, was "collateral attack," and court need only determine whether default judgment was void.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collateral Attack.]

12. Judgment 🔑489—"Jurisdiction," as regards collateral attack, is power to both hear and determine or to do either, and does not depend on decision's correctness.

Jurisdiction is power to hear and determine, or to hear without determining, or to determine without hearing, and does not depend on correctness of decision made to render judgment valid against collateral attack.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (Of Courts).]

13. Judgment 🔑501—Judgment of court having jurisdiction of subject-matter and parties is not void for mere erroneous decision on question of law.

Judgment of court having acquired jurisdiction of subject-matter and of parties is not void for mere erroneous decision on question of law, so as to render it vulnerable on collateral attack, however important such question may have been in contemplation of parties' rights in original action.

14. Judgment 🔑504(1)—Manner of exercising jurisdiction cannot make judgment void.

Where court has jurisdiction of subject-matter and parties, its manner of exercising jurisdiction, even if erroneous, cannot make its action and judgment void and vulnerable on collateral attack.

15. Judgment 🔑501—Judgment of court having jurisdiction held not void on collateral attack, although impotency from error appears from judgment roll.

Judgment of court having jurisdiction of parties and subject-matter is not void and vulnerable on collateral attack, although its impotency because of error appears from judgment roll.

16. Judgment 🔑501—Where jurisdiction has attached, irregularities thereafter merely render judgment erroneous or voidable.

Where jurisdiction has attached, any irregularities thereafter occurring merely render judgment erroneous or voidable, and not vulnerable on collateral attack.

17. Judgment 🔑17(1)—Judgment, without any or insufficient service, or where party had no opportunity to answer and was ignorant of any proceeding until he lost remedies, is absolutely void.

Judgment without any or insufficient service, or where party has had no opportunity to answer and is ignorant of any proceeding against him until he has lost all remedies, is absolutely void.

18. Judgment 🔑456(1), 490(1)—Judgment void for lack of any, or for insufficient service, or lack of opportunity to answer or use remedies, may be attacked directly or collaterally any time.

Judgment void because rendered without any or with insufficient service, or where party had no opportunity to answer and was ignorant of proceeding against him and not able to avail himself of legal remedies until he lost them, may be attacked at any time directly or collaterally.

19. Judgment 🔑501—Judgment founded on jurisdiction cannot be impeached otherwise than by direct attack, although erroneous on face of record.

Where court has jurisdiction of parties' person and subject-matter, its judgment cannot be impeached collaterally or otherwise than by some form of direct attack, even if error appears on face of record.

20. Constitutional law 🔑315—Entry of default judgment for failure to answer within time allowed amended complaint, substantially same as original complaint, while answer to original complaint was on file, held not denial of due process of law (Code Civ. Proc. § 432).

Entry of default judgment for failure to answer within time allowed by Code Civ. Proc. § 432, after overruling demurrer to amended complaint, substantially same as original complaint, except for denial that cause of action was barred by limitation of section 338, while answer to original complaint was on file, even if erroneous, was not denial of due process of law.

21. Constitutional law 🔑251—"Due process of law" means procedure according to rules and principles for enforcement and protection of private rights.

"Due process of law" is law in its regular administration through courts of justice, and means course of legal procedure according to those rules and principles which have been established in system of jurisprudence for enforcement and protection of private rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

22. Constitutional law 🔑315—State court's making erroneous decision while acting within jurisdiction is not denial of due process of law (Const. U. S. Amend. 14).

State is not guilty of violation of federal constitutional provision relating to due process of law (Const. U. S. Amend. 14), because one of its courts acting within its jurisdiction makes erroneous decision.

23. Constitutional law 🔑305—State court's irregularities in procedure are matters for consideration of proper state judicial tribunal, notwithstanding due process requirements.

Regardless of federal constitutional requirement of due process of law, any irregularities in procedure in state courts are matters for consideration of proper state judicial tribunal, empowered by state's law to review and correct error committed by courts.

24. Constitutional law 🔑251—"Due course of law" under state Constitution and "due process of law" under Federal Constitution mean same.

"Due course of law" under state Constitution and "due process of law" under Federal Constitution mean same thing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Course of Law.]

25. Constitutional law 🔑305—Litigant whose case is tried and determined under rules of procedure applied to other similar cases cannot complain of lack of due process of law.

Litigant has right under Federal Constitution's due process clause to have cause tried and determined under same rules of procedure that are applied to other similar cases, and when this is done he has no ground to complain that due process of law is not being observed.

26. Judgment 🔑17(1)—Judgment without service of summons or voluntary appearance is void for absence of jurisdiction.

Judgment obtained against defendant in action in which there has been no service of summons or voluntary appearance is void for absence of court's jurisdiction to render it.

27. Judgment 🔑17(1)—Lack of service of summons or voluntary appearance does not render void decision on collateral question in case where parties are before court.

Principle that judgment obtained against defendant in action without service of summons or voluntary appearance is void for lack of court's jurisdiction does not relate to decision on collateral question, in case where parties are before court.

28. Constitutional law 🔑309(1)—"Notice" essential to due course and process of law is original notice giving jurisdiction and not notice of time for exercise of jurisdiction already vested.

Notice essential to due course and process of law is original notice, whereby court acquires jurisdiction; not notice of time when jurisdiction, already completely vested, will be exercised.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Notice.]

29. Constitutional law 🔑70(1)—Whether notice of subsequent proceedings after court has acquired jurisdiction by original process is necessary is matter of legislative discretion.

Whether notice of subsequent proceedings in case after court has acquired jurisdiction by original process will or will not be required is matter of legislative discretion.

30. Constitutional law 🔑309(1)—After jurisdiction has duly attached, party has no constitutional right to demand notice of further proceedings.

After jurisdiction in case has once attached by due service of original process or voluntary appearance, party has no constitutional right to demand notice of further proceedings.

31. Judgment 🔑490(1)—Lack of notice of entry of default and application for judgment held not to render default judgment void and vulnerable on collateral attack.

If defendant in action to recover secret benefits earned while acting as plaintiff's agent was entitled by statute or rule of court to notice of entry of default, and application for judgment for failure to answer amended complaint, within time allowed by Code Civ. Proc. § 432, after overruling demurrer, want of such notice does not render default judgment void and vulnerable in mandamus proceedings to require clerk of court to comply with default judgment.

32. Constitutional law 🔑309(1)—Party waiving notice of order overruling demurrer and giving time to answer amended complaint may not claim default judgment for failure to answer in time was void for lack of due process.

In action to recover secret profits made by real estate agent, where defendant successfully appealed from judgment against him and after reversal and remanding thereof interposed demurrer to amended complaint, and when it was overruled waived notice of order overruling demurrer and giving him time to answer, and did not appeal from default judgment entered for failure to answer amended complaint within time allowed, he cannot, in proceedings for mandamus to require court clerk to comply with default judgment, claim that due process of law was denied him rendering default judgment void.

Preston and Shenk, JJ., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Application by Harry J. Gray for a writ of mandate, to be directed to Harry W. Hall, County Clerk of the County of Sacramento, and ex-officio Clerk of the Superior Court. From a judgment denying the application for writ, petitioner appeals. Reversed.

Opinion of District Court of Appeals in 254 P. 911, superseded.

Rehearing denied; SHENK and PRESTON, JJ., voting for a rehearing.

Chas. A. Bliss, of Sacramento, for appellant.

John R. Connelly, Evan J. Hughes, and Geo. A. Work, all of Sacramento, for respondent.

WASTE, C. J. This is an appeal from a judgment of the superior court of the county of Sacramento denying appellant's application for a writ of mandate.

[1] The events leading to the institution of

this proceeding may be chronologically recorded as follows: Harry J. Gray, the appellant herein, commenced an action in the year 1921 against one P. L. Yarbrough to recover certain secret profits alleged to have been fraudulently earned by the latter while acting as Gray's agent in the consummation of a real estate transaction. After trial, judgment was entered for the plaintiff therein. An appeal was seasonably prosecuted by Yarbrough, which terminated in a reversal of the judgment, with directions to the lower court that the plaintiff, Gray, be permitted within a reasonable time to so amend his complaint as to show that the cause of action therein alleged had not become barred by the running of the three-year period prescribed in section 338 of the Code of Civil Procedure. Gray v. Yarbrough, 61 Cal. App. 724, 215 P. 914. Plaintiff thereafter pursued the suggested course and filed an amended complaint. The defendant Yarbrough filed a demurrer thereto, which was overruled on September 17, 1923. Notice of the entry of the order overruling the demurrer having been waived, the defendant, Yarbrough, was given ten days within which to answer. He failed to answer within the time allowed, and his default was entered on September 29, 1923, by the respondent herein, as county clerk of Sacramento county. Judgment thereon was entered April 1, 1924, in favor of the plaintiff, Gray. The judgment so entered, after referring to Yarbrough's failure to file an answer to the amended complaint, decreed that:

> "By reason of the law and the premises aforesaid it is ordered, adjudged, and decreed * * * that the judgment which defendant, Yarbrough, obtained against * * * F. W. Herbert * * * for the sum of * * * $1-573.37 in the superior court of Placer county, Cal., on the 2d day of May, 1921, as described in plaintiff's second amended complaint, was obtained by defendant, Yarbrough, as trustee for, and for the benefit of, plaintiff, and said judgment has inured to the benefit of and now belongs to said plaintiff, and that said P. L. Yarbrough never had any interest therein or right thereto; that defendant P. L. Yarbrough be and he is hereby required to make and execute the necessary transfers and assignments to convey and transfer said judgment to plaintiff, and in the event of the neglect or failure of said P. L. Yarbrough to assign and transfer said judgment to plaintiff, the clerk of this court be and he is hereby directed to make the necessary transfer and assignment thereof to this plaintiff."

This judgment is in full force and effect, for it has never been appealed from, vacated, or set aside. Yarbrough, after notice and demand served, refused to abide by the mandatory provisions of said judgment, and has neglected to execute an assignment or transfer, as directed, in favor of Gray, of the judgment entered in the case of Yarbrough v. Herbert. Proof of such demand and refusal was filed with the respondent county clerk and demand made upon him to cause the transfer of said judgment. His refusal to act in the premises led to the institution of this mandamus proceeding to compel him to make such transfer in accordance with the provisions of the judgment entered in Gray v. Yarbrough. The lower court denied petitioner's application and refused to issue a writ of mandate, whereupon this appeal was taken.

In opposition to the issuance of such a writ the respondent vigorously contends that the judgment in Gray v. Yarbrough, under which the appellant seeks to have the judgment in Yarbrough v. Herbert assigned to him, is void on its face for the reason that Yarbrough's default in the former action was improperly entered and judgment taken against him without authority in law. Respondent points out in support thereof that the amended pleading filed in Gray v. Yarbrough left the material allegations of the original complaint substantially unchanged and added thereto only such allegations as were necessary to show that the cause of action for fraud therein alleged had not become barred by the running of the statutory period of limitation. In view of this asserted immaterial amendment of the complaint, the respondent urges that "where an answer is on file to a complaint a default cannot be taken for failure to answer a later amended complaint where the defenses pleaded in the original answer put in issue the material allegations of the amended complaint." In other words, respondent urges that Yarbrough's answer to the original complaint precluded the entry of a default for failure to answer the amended complaint.

Some of the earlier authorities would seem to indicate that an amended complaint supersedes the original for all purposes. The case of Redington v. Cornwell, 90 Cal. 49, 60, 61, 27 P. 40, 43, however, correctly interprets these decisions and declares:

> "It has been said in a number of cases that an amended pleading supersedes the original; but I think a careful examination of those cases will show that it was only intended to decide that the amended pleading superseded the original for certain specified purposes, and only to the extent of the amendment. Beyond this, whatever may have been said is mere dictum. But in none of the cases has it been even said that the original is not a part of the judgment roll; nor has it been decided that an original complaint is superseded for the purposes of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment. For the purpose of determining these questions, and perhaps others that may arise, which often become material on appeal, the amended complaint can by no possibility supersede the original."

With this declaration before us we have examined both the original complaint and the amended complaint filed in the case of Gray v. Yarbrough, and have concluded that the allegations and cause of action found in each are substantially identical. We have failed to find any material alteration in the cause of action as alleged in the amended complaint. Under these circumstances the question immediately confronting us is whether Yarbrough's answer putting in issue the material allegations of the original complaint was available to him, in the absence of a supplementary or amended plea, as an answer to the amended complaint. If this question be affirmatively disposed of it will necessarily follow, as contended for by respondent, that Yarbrough's default in the case of Gray v. Yarbrough was improperly taken.

[2-4] It has been generally held that where a plaintiff amends his declaration or complaint so as to change the cause of action, or add a new one, it constitutes an abandonment of the original issues, and judgment by default may be taken against the defendant if he fails to file a new or amended answer or plea within the time allowed therefor, notwithstanding the original answer or plea is still on file. 34 C. J., 164, § 375d, and authorities there cited. This rule is without application, however, where the amendment is merely as to formal or immaterial matters, and does not change the cause of action; nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint as amended. Lincoln County Bank v. Fetterman, 170 Cal. 357, 360, 361, 149 P. 811; Brock v. Martinovich, 55 Cal. 516; Fox v. Hale & Norcross, etc., Co., 5 Cal. Unrep. 980, 53 P. 32, 40, 41, 169; Ermentraut v. American Fire Ins. Co., 63 Minn. 194, 65 N. W. 270; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488, 490; Yates v. French, 25 Wis. 661, 663–665; Kuhuke v. Wright, 22 Kan. 464; Cohen v. Hamill, 8 Kan. 621; 3 Freeman on Judgments (5th Ed.) 2640, § 1268a; 1 Encyc. of Pl. and Pr. 628, and authorities there cited.

[5] In the case of Lincoln County Bank v. Fetterman, supra, it is declared that:

> "Section 432 of our Code of Civil Procedure in declaring that the amendments, or the complaint as amended, must be answered by the defendant within ten days, or such other time as the court may direct, is but a direction to compel the joining of issues within a reasonable time so as to expedite the trial of actions. It still rests within the sound discretion of the court as to whether any time shall be allowed to the defendant to answer, and whether or not time will be allowed will depend upon the nature and character of the amendment to the complaint. It states the rule too broadly, therefore, to say that because a complaint is amended, even in most trivial and unimportant particulars, the defendant has the absolute right to time and to the postponement of the case to plead to this amendment. * * * In the present case, all that the plaintiff asked leave to do and did was to make more specific an allegation of nonpayment of a promissory note, which allegation was certainly sufficient to pass a general demurrer. It could not have taken defendant by surprise to have had this allegation of nonpayment made more specific. It could not have introduced any new element in the case which he was not prepared to meet. * * * This being so, then the amendment raised no new issue and presented no new proposition which the defendant was called upon to meet and the court was absolutely justified in refusing leave to the defendant to amend. * * * The original answer was not only not eliminated by virtue of the amendment to the complaint, but was the answer joining the issues upon which the action was tried. It was an essential part of the judgment roll. * * *"

The case of Fox v. Hale & Norcross, etc., Co., supra, indicates that upon the second trial of a cause the answer to the original complaint may serve as a plea to an amended complaint filed during the progress of the first trial to conform to the proofs there adduced. It is stated in the opinion that:

> "The answer already in was as appropriate to the complaint as amended as before the amendment, for it was in all material respects the same identical pleading."

Ermentraut v. American Fire Ins. Co., supra, is very persuasive upon the point under consideration. The opinion therein states that:

> "The judgment was wholly unauthorized, and the court was clearly right in setting it aside. Counsel for the plaintiffs proceeded upon the erroneous idea that, inasmuch as an amended pleading supersedes the original, therefore all subsequent pleadings are also superseded, and cease to be a part of the record, and hence an answer to the original cannot stand as an answer to the amended pleading. This was not the rule either at common law or in equity, and the rule has not been changed by the code. The rule in common-law actions is correctly stated in Tidd, Prac. 708, and notes, as follows: 'After an amendment of a declaration, the defendant is at liberty to plead de novo; that is, he may do so if he has occasion or thinks proper, but he is not obliged to vary his first defense.' Also: 'Anciently, it seems, the defendant did not plead de novo after an amendment, but he is now at liberty to do so when the amendment is of such a nature as to occasion any alteration in the plea but not otherwise.' The chancery practice was the same. If a bill was amended after answer, the defendant was not required to put in a new or further answer, unless the amendment consisted of the allegation of new facts which would vary the rights of the parties; and even in that case he was not required to file an entirely new answer, repeating the allegations of his original one, but merely a supplemental answer to the new facts alleged in the amended bill. * * * In short, when a complaint is amended after answer, the defendant is not bound to answer de novo. He may do so if he chooses; but, if he does not elect to do so, his original answer stands as his answer to the amended complaint; and in such case he will not be in default except as to the additional facts set up in the amended complaint, and not put in issue by the answer. * * *"

In the light of these authorities we are of the firm opinion that it was error to disregard Yarbrough's answer to the original complaint, and his default was therefore improperly taken and entered in the case of Gray v. Yarbrough.

[6-11] Notwithstanding that it was error for the trial court to enter the default of Yarbrough in the original case, the judgment thereafter entered is not subject to collateral attack in this mandamus proceeding. It is not void on its face. Whether or not the defendant Yarbrough should have been permitted to answer was a question of law necessarily involved in the original case, and there can be no doubt that it was within the jurisdiction of the superior court to decide that question. The judgment rendered there is in full force and effect, for it was not appealed and has not been vacated or set aside. The decision of the court was final and cannot be reviewed on appeal, for there is now no appeal. Nor will a review be permitted upon this application for a writ of mandate. Assuming that mandamus is a remedy open to the petitioner, there is nothing in the law relating to such a proceeding to indicate that the respondent may avail himself of the position, which he now takes, to review the decision of the court in the original action upon a question of law which does not involve the jurisdiction or powers of the court to act in the matter. If the court had determined in the original action that the answer of the defendant there was sufficient, or had refused to enter his default for not answering, the respondent would not now be contending that the court had no jurisdiction to so decide. It is fundamental that it had jurisdiction to decide the matter either way. Jurisdiction in cases of this character implies the power of the court to decide a question wrongly as well as rightly. It was not necessary for us to determine in this proceeding whether the ruling of the court in the original action was correct or not. This being a collateral attack upon the judgment, we need have gone no further than to determine whether it was void or not. Howe v. Southrey, 144 Cal. 767, 769, 78 P. 259. But, because of the importance of the question involved in its relation to our method of pleading, we deemed it advisable to do so, with the result already announced.

[12-15] The judgment in Gray v. Yarbrough was voidable merely and not void, and is but an instance of an erroneous exercise of jurisdiction and not of an entire lack, or even loss, of jurisdiction. Jurisdiction is but the power to hear and determine, and it does not depend upon the correctness of the decision made. Bennett v. Wilson, 133 Cal. 379, 385, 65 P. 880, 85 Am. St. Rep. 207; Rountree v. Montague, 30 Cal. App. 170, 178, 157 P. 623. The court having acquired jurisdiction of the subject-matter and of the parties, its judgment is not void for the mere erroneous decision on a question of law, however important that question may have been in contemplation of the rights of the parties in the original action. A judgment is never absolutely void if the court had jurisdiction of the subject-matter and the person of the defendant no matter how erroneous it may be. Mayo v. Ah Loy, 32 Cal. 477, 480, 91 Am. Dec. 595; Crew v. Pratt, 119 Cal. 139, 151, 51 P. 38; In re Pratt's Estate, 119 Cal. 153, 51 P. 1099. The manner of exercising its jurisdiction cannot make void the action of the court. Cloud v. El Dorado County, 12 Cal. 128, 133, 73 Am. Dec. 526. Neither will such judgment be in the least affected because its impotency appears from the judgment roll. Wood v. Jordan, 125 Cal. 261, 262, 57 P. 997; Rountree v. Montague, supra. In 1 Freeman on Judgments (5th Ed.) par. 360, the author says:

> "The character and scope of the issue upon collateral attack have already been defined. Jurisdiction appears to be the keynote of every such controversy. Efforts to avoid the judgment must be directed to proving a want of power in the court rendering it. Upon this point the cases are clear. They emphasize the difference between an absence of jurisdiction and the irregular or erroneous exercise of it. The line which distinguishes the two is very definite and is precisely that which denotes the cases where a judgment is reversible only or, on the other hand, may be declared a nullity when interposed collaterally. Consequently it is a firmly established rule of the law of collateral attack that once jurisdiction of the subject matter and the parties is acquired, no errors or irregularities in the subsequent proceedings which do not induce a loss of such jurisdiction will avail to defeat the judgment."

Jurisdiction has often been said to be "the power to hear and determine." It is in truth the power to do both or either—to hear without determining or to determine without hearing. Ex parte Bennett, 44 Cal. 84, 88. It has even been held that a judgment ordered without a trial cannot be attacked collaterally. Johnston v. S. F. Sav. Union, 75 Cal. 134, 139, 16 P. 753, 7 Am. St. Rep. 129.

[16] Although the court in the original action committed error which would have called for reversal on appeal, it had acquired jurisdiction to act in the premises long before its commission, and, its judgment having become final without appeal or other direct attack, it is now conclusive against this collateral attack, whether the matter was rightly or wrongly decided as to the matters presented or which should have been presented on the hearing. Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 513, 197 P. 334. Where jurisdiction has attached, any irregularities thereafter occurring merely render the judgment erroneous or voidable. Estate of Newman, 75 Cal. 213, 220, 16 P. 887, 7 Am. St. Rep. 146; May v. Hatcher, 130 Cal. 627, 629, 63 P. 33; 1 Freeman on Judgments (5th Ed.) par. 321 et seq. The case of Endowment Department, etc., v. Harvey, 6 Ala. App. 239, 60 So. 602, 604, presented a situation somewhat similar to the one before us in the instant proceeding, in that a default judgment was improperly entered against the defendants

therein while demurrers were on file and undisposed of. In that case the court held that, while the entry of such judgment was erroneous and voidable, yet the judgment was not void. In Chehalis Coal Co. v. Laisure, 97 Wash. 422, 430, 166 P. 1158, 1160, a default judgment was erroneously entered pending the disposition of a motion in the cause. After pointing out that the lower court had properly secured jurisdiction of both the person and subject-matter, the opinion declared that:

> "If through fraud or concealment practiced upon it, or through inadvertence or mistake, it thereafter entered a judgment prematurely or while a motion was pending undisposed of and without notice, the judgment was irregularly entered. It was voidable, not void."

In Estate of Newman, supra, judgment was rendered upon default entered before the time allowing the defendant to answer had expired. This court held that it was error simply, not void, and could be attacked only on motion or by appeal. In a much earlier case, in which the judgment was attacked collaterally upon the ground that the defendant, although served with process, was not given the time allowed by law to appear and answer, Mr. Chief Justice Murray said:

> "There can be no controversy upon the proposition that a personal judgment of a court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively on the face of the record, that the court had acquired no jurisdiction over the person of the defendant. There is, however, a very decided distinction between want of jurisdiction and irregularity in procuring jurisdiction. In the latter case some of the authorities speak of it as a want of jurisdiction, but when so employed it is a loose and improper use of the term." Whitwell v. Barbier, 7 Cal. 54, 63.

See, also, Peck v. Strauss, 33 Cal. 678, 685. Such "loose and improper use of the term" will be frequently found in decisions in cases involving direct attacks on judgments which are there termed "void," when they are only "voidable."

[17-19] It cannot be denied that, in those cases in which judgments have been rendered without any or insufficient service, or where the party not only has had no opportunity to answer, but is so ignorant of any proceeding against him as not to have been able to avail himself of the remedies which the law gives him until he has lost them all, the judgment is absolutely void. Such a judgment may be attacked at any time, directly or collaterally. People v. Harrison, 84 Cal. 607, 608, 24 P. 311. But it is a fundamental principle, everywhere prevailing, that where a court has jurisdiction of the person of the parties and the subject-matter of the controversy submitted to it by them, its judgment thereon cannot be impeached collaterally or otherwise than by some form of direct attack, although it may appear on the face of the record that error was committed by the court in determining the question. Cellulose Package Mfg. Co. v. Calhoun, 166 Cal. 513, 515, 137 P. 238; Le Mesnager v. Variel, 144 Cal. 463, 465, 77 P. 988, 103 Am. St. Rep. 91. If it were the rule that judgment in every case in which it appeared on the face of the record that error was committed by the court rendering it is subject to collateral attack the doctrine of the finality of judgments would become a myth. This court long ago considered the precise question we are now discussing, and said:

> "If, after acquiring jurisdiction of the parties and subject-matter of an action, a superior court should order judgment in favor of one of the parties without a trial, that judgment would neither be 'without or in excess of the jurisdiction of such tribunal', although it might be erroneous, as any judgment might be if rendered upon the naked pleadings in a case where the pleadings raised a material issue." Clark v. Superior Court, 55 Cal. 199, 200.

[20-25] The contention is also advanced here that the action of the trial court in entering the judgment amounted to a denial of "due process." The contention is untenable. Due process of law is law in its regular administration through courts of justice and means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights" (Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565); "and when secured by the law of the state the [federal] constitutional requirement is satisfied" (Leeper v. Texas, 139 U. S. 462, 468, 11 S. Ct. 577, 579, [35 L. Ed. 225]). A state cannot be deemed guilty of a violation of the federal constitutional provision relating to due process because one of its courts, while acting within its jurisdiction, has made an erroneous decision. Arrowsmith v. Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243. Any irregularities in procedure are matters for the consideration of the judicial tribunal within the state empowered by the law of the state to review and correct error committed by the courts. Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467. Due course of law under the state Constitution and due process of law under the Federal Constitution mean the same thing. Griggs v. Hanson, 86 Kan, 632, 634, 121 P. 1094, Ann. Cas. 1913C, 242, 52 L. R. A. (N. S.) 1161. It is the right of a litigant to have his cause tried and determined under the same rules of procedure that are applied to other similar cases, and when this is afforded to him he has no ground to complain the due process of law is not being observed. Estate of McPhee, 154 Cal. 385, 390, 97 P. 878.

[26-31] A judgment obtained against a defendant in an action in which there has been

no service of summons or voluntary appearance is void by reason of the absence of jurisdiction in the court to render it; but that is so only where original jurisdiction is exercised, and does not relate to a decision on a collateral question in a case where the parties are before the court. Walden v. Craig's Heirs, 39 U. S. (14 Pet.) 147, 154, 10 L. Ed. 393; Cowles v. Cowles, 80 N. H. 530, 120 A. 76; Bonney v. McClelland, 235 Ill. 259, 261, 85 N. E. 242. The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction, and is not notice of the time when jurisdiction, already completely vested, will be exercised. The court having once acquired jurisdiction, "however wrong the result of the proceeding may be, missteps occurring in the course of it constitute irregularities and errors in procedure only, and * * * cannot be conjured into anything graver by the use of impressive and high-sounding characterizations." Griggs v. Hanson, supra; Cramer v. Farmers' State Bank, 98 Kan. 641, 158 P. 1111. Whether notice of subsequent proceedings, after the court has acquired jurisdiction by original process, will or will not be required is a matter of legislative discretion. After jurisdiction has attached, the party has no constitutional right to demand notice of further proceedings. Estate of McPhee, supra; Brown & Bennett v. Powers, 146 Iowa, 729, 732, 125 N. W. 833; Savage v. Welch, 246 Mass. 170, 184, 140 N. E. 787. If the defendant in the original action was entitled, by statute or rule of court, to notice of the entry of default and application for the judgment, want of such notice does not render the judgment void. Egan v. Sengpiel, 46 Wis. 703, 709, 1. N. W. 467.

[32] In the case before us Yarbrough, as defendant, was a party to the first trial, and it was by reason of his successful appeal from the judgment there rendered that the amended complaint was permitted to be filed in the court below. He continued his active participation in the case and interposed a demurrer to the amended pleading. When it was overruled he waived notice of the order overruling the demurrer and giving him time to answer. So far as the record discloses, he took no more interest in the matter. From that fact it would seem that he invited the further action of the court, which resulted in default and judgment being entered against him. He had his remedy in the due and orderly procedure provided by the Legislature for the correction of error in judicial proceedings. He failed to avail himself of it and cannot now claim that due process of law was in any way denied him.

The judgment is reversed, with directions that a writ of mandate issue as prayed for.

We concur: LANGDON, J.; SEAWELL, J.; CURTIS, J.

RICHARDS, J. I concur in the order for the issuance of a writ of mandate herein, not only upon the grounds set forth in the majority opinion, but upon the additional ground that, even conceding the judgment in the case of Gray v. Yarbrough to be void upon its face, the respondent herein does not stand in such a relation thereto as would enable him to attack such judgment collaterally upon that ground. The rule upon this subject applicable to judgments void upon their face is thus set forth in Freeman on Judgments:

> "It must not, however, be understood that all strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full force and effect, would be prejudiced in regard to some pre-existing right that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interests acquired prior to its rendition." 1 Freeman on Judgments (5th Ed.) § 319.

The learned author cites a large number of cases in support of the foregoing limitation upon the right of assault collaterally upon a judgment void upon its face. The respondent herein comes within none of the classes of persons entitled to attack this judgment, conceding it to be void upon its face. He was not a party to the original action. He is not a party to the judgment rendered therein. His name is not mentioned therein, and his whole connection with such judgment consists in the fact that he happened to hold the position of clerk of the court in which said judgment was rendered. Said judgment directs, not this respondent by name, but "the clerk of the court," to execute the conveyance in question in the event of the failure or refusal of the defendant so to do, and thus carry into effect the judgment of the court directing such conveyance to be made. As such "clerk of the court" this respondent is merely an administrative arm of the court performing a similar function to that performed by him when he entered the defendant's default, or filed or recorded the judgment entered thereon. From time immemorial courts of equity have made similar use of their clerks or bailiffs or sheriffs or other administrative officers to assist in carrying into effect judgments of this character, and in fact have found it necessary so to do in order to render effective their decrees. The administrative officers of the court so selected are in nowise injuriously affected by the judgment itself, and to allow such officers of the court rendering such a judgment to question its validity collaterally would be to open the door to serious interferences with the judgments and processes of courts on the part of those who have no interest in the subject-matter of the judgment, but whose only duty in relation thereto is that of its enforcement. For the foregoing reasons I am of the opinion that this respondent is in no position to refuse to execute the purely administrative duty with relation to the judgment in question which the court, in order to render it effectual, directed its clerk to perform.

PRESTON, J. (dissenting). I am unable to concur in the conclusion in this case. I heartily concur, however, in so much of the opinion as holds the answer on file to be a sufficient traverse of the allegations of the complaint.

The net result of the situation then is that a defendant who has fully answered the plaintiff's complaint has, without a hearing or a chance to be heard, had his property taken from him by ex parte action of the court. The question may again be stated as follows: Is due process of law satisfied where a defendant has appeared and set up a complete defense to the cause of action against him and yet, having been given no opportunity to be heard, has had entered against him without fault on his part, a judgment depriving him of his property?

It is readily agreed by all that such an act of the trial court is erroneous and may be reviewed upon appeal or other direct attack. The judgment roll in this case is offered in evidence in a proceeding brought to carry into effect the same judgment. There is grave doubt as to whether the resistance of such an attempt is not itself a direct attack, but for the purposes of this discussion it may be assumed to be a collateral attack. Is such a judgment void upon collateral attack?

It is a well-settled proposition that any action by a trial court in excess of its jurisdiction is void. The chief distinction between a collateral and a direct attack upon such a judgment is that in a collateral attack the evidence which may be received to show excess of jurisdiction is restricted to the judgment roll as defined by law at the time of the rendition of the judgment. But where by a resort to such evidence the want of vitality in the judgment is demonstrated, the duty to declare it void is as imperative on collateral as on direct attack. This principle is found, among other places, in the following cases: People v. Greene, 74 Cal. 405, 16 P. 197, 5 Am. St. Rep. 448; People v. Davis, 143 Cal. 673, 675, 676, 77 P. 651, 652. The latter case was an appeal from an order vacating and setting aside a prior order vacating and setting aside a judgment by default, and there the court said:

> "Such an order occupies no better position than a judgment that is void upon its face, and, like such a judgment, is assailable wherever and whenever it may be produced, and whether the attack upon it be direct or collateral. In People v. Temple [103 Cal. 447, 37 P. 414] the attack upon such an order was collateral, and the order was held to be a mere nullity. * * * As was held in People v. Greene, 74 Cal. 400, 405 [16 P. 197, 199 (5 Am. St. Rep. 448)], 'A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant.' * * * While it is immaterial in a certain sense whether such a judgment or order be formally set aside, for it neither binds nor bars any one, still it is well settled that the court whose records are thus encumbered with what is a mere form without substance may at any time formally remove the same by declaring it a nullity."

In 15 R. C. L. p. 847, § 321, under the heading "Collateral Attack for Want of Notice," it is said:

> "It is a fundamental principle of the common law, founded in justice and sound policy, that no judgment or decree affecting the person or property of an individual shall be valid, unless notice, actual or constructive, is given to the individual whose rights are to be affected. Every man is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision of the question. Such notice and opportunity to be heard are essential elements of due process of law, and the sentence or judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal."

The judgment roll in the case at bar consists of the pleadings and the judgment. Code Civ. Proc. § 670. The pleadings are the original and amended complaint and the answer. The judgment affirmatively shows the following:

> "In this action the defendants * * * were regularly served with plaintiff's second amended complaint herein, and defendant P. L. Yarbrough having filed a demurrer thereto, which demurrer was by the court overruled, and said defendant * * * having failed to answer plaintiff's second amended complaint within the time allowed therefor, and the defendant Elmer H. Gum, as sheriff of Placer county, Cal., having failed to answer or demur to said second amended complaint, and the legal time for answering having expired, the defaults of said defendants * * * were duly entered according to law. * * *"

We then have a case where the answer has been ignored in toto. The defendant has been given no hearing and all he has received is a judgment against him, which directs him to deliver by assignment his property to plaintiff. Has he had his day in court under the terms "due process of law" or "law of the land?" It may freely be conceded that where jurisdiction of the subject-matter and person are both present, any error, however gross or far-reaching, made by the court in the exercise of its jurisdiction, will not render a judgment void and relief therefrom may not be had by collateral attack. But it must always be remembered that this statement must be held to include the right and opportunity to be heard. If such right is denied, it is as though jurisdiction of the person is repudiated or disclaimed. "The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him." 6 R. C. L. § 446, p. 451.

This is doubtless what Mr. Freeman (1 Freeman on Judgments [5th Ed.] par. 360, p. —), quoted in the majority opinion, means by the use of the following language:

> "* * * no errors or irregularities in the subsequent proceedings which do not induce a loss of such jurisdiction will avail to defeat the judgment."

In the case under consideration the court in effect struck out, without cause, the answer of defendant. It was directly effective to "induce a loss" of jurisdiction. The principle here attempted to be stated is elsewhere set forth as follows:

> "It is a cardinal principle of our jurisprudence that one shall not be bound or concluded by a judgment, either in respect to his person or property, unless he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard, and upon such hearing to offer evidence in support of his cause." 5 Cal. Jur. pp. 875, 876, § 224.
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> "It was a maxim of the common law that no man should be punished without an opportunity of being heard, and it has been broadly stated that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. To assert that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. * * * When the right to a hearing is denied, the mere giving of a notice is ineffectual for any purpose within the meaning of the constitutional guaranty. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. For example, ordering one to pay alimony without having had his day in court and a hearing on the question of the marriage, when that is denied, amounts to a taking of his property without due process of law." 6 R. C. L. § 446, pp. 450, 451.

This principle has many times been recognized in California. The case of Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82, is cited as authority for the foregoing statement. In Baker v. Baker, 136 Cal. 302, 68 P. 971, upon filing of the complaint, the court made an order, ex parte, requiring the defendant to pay alimony. Such order was held to be unauthorized and void, as the court had not acquired jurisdiction over the person of the defendant at the time it was made, as there had been no service of process in the action or notice of the application for the order. In that case it is said:

> "No valid order or judgment affecting a person or his property can be rendered against him without a hearing or an opportunity to be heard. This is a rule of law so well understood as to be elementary, at least since the famous Dartmouth College Case. As said in Hite v. Hite, 124 Cal. 393 [57 P. 229, 45 L. R. A. 793, 71 Am. St. Rep. 82]: 'To satisfy the requirement of due process of law it is not always necessary that such trial should be afforded as is had in ordinary suits in courts of justice. The hearing allowed must be such as is practicable and reasonable in the particular case. * * * Cooley says, "the opportunity to be heard must be such as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."'"

In McClatchy v. Superior Court, 119 Cal. 413, 419 et seq., 51 P. 696, 698 (39 L. R. A. 691), this question is again discussed. The phrases "due process of law" and the "law of the land" are considered, and a quotation from Mr. Webster in the famous Dartmouth College Case is cited as follows:

> "By law of the land is most clearly intended the general law, which hears before it condemns, which proceeds from inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold life, liberty, property, and immunities under the protection of general rules which govern society."

Said case also discusses and cites with approval Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215, stating:

> "And in the very recent case of Hovey v. Elliott, 167 U. S. 409 [17 S. Ct. 841, 42 L. Ed. 215], decided by the Supreme Court of the United States, where, in a civil action, the court had stricken out the answer of a party because of his contempt of an order requiring him to pay money into court, and rendered judgment against him pro confesso, it was held that the act was beyond the power of the court, for the reason that it deprived the party of the right to be heard in his defense; and that the judgment so entered against him was void, even as against collateral attack. Among other things it is there said: 'Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, could it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under the express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of

their establishment to compel obedience to law and enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.'"

It is therein further held:

> "And, as showing that it is not sufficient that the court shall go through the mere form of citing a party to appear upon the pretense of giving him a hearing while in fact denying him the right in its substance, it is there said: 'Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. The denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to the party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.' And, quoting from Galpin v. Page, 18 Wall. 350 [21 L. Ed. 959] it is said: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'"

In the case of Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am. St. Rep. 147, the court below struck out the demurrer of defendant, refused to permit him to answer and rendered judgment against him pro confesso for his failure to obey its order for alimony. This court, upon authority of Hovey v. Elliott, supra, held that the court below was unauthorized to enter the judgment, saying, among other things:

> "Where a given act amounts to the invasion of a constitutional right, we can perceive no well-founded distinction in principle whether such invasion come from an attempted legislative sanction, or from the naked, unauthorized act of the court. The one is as ineffectual as the other."

In the case of Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 608, 79 P. 281 (68 L. R. A. 600), a trial by jury was waived, and when the cause came on for trial the plaintiff's counsel read the verified complaint and answer and called a witness to the stand, who was duly sworn by the clerk. Thereupon the court made an order reciting that the parties had been requested to deposit with the clerk each one-half of the reporter's per diem to abide the result of the suit; that the reporter had refused to report the testimony unless the fees were paid, and that the defendant had refused to comply with said request, and concluding with the following language:

> "It is therefore ordered that the defendant deposit the fee of the reporter within five minutes, or a judgment will go for plaintiff as prayed for."

Defendant's counsel refused to obey the order and judgment was thereupon entered for plaintiff. Upon appeal this court held:

> "The failure or refusal of a defendant to pay the costs of an action, or any portion thereof, in advance of a trial, does not authorize the court to deprive him of his defense to the action. The guarantee of the Constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession; and he is not to be deprived of this right as a penalty for failing to comply with some rule of court."

In the case of Younger v. Superior Court, 136 Cal. 682, 69 P. 485, this court, upon certiorari, set aside and annulled an order of the superior court of Santa Cruz county striking a complaint from the files. Said order recited that the complaint was false, deceitful and abusive of the process and proceedings of the court in the matter of the allegation that Hon. Lucas F. Smith (the judge then presiding) claimed to have some interest in or claim to the land therein described, and further stated:

> "It further appearing to the court that said allegation in so far as it relates to the said Lucas F. Smith is absolutely false, and was known by the said plaintiff Helen Younger at the time of the signing of said complaint, and also at the time of the filing thereof, to be false. * * *"

Again, upon authority of Hovey v. Elliott, supra, and McClatchy v. Superior Court, supra, the order was set aside and annulled, this court saying, among other things:

> "The court in making the order exceeded its jurisdiction, and there is no other plain, speedy, and adequate remedy. No judgment was entered and there does not appear to be any right of appeal from the order. 'Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right is as much an excess of jurisdiction as where there is an inceptive lack of power.'"

This same principle has also been recognized many times in other jurisdictions. See Hovey v. Elliott, supra; Morley v. Morley, 131 Wash. 540, 230 P. 645, which cites with approval the above quotation from 15 R. C. L. p. 847, § 321. Likewise, in City of Taylorville v. Central Ill., etc., Co., 301 Ill. 157, 160, 133 N. E. 720, 721, it is said:

> "It is an essential of due process of law that every person whose property rights are to be affected shall have notice and an opportunity to

be heard to defend, enforce, and protect his rights. The Workmen's Compensation Act makes no provision for notice to a third party nor duty nor opportunity to be heard or to contest the amount of compensation to be awarded, and the defendant had neither notice nor hearing before the administrative body that fixed the amount to be allowed. A statute providing that the defendant should pay a certain sum as damages for its negligent act, without notice or a hearing as to the amount of such damage, would violate the Constitution. Campbell v. Campbell, 63 Ill. 462; Gage v. City of Chicago, 225 Ill. 218, 80 N. E. 127; Hultberg v. Anderson, 252 Ill. 607, 97 N. E. 216; 6 R. C. L. 450; 12 Corpus Juris, 1195."

In Lacher v. Venus, 177 Wis. 558, 572, 188 N. W. 613, 618 (24 A. L. R. 403), it is said:

> "Notice that some particular judicial proceedings are already instituted or proposed to be instituted; notice of the time and place where such hearings are to be had; reasonable opportunity to be heard—are the essentials of due process of law; anything short of this is absence thereof. Seifert v. Brooks, 34 Wis. 443, 448; State ex rel. Mil. Med. Col. v. Chittenden, 127 Wis. 468, 506, 107 N. W. 500; Ekern v. McGovern, 154 Wis. 157, 240, 142 N. W. 595, 46 L. R. A. (N. S.) 796; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 [27 A. L. R. 375], decided December, 1921; 12 C. J. p. 1192; 6 R. C. L. p. 446. There having been a lack of due process of law, the attempted adoption proceedings in the county court of Monroe county in August, 1918, were void."

These cases are all in point because there can be no difference between a case where the court had an excuse, although insufficient, for denying a hearing and a case like the one before us where no legal excuse existed.

The authorities cited in the main opinion may with profit be noted here. The first and only important one is In re Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146. In that case the proceeding under consideration was an attack twice removed from a direct attack. Bernard Newman died intestate and without wife or blood issue. An alleged adopted son, through his mother, as guardian, applied for letters of administration. The application was contested by a brother of decedent, who assailed the adoption proceedings. The chief ground of attack was that said proceedings were illegal because the father of the child had not consented thereto. The petitioner contended that this consent was unnecessary, as the mother and father were divorced and custody of the child had been awarded to the mother. Respondent, decedent's brother, answered this contention with the allegation that the judgment in the divorce action between the mother and father was invalid. The contention in reality was, therefore, that the adoption proceedings could be collaterally questioned by collaterally questioning the judgment in the divorce proceeding. No authority need be cited to support the statement that one collateral attack may not be pyramided upon another attack of the same kind. But, disregarding that point, we find that in said case the service of summons in the divorce proceeding was by publication upon an affidavit and order. In 1886, the year of the death of Bernard Newman, these papers were not a part of the judgment roll and could not be considered. See Amendments to the Codes, 1875–1876, p. 93. The judgment recited due service of the summons, default of defendant and that service was by publication. An affidavit appeared in the files impossible on its face, as it recited publication before the suit was instituted and publication after the judgment was entered. In other words, the recitals in the judgment contradicted the affidavit of service. The court permitted to be filed nunc pro tunc an affidavit of service the facts of which are not stated. Thereupon the adoption proceedings were declared valid and the petitioner was appointed administratrix. The court in this behalf said:

> "The recital in the judgment that the defendant was duly served with process is consistent with the proof of service. It is the fact of service which gives the court jurisdiction—not the proof of service—and the court had authority to receive the amended affidavits of service after judgment and before the roll was made up. Mason v. Messenger, 17 Iowa, 261; Rickards v. Ladd, Fed. Cas. No. 11,804; Allison v. Thomas, 72 Cal. 562, 14 P. 309, 1 Am. St. Rep. 89. The affidavits of service and the recitals in the judgment are conclusive. The affidavit on application for an order of publication, and the order of publication, cannot be considered. They are no part of the roll."

The issue as to service being in doubt upon the face of the record, it may well be that a situation was presented to the court in that action with regard to which the following language of Wharton v. Harlan, 68 Cal. 422, 425, 9 P. 727, 728, is applicable:

> "Moreover, since service of summons may be proved by affidavit, and the proof of nonservice may also be by affidavit, thus sometimes making an issue of fact, there may possibly be some reason for sending a defendant into a court of equity in that case which does not apply when the judgment is void for defects appearing in the roll (Code Civ. Proc. § 670, subd. 1), and which thus bears on its face the evidence of its invalidity."

Certainly in a collateral attack, the proof of service being in doubt, the judgment should not be disturbed. It is true that the court in the Newman Case said by way of obiter this:

> "The fact that judgment was rendered upon default entered before the time allowing the defendant to answer had expired rendered the judgment erroneous simply, not void. A judgment thus rendered can be attacked only upon motion or by appeal, and by the parties in interest. Maldonado is the only party aggrieved by the decree, and he is the only one who can attack it in any way. Anderson [Alderson] v.

Bell, 9 Cal. 321; Mitchell v. Aten [37 Kan. 33] 14 P. 497 (1 Am. St. Rep. 231)."

The reply to this observation is, first, that it is not the same issue which is before us, as a valid answer, which is a prayer for hearing is on file. Second, the case stands alone and is contrary to the weight of authority elsewhere. "At the expiration of the time allowed by law for the filing of an appearance or answer, judgment by default may generally be entered. Although it has been held that a judgment by default, rendered before time allowed defendant to answer has expired, is erroneous simply, the weight of authority is apparently to the effect that a judgment by default entered too soon is a nullity, and it has been said that to take a judgment by default before the return day is the same as signing judgment without service or process at all." 15 R. C. L. p. 665, § 113, citing Yentzer v. Thayer, 10 Colo. 63, 14 P. 53, 3 Am. St. Rep. 563; Vohlers v. E. H. Stafford Mfg. Co., 171 Mich. 8, 137 N. W. 128, Ann. Cas. 1914B, 1032; State ex rel. Hickey v. District Court, 42 Mont. 496, 113 P. 472, Ann. Cas. 1912B, 246; Winslow v. Anderson, 20 N. C. 1, 32 Am. Dec. 651. Third, it is contrary to the line of later cases above cited, and if any conflict appears the Newman Case must give way. Lastly, it is squarely and pointedly distinguished by the later case of Reher v. Reed, 166 Cal. 525, 528–529, 137 P. 263, 264 (Ann. Cas. 1915C, 737), a case exactly apposite to our present inquiry, wherein it is said:

> "It follows that on the face of the record it appeared that the clerk was without authority to enter the default, and, consequently, without authority to enter the judgment. In such a case the court may set aside the judgment of its own motion at any time, and it is immaterial how the invalidity is called to its attention. Wharton v. Harlan, 68 Cal. 422, 425, 9 P. 727; Kelly v. Van Austin, 17 Cal. 564; People v. Greene, 74 Cal. 404, 16 P. 197, 5 Am. St. Rep. 448."

To the same effect see Ann. Cas. 1915C, p. 738, note. Said declaration in the Newman Case is also at variance with the cases of Kelly v. Van Austin, 17 Cal. 564–566, and Junkans v. Bergin, 64 Cal. 203, 204, 30 P. 627, both cases of collateral attack. In the latter case the court said:

> "When the casus legis does not exist, his entry of judgment is void and of no avail. This very point was determined in Kelly v. Van Austin, 17 Cal. 565, 566, where, as here, the judgment was collaterally attacked. This ruling has been frequently approved."

In this case the default was entered while an answer, though a belated one, was on file.

What is above said disposes of the cases of Endowment Department, etc., v. Harvey, 6 Ala. App. 239, 60 So. 602, 604, and Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 P. 1158, 1160. Furthermore we are not advised as to what constitutes the judgment roll in those states. The main opinion cites no other cases requiring discussion.

It is no answer to this contention to say that the defendant was in duty bound to watch the calendar of the court to see if some action was being taken against him without notice and, so finding, he had the right of appeal. Such a position discounts the strength of the provision in our Constitution requiring "due process of law." An appeal without evidence and without a chance to make a record is wholly insufficient to constitute a day in court and time need not be taken to cite authority on so evident a proposition. Likewise it is no excuse to say that a judgment void on its face may not be called into question by a party who has no beneficial interest thereunder or who is not injuriously affected thereby. The cases of People v. Greene, supra, People v. Davis, supra, and 15 R. C. L., supra, answer such contention beyond doubt. If such a judgment is a "dead limb upon the judicial tree," why may not a court of its own motion or at the behest of any other person, destroy the rubbish and decayed matter from the legal tree? Moreover, the defendant in this action is the identical person made a party to the judgment under examination. His failure to properly defend himself against said judgment might well bring him into an actionable position with one or the other parties thereto. Certainly said defendant has a legal duty to perform and should be allowed to perform it, as he is the alter ego of one of the parties to the action in question.

The line of demarcation between void and voidable judgments is clearly marked, and the judgment in question is void upon collateral attack, in my opinion. This question I regard of grave importance for under a contrary holding any defendant over night might find himself in a position where he would have to go to the trouble and expense of an appeal and in some cases he might discover his predicament too late to make direct attack on the judgment.

When a litigant submits to the jurisdiction of the legal forum and prays for a hearing he supplicates the throne of justice and not that of oppression. If he may not be heard, the court then becomes the executioner of one who has prayed for mercy and does exactly what it is organized to prevent. We should not hesitate, therefore, and weaken at the usurpation, simply because the attack is collateral so long as the infirmity appears in a way to permit the attack, to wit, on the face of the judgment roll.

Judgment of the court below was correct and should be affirmed.

SHENK, J. I dissent. I am in accord generally with the views expressed by Mr. Justice PRESTON in his dissenting opinion. I entertain no doubt, however, that the attitude assumed by the respondent herein is in the nature of a collateral attack upon the judgment in the original action of Gray v. Yarbrough. Howe v. Southrey, 144 Cal. 767, 78 P. 259; Hamblin v. Superior Court, 195 Cal. 364, 233 P. 337, 43 A. L. R. 1509. When such an attack is made an inspection of the judgment roll alone must disclose whether the judgment is void for want of jurisdiction of the court to pronounce it or is merely the result of error in the exercise of jurisdiction. The main opinion holds that the judgment was erroneous and subject only to direct attack. With this conclusion I am unable to agree. In brief, an inspection of the judgment roll shows that the court rendered the judgment on the merits when the case was at issue on questions of fact and without notice to the defendant or any opportunity afforded him to be heard. This action on the part of the court was, I think, in excess of its jurisdiction. As said by this court in Pioneer Land Co. v. Maddux, 109 Cal. 633, at page 642, 42 P. 295, 297 (50 Am. St. Rep. 67) quoting with approval from Mr. Van Fleet on "Collateral Attack," § 16:

> "In order to make a judgment void collaterally, either (1) a legal organization of the tribunal; or (2) jurisdiction over the subject-matter; or (3) jurisdiction over the person must be wanting; or (4) one or more of these matters must have been lost after it once existed. When either of these defects can be shown, the judgment and all rights and titles founded thereon are void. * * * When a judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or the lowest court in the land—it is equally worthless. No one is bound to obey it. The oath of all officers, executive, legislative, or judicial compels them to disregard it."

Assuming that the court in the action of Gray v. Yarbrough acquired jurisdiction of the person of the defendant in the first instance by the service of summons upon him and his appearance, it is clear to me that the jurisdiction so acquired was not continuing so as to empower the court to hear the cause upon issues of fact joined and pronounce judgment against him ex parte. In harmony with and in furtherance of the constitutional requirement of due process of law, the Legislature has prescribed that when a case is, as here, at issue on questions of fact, the adverse party must have notice of trial. Section 594, Code Civ. Proc. That section of the Code has been applied in numerous instances; but in no case, to my knowledge, has it been held, where the point was directly involved, that the required notice was not jurisdictional. In Uplinger v. Yonkin, 47 Cal. App. 435, 190 P. 822, it was held that the requirements of that section did not apply to a defaulting defendant. It is true the court then went on to say that even when the requirements of the section are applicable, a trial and judgment given without such notice is merely erroneous, citing Estate of Dean, 149 Cal. 492, 87 P. 13. But the Dean Case was a direct appeal, and the holding therein went no further than to declare that the failure to give notice of trial was prejudicially erroneous and would necessitate a reversal. The question of collateral attack was not involved in either case. In Clark v. Superior Court, 55 Cal. 199, referred to in the main opinion, a trial on the merits had taken place in the old district court, all parties being present. Findings and judgment had been signed by the court, but were not filed until after the new Constitution became effective. The question of whether the court had jurisdiction of the parties was not involved. In fact, the statement of the court, quoted in the main opinion, recognizes that jurisdiction of the parties must exist. Furthermore, the quoted statement is obiter.

In the present case no disputed question of fact is involved. On the record the main opinion declares correctly that the original cause was at issue, was heard and decided by the court and judgment pronounced without notice to the defendant. In such case it is not correct to assume, as is assumed in the main opinion, that the court had continuing jurisdiction of the person when notice of hearing under the law was necessary. The judgment on its face shows the defect of want of jurisdiction of the person. It is therefore void and "may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever." Forbes v. Hyde, 31 Cal. 342, 348; Estate of Pusey, 180 Cal. 368, 374, 181 P. 648. Even the affirmance of such a judgment on appeal could not make it valid. Pioneer Land Co. v. Maddux, supra; Ball v. Tolman, 135 Cal. 375, 67 P. 339, 87 Am. St. Rep. 110.

In my opinion the respondent clerk was justified in disregarding the judgment relied on by the appellant. It imposed upon him no duty enjoined by law, and the trial court was right in denying the writ of mandamus.

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REICHERT et al. v. RABUN et al.
(Civ. 6127.)

District Court of Appeal, First District, Division 2, California. Feb. 21, 1928.

1. Judgment 🔑518—Motion to set aside judgment based on want of jurisdiction was "direct attack" (Code Civ. Proc. § 473).

Motion to set aside judgment in action to quiet title, based on want of jurisdiction, was direct attack on judgment, and was not controlled by Code Civ. Proc. § 473.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Direct Attack.]

2. Judgment 🔑354—Trial court cannot vacate judgment regularly entered because of court's errors.

Trial court may not vacate its judgment, regularly entered, either on motion or sua sponte, because of errors of court alone.

3. Judgment 🔑304—Errors of court alone can be corrected only by appeal from judgment, motion for new trial, or other statutory motion.

Errors of court alone can be corrected only by appeal from judgment, motion for new trial, or other motion specially provided by statute.

4. Quieting title 🔑50—Court could not give plaintiffs judgment for strip in addition to property claimed in complaint, though prayer of complaint asked court to fix boundary lines (Code Civ. Proc. § 580).

Court could not by judgment in action to quiet title give plaintiffs strip of property in addition to property claimed in complaint under Code Civ. Proc. § 580, though prayer of complaint asked court to fix boundary lines of lots.

5. Quieting title 🔑30(3)—Where pleadings in action to quiet title showed several lot owners in block were jointly interested in excess strip, lot owners of entire block were necessary parties (Code Civ. Proc. § 389).

Where pleadings in action to quiet title showed on face that there were 29.02 feet in block in excess of width shown on map, and that the several lot owners were all jointly interested in excess, lot owners of entire block were necessary parties to controversy, and should have been joined as such under Code Civ. Proc. § 389.

6. Constitutional law 🔑309(1)—To enforce judgment taking strip of defendants' land, based on cross-complaint not served on them, defendants not appearing, was taking of property without due process (Code Civ. Proc. § 442).

Where judgment taking strip of defendant's land in action to quiet title was based on cross-complaint to which defendants were not parties, and which was not served on defendants as required by Code Civ. Proc. § 442, where defendants did not appear, to enforce judgment without giving defendants their day in court was taking of property without due process.

7. Judgment 🔑28—Where judgment based on cross-complaint, if vacated as to defendants not served, was not enforceable, judgment was void in toto (Code Civ. Proc. § 442).

Where if judgment based on cross-complaint in action to quiet title was vacated as to defendants not served with cross-complaint as required by Code Civ. Proc. § 442, it could not be enforced because it would be impossible to ascertain what was determined by it, the void portion of judgment was so interwoven with entire judgment as to render it void in toto.

8. Judgment 🔑141—Where defendants were not served and did not appear, want of jurisdiction being apparent, trial court properly set judgment based on cross-complaint aside (Code Civ. Proc. § 442).

Where want of jurisdiction over defendants was apparent on face of record because defendants were not served with copies of cross-complaint on which judgment was based as required by Code Civ. Proc. § 442, and defendants did not appear at trial, judgment could be attacked anywhere, directly or indirectly, and trial court properly set it aside on defendants' motion.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action to quiet title by Ralph E. Reichert and others against Wiley T. Rabun and another, who filed cross-complaint, and others. A judgment for cross-complainants and for plaintiffs against the other defendants was set aside, and plaintiffs and cross-complainants appeal on joint bill of exceptions. Affirmed.

Walter W. Hoye, of Los Angeles, for appellant Rabun.

Thomas V. Cassidy and Charles G. Hedgcock, both of Huntington Park, for appellants Reichert and others.

Edward H. Miller and Arch G. McLay, both of Huntington Park, for respondents.

NOURSE, J. Plaintiffs sued to quiet title to certain lots of land situated in Los Angeles county. Defendants Doll defaulted, and defendants Rabun filed an answer and cross-complaint. Judgment went for defendants Rabun on their cross-complaint giving relief to plaintiffs against the Dolls beyond the issues raised in the complaint. This judgment was set aside, and both plaintiffs and cross-complainants appeal on a joint bill of exceptions.

The complaint was in the usual form and described the property involved as lots 20 and 21 in block E of Nadeau Vineyard tract, according to the map of the tract recorded with the county recorder, and also the north 10 feet of Irene avenue, a vacated public way. Service of this complaint was made upon the defendants Doll, and their default was duly entered. The defendants Rabun, owners of lots 22, 23, and 24 adjoining plaintiffs on the east, filed a cross-complaint against plaintiffs alone in which they pleaded that, though it appeared on the recorded map of the tract that each of the lots in block E was 50 feet in width, each was in fact 52.41 feet in width. They then described by metes and bounds the land claimed by them having a frontage of 157.23, and asked that their title be quieted to that area. The theory upon which relief was sought under the cross-complaint was that there was an excess of ground along the entire width of block E over that shown upon the map; that this map, filed for record in 1888, had incorrectly described the 12 lots in that block as of 50 feet in width, and had given the entire frontage of the block as 600 feet, whereas this frontage should have been shown as 629.02 feet; and that the cross-complainants, as owners of 3 of the 12 lots, were entitled to an equitable adjustment of this excess in frontage amounting to 2.41 feet to each lot. In their answer to the cross-complaint the plaintiffs pleaded that this excess had been taken and held under adverse possession for a period of more than five years by an occupant and claimant, who had inclosed, cultivated, and improved said property and paid all taxes thereon; that, upon the recognition by the other lot owners of the block of such adverse holding of such excess, they had built houses, fences, and other improvements of great value upon their several lots; and that it would be unjust and inequitable to apply the rule of apportionment to such owners.

The case which was thus framed by the cross-complaint and the answer to it was that the map of the tract which had been on record more than 37 years and upon which the several lots in the block had been sold had incorrectly described the lots; that the excess of 29.02 should be equally divided between the several lot owners each being given a lot having a frontage of 52.41 feet. But to make this adjustment it appeared that the lines of each lot owner must be moved, and that in some instances this would interfere with permanent improvements of the owners to the west of the parties who appeared. This cross-complaint was not served on defendants Doll, and the trial was had without their appearance.

The trial court found that the allegations of plaintiffs' complaint were not sustained by the evidence, but that the evidence sustained the allegations of the cross-complaint. Judgment was thereupon rendered upon this cross-complaint in favor of cross-complainants, quieting their title to lots 22, 23, and 24, together with a strip adjoining the westerly line of lot 22, 7.23 feet wide by 144.91 feet deep. The land thus set apart to cross-complainants was then described as having a frontage of 157.23 feet and a depth of 144.91 as described in the cross-complaint, and the plaintiffs and defendants Doll were adjudged to have no estate or interest therein. The judgment also quieted plaintiffs' title to lots 20 and 21, "together with a certain parcel or strip of ground 144.91 feet in length and of the uniform width of 4.82 feet, adjoining and of equal length to the westerly line" of lot 20. The boundary line between the property of plaintiffs and cross-complainants was then fixed at 157.23 feet west of and parallel to the westerly line of Belgrave avenue, and the boundary line between the property of plaintiffs and defendants Doll was fixed at 262.05 feet west of the westerly line of Belgrave avenue. The decree was based upon the conclusion that there was an excess of ground along the north and south boundary of block E of 29.02 feet and that plaintiffs and cross-complainants were entitled under the equitable rule of apportionment to have added 2.41 feet to each lot as it appeared on the official map. The effect of the decree was to move cross-complainants' westerly boundary line 7.23 feet over on lot 21 claimed by plaintiffs and, by adding 4.82 feet to their holdings, their westerly boundary line was moved over onto the Dolls' lot 12.05 feet.

[1] The motion to set the judgment aside was made upon the grounds of irregularity, that the findings disclosed that the allegations of the complaint were not sustained, that the cross-complaint was not served upon them, and that the judgment was void and without due process. The motion was granted as to these defendants and the court, of its own motion, set aside the judgment as to all other parties without prejudice to them. The plaintiffs appealed from the entire order, while the cross-complainants appealed from that portion only of the order which set aside the judgment as to plaintiffs and themselves. By stipulation of all the parties both appeals are heard upon a bill of exceptions prepared by cross-complainants.

The motion of respondents to set aside the judgment, based upon want of jurisdiction, was a direct attack upon the judgment. Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386–391, 212 P. 933; Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 392, 30 P. 585, 32 P. 452, 33 Am. St. Rep. 198; Waller v. Weston, 125 Cal. 201, 203, 57 P. 892. This motion is made independently of and is not controlled by section 473, Code of Civil Procedure. In re Seaman's Estate, 51 Cal. App. 409–411, 196 P. 928; Baker v. O'Riordan, 65 Cal. 368, 370, 4 P. 232; 14 Cal. Jur. p. 907, par. 30. If the judgment was based upon the cross-complaint it was void as to these respondents because they were not parties to the cross-complaint, it was not served upon them as required by section 442, Code of Civil Procedure, and they did not appear at the trial. White v. Patton, 87 Cal. 151–153, 25 P. 270; Houghton v. Tibbets, 126 Cal. 57–60, 58 P. 318.

[2, 3] The case is not like Stanton v. Superior Court (Cal. Sup.) 261 P. 1001, and the authorities there cited. It has been long recognized as the rule in this state that the trial court may not vacate its judgment regularly entered, either upon motion or sua sponte, be-

cause of errors of the court alone. Williams v. Reed, 43 Cal. App. 425–432, 185 P. 515; Grannis v. Superior Court, 146 Cal. 245, 257, 79 P. 891, 106 Am. St. Rep. 23. Such errors can be corrected only by appeal from the judgment, motion for new trial, or other motion specially provided by statute. But in People v. Greene, 74 Cal. 400, 405, 16 P. 197, 199 (5 Am. St. Rep. 448), it is said:

> "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant."

Quoting this language with approval in People v. Davis, 143 Cal. 673–676, 77 P. 651, 652, the court said:

> "While it is immaterial in a certain sense whether such a judgment or order be formally set aside, for it neither binds nor bars anyone, still it is well settled that the court, whose records are thus encumbered with what is a mere form, without substance, may at any time formally remove the same by declaring it a nullity."

To the same effect are Luckenbach v. Krempel, 188 Cal. 175, 177, 204 P. 591; Estate of Pusey, 180 Cal. 368, 374, 181 P. 648; Forbes v. Hyde, 31 Cal. 342, 347.

In Gray v. Hall (Cal. Sup.) 265 P. 246, it is said:

> "It cannot be denied that, in those cases in which judgments have been rendered without any or insufficient service, or where the party not only has had no opportunity to answer, but is so ignorant of any proceeding against him as not to have been able to avail himself of the remedies which the law gives him until he has lost them all, the judgment is absolutely void. Such a judgment may be attacked at any time, directly or collaterally."

[4] That the judgment was based upon the cross-complaint admits of no doubt. The court found that the allegations of the complaint had not been sustained, and based its judgment upon findings in accord with the allegations of the cross-complaint alone. These were so essentially different from the allegations in the complaint that respondents' default to the complaint did not justify the entry of the judgment against them. Balfour-Guthrie v. Sawday, 133 Cal. 228, 230, 65 P. 400; Holman v. Vallejo, 19 Cal. 499, 500. The complaint described the property as lots 20 and 21, as they appeared on the map on file with the county recorder. Respondents had no interest in these lots and suffered their default to be entered. The judgment gave the plaintiffs a strip 144.91x4.82 feet, in addition to the property claimed by plaintiffs in their complaint, and a strip 144.91x12.05 feet, claimed by respondents but not described nor referred to in the complaint. When the default of defendants is entered the relief granted to the plaintiff cannot exceed that demanded in his complaint. Section 580, Code Civ. Proc. It is of no importance that the prayer of the complaint asked the court to fix the boundary lines of the lots. The description in the body of the complaint of the lots as they appeared upon the official map put respondents upon notice that title to these lots alone was involved. The judgment was based upon a theory entirely different from that pleaded—it was in the nature of a suit to reform the descriptions in the map and in the deeds of conveyance. Respondents were not summoned to answer such a suit and the court was without jurisdiction to enter the judgment against them. Such is the effect of Balfour-Guthrie v. Sawday, supra, and this requires an affirmance of that part of the order setting aside the judgment as to respondents.

[5-7] Upon the face of the pleadings the lot owners of the entire block were necessary parties to the controversy and should have been joined as such (section 389, Code Civ. Proc.), as the only theory upon which the judgment was based was that the several lot owners were all jointly interested in the excess. But to enforce the judgment as entered it would be necessary to take 12.05 feet of respondents' land. To do this without giving them their day in court was a taking of property without due process. As the judgment is unsupportable on any theory of equity unless the 12.05 feet be taken from the respondents and some compensation given them for it, it is apparent that the controversy was one which could not have been determined between the parties before the court without prejudice to the respondents. Of this strip of 12.05 feet claimed by them, 4.82 feet was given to plaintiffs and 7.28 feet was theoretically given to cross-complainants. If the portion of the judgment affecting the respondents alone is vacated the judgment would then be an empty shell which could not be enforced because it would be impossible to ascertain what was determined by it. We are therefore satisfied that the void portion of the judgment relating to respondents is so interwoven with the entire judgment as to render it void in toto.

[8] Though the court was without jurisdiction to enter any judgment against the respondents upon the cross-complaint because of want of jurisdiction of the person, it did enter such a judgment purporting to adjust between all the parties the properties claimed by each. It is impossible to segregate from the judgment the portions relating to respondents alone and leave a judgment which has any meaning or effect. The want of jurisdiction over the respondents being apparent upon the face of the record, the judgment becomes one of that class which may be attacked anywhere, directly or indirectly, and the trial court properly set it aside.

Some of the authorities cited hold that even where the judgment or order is void on its face application for relief must be made within a reasonable time. This question does not arise here, as the judgment was vacated within 30 days of its entry.

The order vacating the judgment as to all parties is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

HORAN v. VARIAN et al. (Civ. 5976.)★

District Court of Appeal, First District, Division 2, California. Feb. 23, 1928.

Rehearing Denied March 23, 1928. Hearing Granted by Supreme Court April 23, 1928.

1. Trusts 🔑372(3)—Evidence did not support finding that deed was delivered to defendant alleged to be holding title in trust for another after commencement of partition action.

Evidence *held* insufficient to support finding that deed from one alleged to have held title in trust for defendant P. was not delivered to defendant M. until after commencement of action in partition.

2. Trusts 🔑110—Evidence held not to support finding that conveyance under power of attorney created constructive trust.

In action for partition of real property, in which D. who was attaching creditor in action pending against M. and others, was made defendant, evidence *held* insufficient to warrant finding of trial court that defendant M., claiming to be owner of undivided interest, who had conveyed P.'s property, under power of attorney, to another who conveyed to M., held ten fifty-fourths interest in property as trustee of a constructive trust in favor of M. and not otherwise.

3. Trusts 🔑102(1)—"Constructive trust" arises whenever by fraud or breach of fiduciary duty one uses another's property to make purchase in his own name.

A "constructive trust" arises regardless of intention, whenever by fraud or a breach of a fiduciary duty one uses the property of another to make a purchase in his own name.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Trust.]

4. Trusts 🔑102(1)—Use of principal's money to purchase property in agent's own name must be unauthorized before "constructive trust" arises.

Before a "constructive trust" arises where agent uses principal's money to make purchase in his own name or in name of third person, such use of principal's money must be unauthorized or fraudulent.

5. Principal and agent 🔑71—That agent takes principal's property in his own name under power of attorney does not in itself denounce transaction as fraud.

An agent is not barred from dealing with his principal's property, and mere fact that he acts under power of attorney from his principal does not in itself denounce transaction as fraud on principal, and, when power of attorney is broad enough to authorize agent to so act, there is nothing inherently wrong in agent taking property of principal in his own name.

6. Principal and agent 🔑75—Principal's ratification of agent's taking title in his name for his benefit has effect of previous authorization.

Where agent has taken title in his own name or in name of a third person for his benefit, principal may ratify or confirm transaction, and, if he does so, such ratification has effect of previous authorization for such purpose, and constructive trust does not arise in favor of principal; there being no want of authority on part of agent to make purchase nor fraudulent use of principal's money.

7. Principal and agent 🔑75—Statute prohibiting ratifying unauthorized act, retroactively, to third person's prejudice does not apply to authorized act of agent taking title to principal's property under power of attorney (Civ. Code, § 2313).

Civ. Code, § 2313, providing that "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent," does not apply in favor of principal's creditor, where agent had authority under power of attorney to convey principal's interest in land to himself through another party for purpose of effecting part payment of indebtedness of principal to agent, and principal ratified and confirmed acts done by agent under power of attorney.

8. Trusts 🔑91—Title chargeable with constructive trust is voidable merely.

Since constructive trust arises by operation of law and not by agreement or intention and is based on fraud, actual or constructive, title chargeable with such trust is voidable merely and not void.

9. Trusts 🔑144—Ratification by principal who would become cestui que trust makes it impossible for him to set up constructive trust, and no one can do it for his benefit.

Cestui que trust may enforce or renounce trust at his option, and ratification by principal who would become cestui que trust makes it impossible for him to set up constructive trust, and, when principal is unable to do it, no one can do it for his benefit.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action in partition by Thomas J. Horan against Mary A. Varian, H. M. Driscoll, R. McColgan, and others, in which H. M. Driscoll filed a cross-complaint. From the judgment, McColgan appeals. Reversed.

★Superseded by opinion of Supreme Court, 268 P. 637.

George D. Collins, Jr., of San Francisco, for appellant.

Loyd Wright, of Los Angeles, and Ford, Johnson & Bourquin, of San Francisco, for respondent Driscoll.

NOURSE, J. Plaintiff sued for the partition of certain real property situated in Los Angeles county, joining as parties defendant the heirs of the estate of Sabina Lanon, deceased, certain assignees of portions of the shares of such heirs and Driscoll, who was an attaching creditor in an action pending in the superior court against three of said heirs and one Eugene A. Platt. The answer of the defendant McColgan set up that he was the owner in fee simple of an undivided five-eighteenths interest in the property in suit and that he held the mortgage upon an undivided five fifty-fourths interest in said property held by defendant Cox. The answer of the defendant Driscoll pleaded that on November 14, 1922, she commenced an action in the superior court against the three heirs named as parties defendant in this proceeding and against Platt for an indebtedness claimed to be due her in the sum of $8,000, and that attachments were duly levied, and notices of garnishment as to defendant Platt were served upon defendant McColgan and others, but that she was unable to ascertain what, if any, sum of money was due Platt from them. She also alleged that the five twenty-sevenths interest in the property in the name of defendant Russell was held by him in trust for Platt. Thereafter Russell disclaimed any right of interest in the premises, and this disclaimer was duly filed of record. On June 20, 1924, the defendant Driscoll filed an amendment to her answer, accompanied by what she terms a cross-complaint. In this amendment she alleged that the defendant McColgan was the attorney in fact for defendant Platt, who at all the times mentioned resided in Paris, France; that prior to November 14, 1922 (the date of the commencement of her action in which the attachment was issued), McColgan, as said attorney in fact, "without instructions from, notice to, consent of, valuable or any consideration to, or thereafter or at all reporting the same to, said Eugene A. Platt," executed and delivered an assignment of an undivided five-eighteenths interest in said property to Lyman Russell; that said interest at the time the attachment was levied stood of record in the name of said Russell; that thereafter said Russell conveyed said legal title to said interest to defendant McColgan; and that said McColgan acquired and now holds an undivided five twenty-sevenths interest in the same; and that said McColgan holds said undivided five twenty-sevenths interest in trust for said Platt and not otherwise. As a separate answer, defendant Driscoll alleged that Russell acquired the undivided five eighteenths interest in said property "as trustee of a constructive trust in favor of Eugene A. Platt" and that said McColgan acquired said five-eighteenths interest and now holds a five twenty-sevenths interest in said property "with full knowledge of said facts and acquired and at all of said times held and now holds the same as trustee of a constructive trust in favor of said Eugene A. Platt and not otherwise." It was also alleged in this amendment to the answer that these transactions between McColgan, Platt, and Russell were all taken for the purpose of defrauding creditors of Platt, but no attempt was made to prove any of these allegations, and this defense was apparently abandoned. Attached to this amendment is a cross-complaint pleading two causes of action. The first cause merely refers to paragraphs of the answer and the amendment thereto and makes them a part of this pleading. The same method is used in pleading the second and third causes of action. A prayer follows asking that the property be partitioned, but that, if this cannot be done without material injury, the premises be sold and the proceeds divided among the parties according to their respective rights. On July 16, 1924, the defendant Driscoll filed a second amendment to her answer in which she pleaded that the deed heretofore mentioned from Russell to McColgan was made for the purpose of securing the payment by Eugene A. Platt to McColgan of certain indebtedness then owing, and that said deed was intended to be a mortgage for the security of said indebtedness.

The trial court found the respective interests in the property to which the plaintiff and the three other heirs named as defendants were entitled and also found that at the time of the commencement of the action in partition Russell held an undivided ten fifty-fourths interest in the property; that prior to the commencement of this action he signed and acknowledged a deed conveying legal title to such interest to defendant McColgan, but that said deed was not delivered until after the commencement of the action; that said McColgan acquired and holds said interest as trustee of a constructive trust in favor of Platt and not otherwise. The court further found that all the allegations of the first and second separate defenses contained in the amendment to the answer of defendant Driscoll and that all the allegations of the first and and second counts of her cross-complaint were true. It was also found that upon motion of defendant Driscoll the determination of other issues between her and defendant McColgan should be reserved until the final determination of the action entitled Driscoll against Varian in which the attachment was issued. At this point it should be noted that no findings were made upon the third defense of defendant Driscoll that the transfer from Platt to Russell to McColgan was in fraud of creditors of Platt or upon the fourth defense raised by her that the deed delivered in this transaction was intended to be a mortgage for the security of a debt due from Platt to McColgan.

[1] The appeal is taken by McColgan from the judgment and at the outset he attacks the finding that the appellant holds a ten fifty-fourths interest in the property as the trustee of a constructive trust in favor of Platt and not otherwise, as well as the finding as to the date of delivery of the deed from Russell to McColgan. As to the latter finding, it is contrary to all the evidence in the record. This deed was executed on October 3, 1922, and delivered to McColgan immediately after it was acknowledged on the same day. The complaint in this action was filed on June 11, 1923, while the complaint in the attachment suit was filed on November 14, 1922. There is the testimony of George K. Ford, who is the assignor of the defendant Driscoll and who was the counsel for the defendant McColgan at the time these transactions were had, that on October 22, 1922, he had Russell make a deed of a five fifty-fourths interest in this property to one Cox, and that the deed had been executed by Russell rather than by McColgan because the record title was in the former. It is in the testimony of this same witness that on March 23, 1923, McColgan stated to him "that he had not had Lyman Russell deliver the deed to him; that the title still stood in Lyman Russell." There is no dispute that the deed was not recorded until August, 1923, while the positive testimony of the grantor and the grantee that it was delivered in October, 1922, is contradicted by this testimony of Mr. Ford. This testimony might have sustained a finding that the deed was not delivered until after March 23, 1923, but there is no testimony of any character supporting the finding that it was not delivered until after June 11, 1923, the date this action was commenced. We cannot say that the trial court believed the testimony of Mr. Ford as to what was said on October 22, 1922, and March 23, 1923, and we cannot say that the finding should be changed so as to find that delivery had not been made at either one of those dates. The whole question is of little importance, however, inasmuch as the attachment suit was against Platt and not against Russell or McColgan. There is neither allegation nor proof that Russell stood in any confidential relation with Platt; that he had any knowledge of any confidential relation between Platt and McColgan; that he took the assignment in fraud of Platt; or that when he executed or delivered the deed he had knowledge of the attachment or of any interest claimed to be in Platt.

[2] The serious question is whether the facts warrant the finding of the trial court that appellant McColgan held a ten fifty-fourths interest in the property as trustee of a constructive trust in favor of Platt and not otherwise. In this connection it is pointed out that the trial court found that all the allegations in the first and second separate defenses contained in the amendment of the answer of Driscoll were true. These allegations are that the appellant, acting as attorney in fact for Platt "without instructions from, notice to, consent of, valuable or any consideration to, or thereafter or at all reporting the same" to, Platt, had executed and delivered an assignment of this interest to Russell who thereafter deeded the same interest to McColgan, and that the latter holds said interest in trust for Platt; also that Russell acquired and held said interest as trustee of a constructive trust in favor of Platt and that McColgan acquired the interest therein with full knowledge of all the facts. It should be noted that there is no allegation of any facts constituting fraud or breach of fiduciary relation, and no effort was made to prove that either of the transfers were made "without instructions from, notice to, consent of, valuable or any consideration to, or thereafter or at all reporting the same" to, Platt. If we are to assume that the allegation means that the power of attorney under which appellant was acting required instructions, notice, consent, or report to Platt, the written power is evidence to the contrary. This document which was drawn by Mr. Ford, as counsel for the appellant at that time for the purpose of enabling the latter to satisfy the indebtedness owing him from Platt, is in the usual form of a general power of attorney and particularly authorizes the appellant to sell, convey, and mortgage land, choses in action, and other property in possession or in action, and to sign, execute, and deliver deeds, agreements, evidences of deeds, and other instruments in writing of every kind, and particularly to assign, transfer, and convey any and all interest, estate, and property vested in Platt by virtue of any agreement or assignment of any interest conveyed to him in any estate or estates of any person deceased. The power of attorney was executed under an arrangement with Platt to enable the appellant to realize on any of the assignments for the purpose of liquidating the debts due from Platt to him. The evidence is that this arrangement was made in 1921 before Platt left San Francisco for France; that thereafter the power of attorney was sent to him for signature in accordance with a promise which Platt had made to appellant at the time he had borrowed the money from him; that the assignment from Platt to Russell, executed by the appellant under this power of attorney was made for the benefit of the appellant as a part of the arrangement between appellant and Platt; that it was made for the purpose of effecting a part payment of indebtedness of Platt to the appellant; and that it was not taken as security. It is also in the

evidence that through an express agreement with Platt and the appellant any property acquired in this manner was to be transferred to the appellant by assignment, and that the appellant should apply the same or the money realized from the sale thereof in part payment of the indebtedness owing from Platt. This is the undisputed evidence of the purposes for which the power of attorney was given to appellant, and of the circumstances under which the assignments were made, while respondent has not shown any evidence tending in any way to support the allegations of her cross-complaint.

In addition to this, we find that on April 11, 1924, Platt fully ratified and confirmed all acts done by the appellant under this power of attorney. In this ratification he recited that the power of attorney had been given to appellant for the special purpose of enabling and authorizing the latter to transfer, convey, and dispose of all property in which he had any interest to the end that appellant could apply the proceeds from the sale or other disposition thereof to the payment of the indebtedness due him from Platt. It is also recited that, whereas the appellant had conveyed and assigned to him and conveyed and assigned to others for him and for his benefit certain property in which Platt held an interest, the latter *for value received* fully ratified, confirmed, and approved all these conveyances and assignments. When this ratification was offered in evidence an objection was made by counsel for Driscoll, but the objection was not pressed, and counsel admitted that it was "relevant and material in the matter for the purpose of showing whether Mr. McColgan has title or not." The importance of the document is that it was some evidence explaining the intention of the parties in the execution of the power of attorney, that it disclosed that a valuable consideration was received for the transfer to appellant, and it completely foreclosed Platt from asserting that the appellant held title as trustee of a constructive trust for him.

[3-6] Passing the question of the insufficiency of the pleadings to raise the issue that a constructive trust arose, and assuming for the moment that an attaching creditor may sue to impress a trust on behalf of his debtor, we will consider the case in the light of the objection as to the insufficiency of the evidence to support the finding that either Russell or appellant held as a trustee for Platt. A constructive trust arises regardless of intention "wherever by fraud or in breach of a fiduciary relation one uses the property of another to make a purchase in his own name." Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 252, 196 P. 884, 890. It is essential, however, that the use of the principal's money for this purpose or the taking of title by the agent in his own name or in the name of the third person should be unauthorized or fraudulent." 39 Cyc. p. 190. In 26 Ruling Case Law, p. 1236, it is said:

> "It is a well-settled general rule that if one person obtains the legal title to property, not only by fraud, or by violation of confidence of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

In 39 Cyc. p. 27, it is said:

> "Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. * * * They are entirely in invitum, and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud."

One of the most frequent instances in which a constructive trust arises is where an agent or one acting in a fiduciary relation procures, through the means of his agency or fiduciary relation, a benefit to himself adverse to his principal. Thus where an agent, acting under a power of attorney from his principal, acquires the property of his principal in his own name, without consideration and without the principal's consent, equity will generally declare a constructive trust in favor of the principal. But an agent is not always barred from dealing with his principal's property, and the mere fact that he acts under a power of attorney from his principal does not in itself denounce the transaction as a fraud upon the principal. When the power of attorney is broad enough to authorize the agent to so act, there is nothing inherently wrong in the agent taking property of the principal in his own name. Of course, if the transaction is without consideration to the principal, the agent will be presumed to have obtained an advantage, and the burden is then cast upon the agent to show that the transaction was bona fide and authorized by the principal. Mechem on Agency, § 1221; 1 Am. & Eng. Ency. of Law, 1081; Burke v. Bours, 98 Cal. 171, 176, 177, 32 P. 980. In the Burke Case it is said:

> "There is no inhibition upon a purchase by an agent from his principal, 'where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation. The principal may, if he sees fit, deal with the agent as with any other person.' Mechem on Agency, § 466; Rochester v. Levering, 104 Ind. 562 [4 N. E. 203]. The agent has the same right to deal directly with his principal as has a stranger. The rule which prevents the agent from purchasing the property which he is authorized to sell for his principal is based upon the maxim that no man can serve two masters, and that an agent shall not unite in his own person his individual with his representative character, or place himself in a position where his personal

interest will be in conflict with his duty to his principal. When, however, the agent deals with his principal 'at arm's length, and after a full disclosure of all that he knows with respect to the property' (Murphy v. O'Shea, 2 Jones & L. 425), or when the principal ratifies the purchase from himself with full knowledge of the circumstances connected with the transaction, he can thereafter avoid the sale only upon the same grounds as if the purchase had been made by a stranger. The powers of an agent in dealing with the property of his principal are limited in the same manner as those of a trustee. A trustee is not forbidden to deal with the trust property when the beneficiary, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. Civ. Code, § 2230."

In any event, where the agent has taken title in his own name or in the name of a third person for his benefit, the principal may ratify or confirm the transaction, and, if he does so, "such ratification has the effect of a previous authorization for such purchase, and a constructive trust in such lands will not arise in favor of the principal; there being no want of authority on the part of the agent to make the purchase nor fraudulent use of the principal's money." 39 Cyc. p. 190.

[7] Respondent insists that this ratification cannot affect her rights because of section 2313, Civil Code, which provides that:

> "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent."

The section applies to an "unauthorized" act of an agent, and is merely a restatement of the common-law rule of estoppel; that is to say:

> "Ratification applies to a formal declaration of approval of the act of another by the party sought to be bound, whereas estoppel is where a party is bound by his own act." Zenos v. Britten-Cook Land, etc., Co., 75 Cal. App. 299, 307, 242 P. 914, 917, citing Curtin v. Salmon River, etc., Co., 141 Cal. 308, 312, 74 P. 851, 99 Am. St. Rep. 75.

Thus a lessee of land cannot be disturbed by the lessor's ratification of a previous lease of the land made by an agent who was not authorized to make the lease. Borderre v. Den, 106 Cal. 594, 600, 39 P. 946. If a third party has obtained a benefit because of an unauthorized act of the agent, then the Code section steps in and stops the ratification of the act by the principal if such ratification would work to the injury of the third person. The appellant does not rely on the ratification as the basis of his authority to act as Platt's agent—that authority is found in the power of attorney. The ratification was offered for two purposes—to show the construction or understanding of the power of attorney by the parties intrusted, and to show that Platt was foreclosed from making any claim of trust for his own benefit.

[8, 9] As a constructive trust arises by operation of law and not by agreement or intention, and is based upon fraud, actual or constructive (39 Cyc. 109; Lezinsky v. Mason Malt W. D. Co., 185 Cal. 251, 252, 196 P. 884), the title chargeable with such a trust is voidable merely and not void (39 Cyc. 182). This being so, the cestui que trust may enforce or renounce the trust at his option. 39 Cyc. 182, 183. The rule is uniform that the ratification by the principal, who would become the cestui que trust, makes it impossible for him to set up a constructive trust, and, when the principal is unable to do it, no one can do it for his benefit. 1 Mechem on Agency, §§ 1222, 1239; Long v. King, 117 Ala. 423, 429, 23 So. 534. In section 1239 of his work on Agency, Mr. Mechem has said:

> "In any case in which the principal complains of the misconduct or breach of loyalty of his agent, the principal cannot, even against the agent, recover, where he himself has consented to, waived, or condoned the act."

In section 1222 it is said:

> "It is not infrequently said * * * that the agent's act is void. No more is meant by this, however, than that the act is voidable at the principal's election. The rule is designed for the principal's protection, and, like other similar rules, its benefit may be waived if the principal sees fit to do so. If he is satisfied with the act, after full knowledge, no one else can complain."

In Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 528, 39 So. 229, 232, it is said:

> "Now the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void ab origine and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary, in a reasonable time, to say that he is not satisfied with it. It is valid in equity, as well as law, unless the parties interested repudiate it, or complain of it."

See Perry on Trusts (6th Ed.) §§ 195 and 198, and Bresee v. Bradfield, 99 Va. 331, 340, 38 S. E. 196, where the Virginia court, following the same reasoning, held that, where the cestui que trust did not elect to question the act of her agent in acquiring property in his name, her creditors could not do so.

Appellant insists that, even in the absence of ratification or waiver, an attaching creditor may not sue to have a constructive trust established in favor of his debtor, that such an action can be maintained by a judgment creditor only, and that a judgment creditor may sue for such purpose only in the case of a spendthrift trust where the credit has been given the debtor on the strength of the trust relation. Respondent apparently concedes the rule, as she merely refers to authorities holding that the conveyance may be attacked by an attaching creditor when he is sued by the alleged fraudulent trustee and that equity will come to the aid of judgment creditors where it appears that the conveyance was made to defraud creditors. It is not necessary to consider these authorities, as the exceptions upon which they lie are not present in this case. The alleged trustee is not suing the attaching creditor, and there is neither evidence nor finding that the conveyance was made in fraud of creditors of Platt; that it was not made in settlement of a bona fide debt due appellant; that Platt had any other creditors at the time; or that he was then, or at any other time, insolvent.

Appellant insists that respondents' whole case must fall because the decree of distribution in the Lanon estate determined that the whole title to this share was in Russell through assignments from the heirs, and that, the probate proceeding being one in rem, this decree is conclusive and binding upon the entire world. Appellant cites William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323, and a line of cases following, which hold that because of section 1678, Code of Civil Procedure, relating to distribution to heirs and their assignees the decree of distribution became final as to assignees of heirs in the same manner and to the same extent as it is made conclusive upon heirs under section 1664, Code of Civil Procedure. It is not necessary to determine the point, because, assuming that the creditor could assert an interest in Platt adverse to the finding of the decree of distribution, it is apparent that she has not done so by either pleading or proof.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

89 Cal. App. 477

GOTSCH v. MARKET ST. RY. (Civ. 6221.)

District Court of Appeal, First District, Division 1, California. Feb. 27, 1928.

1. Trial 🔑295(1)—Instructions must be taken together and considered as whole in determining whether instruction embodies error.

Instructions must be taken together and considered as a whole in determining whether any specific instruction embodies an improper statement of law or worked prejudice to party.

2. Carriers 🔑321(3)—Instruction that common carrier was bound to exercise utmost care and diligence held not ground for reversal, though not specifically limiting application to passengers, where instructions as whole were so limited.

In personal injury action against street railway, instruction that common carrier of passengers is bound to exercise utmost care and diligence of very cautious persons as far as human care and foresight can go, and is responsible for injuries occasioned by slightest neglect against which human care and foresight might have guarded, *held* not ground for reversal as failing to limit application to passengers, where instructions, considered as a whole, so limited instructions given.

3. Trial 🔑191(9)—Instruction as to plaintiff's duty as passenger at time of injury held not error as assuming existence of carrier-passenger relation.

In suit against street railway by one who had just alighted from street car, instruction that, "while the duty rested upon the conductor to exercise the utmost care and diligence for the safe carriage of plaintiff, as a passenger of the Market Street Railway Company, the duty likewise rested upon plaintiff to exercise ordinary care for her own safety in alighting, and after alighting from the street car," *held* not error as prejudging question whether plaintiff was passenger at time of accident, when matter of her being passenger was disputed question.

4. Negligence 🔑69—Contributory negligence may arise from omission as well as from act.

Contributory negligence may arise from an omission as well as from an act.

5. Trial 🔑296(4, 5)—Any defect in instruction defining contributory negligence as "an act or commission" held cured by subsequent instruction that contributory negligence is plaintiff's "act or omission," etc.

In action against street railway company for personal injury sustained by one who had just alighted from defendant's car, an instruction defining contributory negligence as "an act or commission," where, as matter of law, it may be either an act or an omission, *held* cured by court's subsequently instructing that contributory negligence is such an "act or omission" on part of plaintiff, etc.

6. Trial 🔑260(8)—Refusal to give defendant's prepared instruction concerning sole proximate cause held not error, where jury was fully instructed thereon.

In action against street railway company for injuries sustained just after plaintiff had alighted from defendant's car, refusal to give defendant's prepared instruction concerning sole proximate cause *held* not error, where jury was fully instructed on this and all other questions.

7. Evidence 🔑364—Mortality tables held admissible as evidence in personal injury suit as to length of time permanently injured plaintiff would be incapacitated from performing household duties.

In personal injury action against street railway company, mortality tables *held* admissible as evidence as to length of time plaintiff, who was permanently injured, would be incapacitated from performing her household duties, even though it was not shown that plaintiff was engaged in any direct gainful employment for which she received a specific wage.

8. Damages 🔑38—Impairment of woman's power to work is injury to personal rights, for which she may recover, regardless of whether she worked for pecuniary gain.

Impairment of woman's power to work is an injury to her personal rights, wholly apart from any pecuniary benefit that exercise of the power might bring, and, if her injury has lessened this power, she may recover damages therefor, regardless of whether she worked for pecuniary gain.

9. Damages 🔑163(1)—Jurors may be presumed to be reasonably familiar wtih value of housewife's services.

In personal injury action by woman against street railway company, wherein it was shown that plaintiff had been engaged in performing her own household duties, jurors could be presumed to be reasonably familiar with value of such services as those in which she was engaged.

10. New trial 🔑55—Counsel's proceeding with argument after remark of juror, subsequently alleged as prejudicial, without objecting or excepting until after verdict, held waiver thereof.

Where, in personal injury action by woman against street railway company, a woman juror remarked, during defendant's argument, that women always get off street car facing rear, whereupon counsel for defendant paid no attention to statement, but proceeded with argument without objection or exception, *held* that proceeding without objection precluded defendant's complaining of harm from remark.

11. Appeal and error 🔑181—When knowledge of irregularity is known in time to apply for correction, party may not remain silent and be heard to complain after hostile verdict.

The rule is well established that, when knowledge of irregularity is known in time to apply to court to remedy it, a party may not sit by in silence, taking chances of favorable verdict and, after hostile one, be heard to complain for the first time.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by L. Gotsch against the Market Street Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

TYLER, P. J. Action for damages for personal injuries. The injury suffered is alleged to have been sustained by plaintiff as a result of the premature starting of one of defendant's cars while she was alighting therefrom. The case was tried by a jury, which rendered its verdict in plaintiff's favor and against appellant in the sum of $2,000. There was a conflict in the evidence as to the manner in which the accident occurred. Plaintiff's theory as alleged in her complaint was that on October 14, 1922, she was riding as a passenger upon one of defendant's cars in an easterly direction on Market street; that at First street the car stopped for the purpose of allowing plaintiff to alight therefrom; that, while she was in the act of so doing, the car was suddenly started, throwing her violently to the ground, and inflicting upon her the injuries of which she complains.

Defendant's version of the accident presented a totally different situation. It claimed that the accident was caused by plaintiff's negligence in permitting a part of her wearing apparel to come in contact with the fender of the car after she had ceased to be a passenger and as she was in the act of passing to the rear of the car. It is not contended that the evidence is insufficient as a matter of law to sustain the verdict, but it is claimed that the evidence as to how the accident happened preponderates in favor of defendant's theory, for which reason the judgment should be reversed for the errors complained of. The principal point relied upon for a reversal relates to certain instructions given by the trial court with reference to the degree of care that defendant was bound to exercise toward the plaintiff. At the request of plaintiff, and in support of her theory of the case, the court instructed the jury on this quantum of care as follows:

> "You are instructed that it is the duty of defendant as a common carrier of passengers to exercise the utmost degree of care in the transportation of passengers, and a failure to exercise such care, in law, constitutes negligence on the part of said defendant. *A common carrier of passengers is bound to exercise the utmost care and diligence of very cautious persons as far as human care and foresight can go, and is responsible for injuries occasioned by the slightest neglect against which human care and foresight might have guarded.* The responsibility is proportionate to the danger and is of the highest character in the case of those who operate street cars to carry passengers."

[1, 2] It is claimed that the italicized portion of the above instruction is erroneous and misleading, for the reason that it is not limited in its application to *passengers*, but tells the jury that a common carrier of passengers is bound to exercise the utmost care, and that it is responsible for injuries occasioned by the slightest negligence against which human care and foresight might have guarded, and this irrespective of whether or not the injured person was a passenger at the time of the injury. There might be some merit in the point urged, if this was the only instruction upon the subject. Plaintiff under her theory of the case was entitled to an instruction upon the degree of care that the company owed to her as a passenger. The trial court very fully instructed the jury upon this question. These

instructions must be taken together and considered as a whole in determining whether any specific instruction embodies an improper statement of the law or worked to the prejudice of the plaintiff. Boa v. San Francisco-Oakland T. Rys., 182 Cal. 101, 187 P. 2.

[3] The court further instructed the jury that the duty of exercising the highest degree of care rested upon defendant only in the event that plaintiff was a passenger at the time when the accident occurred, and it further pointed out that, if the accident happened after plaintiff had safely alighted from the street car, and while she was crossing the street behind the car, she was not a passenger, and defendant did not owe her the duty of exercising the highest degree of care for her safety, but was only bound to exercise ordinary care to save her from injury. It further instructed the jury that, if it found plaintiff was not thrown, or did not fall, to the ground at the time and place in question, through or because of any movement of the street car, but through some cause entirely disconnected from such movement, that the defendant could not recover. These instructions were repeated in different form, and defendant's own instructions presenting the situation in the most favorable light to it were given, so that the jury could not possibly have been misled upon the subject. Equally without merit is the claim that the court instructed the jury that plaintiff was a passenger at the time of the accident. In its answer the defendant set up contributory negligence on the part of defendant. The court instructed the jury upon this question, and it is claimed that in doing so it was assumed that plaintiff was a passenger. The instructions were as follows:

> "Contributory negligence in its legal significance is such an act of commission on the part of a passenger amounting to a want of ordinary care as concerning or co-operating with the negligent acts of the defendant is a proximate cause or occasion of the injury to the passenger complained of. To constitute contributory negligence on the part of a passenger there must be a want of ordinary care on the part of the passenger and a proximate connection with that and the injuries sustained by the passenger." "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of the injury, but must be proven." "If you believe from the evidence that plaintiff was guilty of some degree of negligence while attempting to alight from defendant's car as a passenger, yet unless you also believe that said negligence on her part proximately occasioned or contributed to the injuries sustained by her, I charge you that such negligence on her part is not, in law, such contributory negligence as would prevent plaintiff from recovering in this action if she is otherwise entitled to recover."

The mere reference to plaintiff as a passenger did not have the effect claimed. The defense of contributory negligence was not a factor in the case, unless plaintiff established that the accident occurred while she was alighting from defendant's car as a passenger. She had to prove that fact in order to recover under her pleadings. If the accident happened after she had ceased to be a passenger, the question of negligence on the part of defendant or of contributory negligence on plaintiff's part was of no importance, and the court so instructed the jury. One of the instructions given at defendant's request so refers to plaintiff. It is as follows:

> "While the duty rested upon the conductor to exercise the utmost care and diligence for the safe carriage of plaintiff, Mrs. Gotsch, as a passenger of the Market Street Railway Company, the duty likewise rested upon plaintiff, Mrs. Gotsch, to exercise ordinary care for her own safety in alighting, and after alighting from the street car."

[4-6] The court in the use of the language employed did not prejudge the question as to whether plaintiff was or was not a passenger at the time of the accident. If the jury could have understood anything from the instructions as a whole, it certainly knew that plaintiff had to establish the fact that she was a passenger at the time of the accident, or fail in her case, for all the instructions were to this effect, and this question was one which was left entirely for its determination without any indication from the court. Appellant further complains of the giving of the first above-recited instruction on contributory negligence as incorrectly defining that principle. The objection is that it defines it as "an act of commission," whereas as a matter of law it may be either an act or omission. It is true that contributory negligence may arise from an omission as well as from an act. The jury was instructed by the court on its own motion that "contributory negligence" is such "an act or omission on the part of plaintiff," etc. This latter instruction cured any defect in the one complained of which was given at the suggestion of plaintiff. Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93–101, 187 P. 2. Nor is there any merit in the claim that the court erred in refusing to give defendant's prepared instruction concerning sole proximate cause. The jury was fully instructed upon this and all other questions.

[7-9] Mortality tables were offered and received in evidence for the purpose of showing the probable expectancy of the life of plaintiff, and the admission thereof is assigned as error. Defendant company concedes, as indeed it must, that such tables may be properly considered in an action for wrongful death, for the purpose of giving to the jury some evidence upon the life expectancy of the deceased. It claims, however, that such tables are not admissible in actions for personal injuries, except in those cases where the plaintiff has sustained a permanent injury of such a character as to result in a total impairment of his ability to earn money, in which case there must be evidence of earning capacity.

Here the evidence shows that plaintiff's eyesight was permanently impaired, and the tables afford some evidence of how long she will suffer and be incapacitated in consequence thereof, the injuries being lifelong. It further shows that plaintiff did all the sewing for her family from the time her children were young and up to the time of the accident beside performing all the household duties, and since the injury her ability to perform these duties had become permanently impaired. While the evidence does not show that plaintiff was engaged in any direct gainful employment for which she received a specific wage, it does show that she was capable of and did perform her family and household duties. Such services have a value. The impairment of the power of a woman to work is an injury to her personal rights wholly apart from any pecuniary benefit the exercise of the power might bring, and, if her injury has lessened this power she ought to be able to recover damages therefor, regardless of whether she worked or not. The vicissitudes of life might call upon her at any moment to make avail of her capacity to work, and jurors may be presumed to be reasonably familiar with the value of such services. However this may be, it has been generally held that life and mortality tables are admissible to prove the duration of personal injuries when such injuries are proved to be permanent, they being in such case lifelong. 8 Ency. of Ev. p. 634; Cor. Jur., p. 873; Id. p. 1036.

[10, 11] And, finally, appellant complains of misconduct and irregularity in proceedings of the jury. After the evidence had been closed, and while the attorney for defendant was commenting in his argument to the jury concerning the manner in which the plaintiff alighted from the car, as indicating how the accident happened, a lady member of the jury made the following statement: "Don't you know a woman always gets off a street car that way, facing the rear?" It is claimed that the remark constituted misconduct, justifying a reversal of the judgment, as it showed that the juror had both formed and expressed an opinion of the case before its final submission. This point was urged in support of a motion for a new trial. Upon the hearing of the motion the juror filed an affidavit, in which she stated that her remark was not made in a manner to indicate that she was of a fixed state of mind in respect to the facts of the case, nor was it intended to constitute an expression of opinion. The motion for a new trial was denied. Whatever may be said of the conduct of the juror, the record shows that, after the remark was made, counsel for defendant proceeded with his argument without paying any attention to the incident. No objection was made or exception taken until after the verdict. The rule is well established in this state that, when knowledge of irregularity is known in time to apply to the court to remedy or correct it, a party may not sit by in silence, taking chances of a favorable verdict, and, after a hostile one, then, for the first time, be heard to complain. Zibbell v. Southern Pac. Co., 160 Cal. 237–253, 116 P. 513.

For the reasons given, the judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

89 Cal. App. 361

MINTON v. MITCHELL et al. (Civ. 6225.)★

District Court of Appeal, First District, Division 1, California. Feb. 21, 1928.

Hearing Denied by Supreme Court April 19, 1928.

1. Arbitration and award 🔑8—Arbitration clause of contract will not be construed as ousting court's jurisdiction, unless construction is inevitable.

An arbitration clause of contract will not be construed as ousting courts of jurisdiction, unless such construction is inevitable, so that, unless the clause is made a condition precedent by express words or necessary implication, it will be construed as merely collateral to the liability clause, and will be no bar to action without an award.

2. Arbitration and award 🔑8—Agreement to refer case to arbitration will not be regarded by courts, and they will take jurisdiction to determine dispute.

An agreement to refer a case to arbitration will not be regarded by courts, and they will take jurisdiction to determine a dispute between parties, notwithstanding such agreement.

3. Arbitration and award 🔑9—Parties to contract, who had agreed to arbitrate, held not required to do so, where court had decided disputed question after failure to arbitrate.

Defendants in land sale contract *held* not required to arbitrate because of agreement in contract, where matter had been decided by court after failure to arbitrate, since the law does not require needless things to be done, and abhors a multiplicity of actions.

4. Arbitration and award 🔑24—Where agreement to arbitrate is incident to main agreement, failure of one party, without other's fault, to arbitrate, entitles other to proceed to enforce demands, regardless of broken arbitration promise.

Where an agreement to arbitrate is entered into incident to the main agreement of parties, and one party, without fault on the part of the other, fails and refuses to proceed with the portion of the agreement providing for arbitration, then such other party may proceed in court to enforce his demands, regardless of such broken promise to arbitrate.

★Hearing denied by Supreme Court.

5. Contracts 🔑35—Party accepting benefits of contract is bound thereby, even if he has not signed it.

A party who accepts the benefits of a contract is bound thereby, even if he has not signed it.

6. Estoppel 🔑92(2)—Vendor's acceptance of benefits of rescission of contract estopped her from denying rescission.

Where vendor of land had accepted benefits of contract of rescission, and had partly performed under such rescission, she was thereby estopped from denying she was a party to such rescission.

7. Appeal and error 🔑221—Court's method of attempting to ascertain damage for contract breach, if error, could not be considered on appeal, where not attacked in trial court.

Court's method, in its attempt to ascertain amount of damages from breach of contract, if error, could not be considered on appeal, where it was not attacked in trial court.

8. Interest 🔑19(1)—Interest on judgment for breach of contract for period prior to judgment held improper, where damages were not liquidated and accounting was necessary.

In action for damages for breach of contract, allowing interest on amount of judgment for time prior to such judgment *held* improper, where damages were not liquidated, there was a bona fide dispute as to amount due, and an accounting was necessary.

9. Interest 🔑19(1)—Interest should not be allowed on amount of judgment for time preceding judgment, where defendant had substantial claim controversial in character.

Where court finds defendant had a substantial claim and demand, controversial in character, interest on sum awarded defendant for period prior to judgment should not be allowed.

10. Interest 🔑45—Interest is allowable from time sum in suit becomes due, if same is certain, or can be made so by calculation.

The general rule is that interest is allowable from the time the sum in suit becomes due, if the same is certain, or can be made certain by mere calculation.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Earl D. Minton against W. D. Mitchell, as executor of the last will and testament of James Edward Mitchell, deceased, and others. Judgment for plaintiff, and defendants appeal. Modified, and, as modified, affirmed.

William P. Hubbard, of San Francisco, George Cosgrave, of Fresno, and David Cosgrave, of Redwood City, for appellants.

Sapiro & Hayes, of San Francisco, for respondent.

PARKER, Justice pro tem. This is an appeal from a judgment in favor of plaintiff and against defendants. The case was tried by the court without a jury. Defendants' motion for a new trial was denied. The facts follow:

J. Ed. Mitchell during his lifetime had entered into a contract of purchase wherein he agreed to buy from Marin Lumber & Supply Company a certain tract of land known as Duncan's mill property, in Sonoma county, consisting of about 3,500 acres of timber land, sawmill, store, cottages, and personal property used in connection therewith. Upon the death of J. Ed. Mitchell, the defendants W. D. Mitchell and Sallie A. Mitchell, being the sole heirs of J. Ed. Mitchell, succeeded to and took over the rights of decedent in and to the contract, and entered into possession of the property. W. D. Mitchell and Sallie A. Mitchell will be hereinafter referred to as the defendants. Thereafter, on February 19, 1920, defendants entered into a contract with Earl D. Minton, plaintiff, under which they agreed to sell, assign, and transfer their contract of sale and purchase to plaintiff, assuming the liability of payments due Marin Lumber Company, and also paying a certain price to defendants. This arrangement was with permission of Marin Lumber Company, original vendor. Accordingly, delivery of the premises and personal property was made to plaintiff.

A few months thereafter plaintiff desired to withdraw from the transaction and turn the property back to defendants. On June 1, 1920, the parties entered into an agreement, which purported to be an agreement between plaintiff and defendants, but which was actually signed by plaintiff and defendant W. D. Mitchell. The defendant Sallie A. Mitchell did not sign this agreement. This agreement was substantially as follows:

It first recited the contract of sale existing between the parties, and that it was the mutual desire of said parties to give up said contract and deliver possession of the properties involved to the defendants. The defendants release plaintiff from all obligations to be thereafter performed under his contract of purchase, and plaintiff relinquishes to defendants all rights held, owned, or possessed by him by virtue of the contract of purchase, together with the personal property connected therewith, and specifically relinquishes the right to the possession of the real properties referred to in the contract, the operation of the sawmill by plaintiff to cease June 2, 1920, allowing plaintiff to ship such lumber as was then loaded on the cars. The parties, by the same agreement and included therein, agree that two arbitrators, one to be selected by defendants and one by plaintiff, shall be appointed to fix the accounts of the parties, for the purpose of determining by said arbitrators the sum of money, if any, to be repaid to plaintiff by defendants; it being agreed that the said sum of money, if any, shall be paid plaintiff in four equal installments. If the arbitrators thus selected are unable to agree upon the amounts to be repaid plaintiff, then a third arbitrator shall be appointed by the first two, and the three shall determine the amount due plaintiff. The said arbitrators shall have like authority to determine the amount of money, if any, due from plaintiff to defendants by reason of damages to defendants, as of that date, sustained and accrued by the failure, if any, of plaintiff, to comply with the terms of the contract of purchase. The finding of said arbitrators shall be final and conclusive upon all of the parties and said parties agree to abide by the same. Said arbitrators shall consider, in determining the amount to be paid by defendants to plaintiff, or by plaintiff to defendants: (a) The sums paid to defendants by plaintiff; (b) sums paid by plaintiff in improving the property and for the general benefit of the sawmill and sawmill industry; (c) the value of all goods in process of manufacture and all additions to the store stocks; (d) the failure, if any, of defendants to comply with the terms of the contract and the damage thereby caused plaintiff. The said arbitrators shall further consider, in determining the amounts due either party from the other: (a) Amounts due as stumpage in accordance with agreement of purchase, which said agreement is canceled by virtue of this agreement; (b) interest due from February 20, 1920, to June 2, 1920, in accordance with the terms of the agreement; (c) any damages which may have been incurred by said first parties by reason of the occupation of said premises by plaintiff, and the failure, if any, to comply with the terms of the contract of purchase.

We have detailed the provisions of the agreement of June 1, 1920, for the reason that the entire controversy results therefrom. Thereafter each party designated an arbitrator. The person selected by plaintiff was one McConnell, and the one chosen by defendants was named McFaul. The finding of the trial court, which is not attacked, recites:

> "Thereupon said McConnell met with McFaul and presented to him a statement of accounts claimed by plaintiff as due him from defendants under the terms of said contract. McFaul failed and refused to discuss the statement with McConnell, and refused to arbitrate the claim of plaintiff in accordance with the terms of the contract, and refused to agree upon the amount to be paid plaintiff by defendants. Thereupon McConnell delivered and submitted by registered mail the names of various persons to McFaul for selection of a third arbitrator. McFaul failed and refused to approve or reject any of said names, and failed and refused to submit the names of any third persons on his part to act as such arbitrator, and McFaul failed and refused to carry out the terms of the arbitration agreement, and failed and refused to approve or agree upon the appointment of a third arbitrator. Plaintiff notified defendants of these facts and of the acts and conduct of McFaul, and requested defendants to have McFaul proceed, or else that defendants appoint another arbitrator to act in place of McFaul. Defendants failed and refused to have McFaul proceed with the arbitration, and failed and refused to appoint another arbitrator to act in the place and stead of McFaul. Defendants failed and refused to carry out the terms of their agreement. No arbitration was had in accordance with the terms of said agreement, or at all, and said attempted arbitration wholly failed."

This finding being unassailed, we accept it as a correct statement of the situation. Incidentally we may note here that the finding as it appears herein has been deleted of repetitive clauses, and therefore is not in the exact language of the trial court, though quoted as such. The change, however, is not a variance in any respect.

On July 11, 1921, plaintiff notified defendants that, owing to the failure of McFaul to arbitrate, the arbitration terms of the agreement could not be carried out, and demanding that defendants pay him the sum of $10,486.34 due him under the terms of said agreement. Defendants having declined to pay the sum demanded or any sum, plaintiff commenced the present action.

The complaint is in three counts. Plaintiff first pleads the original contract of purchase, and then the agreement of June 1, 1920, and the failure of the arbitration agreement therein contained; he alleges his due performance of all obligations, and his willingness and ability to proceed where there has been insufficient performance, and alleges further the amounts due him and asks judgment therefor. The second count is for moneys had and received, and the third count seeks the recovery of moneys expended by plaintiff for the use and benefit of defendants.

The answer denied categorically the allegations of the complaint, and set up the failure of the arbitration as due wholly to acts of plaintiff. Defendants thereafter and before trial filed a cross-complaint, claiming damages for breach of the original contract of purchase, and damages resulting to them by reason of occupancy by plaintiff, and also set forth many other items of damage. Plaintiff denied specifically the allegations of the cross-complaint and a trial was had. Plaintiff recovered judgment for $4,818.60.

At some length we have thus set forth the controversy, deeming it necessary to a better understanding of the contentions made. Certain other facts as found may appear hereinafter in connection with the several points as each is discussed. Defendants and appellants contend at the outset that plaintiff has no cause of action under the agreement of June 1, 1920, or otherwise, or at all, save and except that he may, upon a sufficient showing, recover any damages he may have sustained in preparing for and attending the arbitration and costs. The contention of appellants further develops to the claim that the arbitration agreement of June 1, 1920, was rescinded by plaintiff, and hence plaintiff could not recover under it, and that in any event there was no covenant in the agreement on the part of defendants to pay plaintiff any moneys.

Taking this contention, in the face of the fact that defendants received back the properties, and plaintiff received nothing in return, it falls of its own weight. Surely, if there was an agreement to arbitrate, and this was rescinded, using the term as including all the elements of a proper rescission, it is difficult to see just what rights of plaintiff were lost, or how he could be foreclosed of any legal rights theretofore existing; and if the agreement contained no covenant that defendants would pay any damages to plaintiff as a result of the arbitration, it seems as though there was little purpose thereof. Defendants' argument is based upon the assumption and conclusion that the agreement of June 1, 1920, was a submission to arbitration and nothing else. A reading of the agreement suffices to negative this idea. The main purpose of the agreement was to rescind and render inoperative the original contract of purchase, and incidental thereto, and as a necessary element of the rescission, restore each party to his original status. As far as the original contract of purchase was concerned, the plaintiff surrendered to defendants the properties described therein, and defendants accepted possession thereof and surrendered all claims against plaintiff for further performance.

Nothing remained to effectually complete the rescission excepting the restoration of the status quo. This could not be effected without a determination of the amount due from one to the other, and this one feature alone was to be determined by the arbitration. So, rather than characterize the entire agreement as a submission to arbitration, it was in essence an agreement of rescission, with the status quo to be arrived at through arbitration. Plaintiff did all that he could do, and on his part the agreement of rescission was virtually executed. The court below evidently took this view of the matter, and proceeded to do what the parties originally intended should be done by the arbitration. In the case of Gunton v. Carroll, 101 U. S. 426, 25 L. Ed. 985, an ancient case is quoted with approval as follows:

> "Here is a man who has had the whole benefit of the partnership in respect to which this agreement was made, and now refuses to have the rest of the agreement performed on account of the difficulty which has arisen. * * * If the valuation cannot be made modo et forma, the court will substitute itself for the arbitrators."

[1, 2] An arbitration clause of a contract will not be construed as ousting the courts of jurisdiction, unless such construction is inevitable, so that, unless the clause is made a condition precedent by express words or necessary implication, it will be construed as merely collateral to the liability clause, and is no bar to an action without an award. 2 R. C. L. 363; Oakdale Irr. Dist. v. Beard, 47 Cal. App. 66, 72, 190 P. 224; Hamilton v. Home Ins. Co., 137 U. S. 370, 11 S. Ct. 133, 34 L. Ed. 708; Loup v. Cal. S. R. R., 63 Cal. 97; Mead v. Owen, 83 Vt. 132, 74 A. 1058; Long v. Cromer, 181 N. C. 354, 107 S. E 217. It is needless to follow the subject of arbitration through all of its phases. It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between the parties, notwithstanding such an agreement. Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Davisson v. East Whittier Land Co., 153 Cal. 85, 96 P. 88.

As found by the court in the case at bar, the agreement to submit to arbitration failed and was of no effect wholly through the refusal of defendants to proceed therewith. In Armstrong v. Sacramento V. R. Co., 52 Cal. App. 117, 198 P. 217, two cases are cited and quoted with approval, viz.:

> Cogswell v. Cogswell, 70 Wash. 178, 126 P. 431, saying: "The matter in suit having been settled by the solemnly executed contract of the parties, that contract having been partly performed on both sides, the failure to arbitrate relating only to a nonessential incident, not giving ground for a rescission, it follows that the appellants have mistaken their remedy. They should have applied to the court for an enforcement of the contract by fixing the price of the land."
>
> And Town of Bristol v. Bristol Water Works, 19 R. I. 413, 34 A. 359, 32 L. R. A. 740, where it is said: "In such a case the courts hold that the matter of determining the price is a matter of form, rather than of substance; and if it becomes evident that it cannot be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other."

In Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696, the court said:

> "So, too, in contracts of sale, the parties may stipulate * * * that the value of the property shall be ascertained by appraisers before either has the right to sue. The fixing of values, however, is a mere incident, and not of the substance of the contract."

In Armstrong v. Sacramento V. R. Co., supra, it is said:

> "We entertain no doubt that the refusal of the appellants to join in the selection of a third appraiser justifies the trial court, sitting as a court of equity, to take the matter in hand and itself fix the values and afford the appellants an opportunity to complete the transaction upon the values thus fixed. Upon their failure so to do, it is well settled that the court could grant, as an alternative, a judgment for monetary relief."

In the instant case appellants urge no facts and advance no theory from which it could be even inferred that any harmful effect follows the failure to arbitrate. Appellants simply urge that plaintiff agreed to submit the question of the amounts due either party to arbitration, and because appellants refused and failed to arbitrate plaintiff has no remedy outside of and beyond the remedy of recovering any costs incident to the attempt to arbitrate. Such a holding would surely evidence a weakness in the law and an alarming deficiency in the courts.

When the last analysis is made, we are brought back to the original rights of the parties, namely, to be placed in statu quo. This was the substance of the contract. The purpose of forcing plaintiff back to another attempt to enforce the arbitration part of the agreement would be to have determined what the status was; and we have here a determination by a court of competent jurisdiction responsive to pleadings of both parties presenting this very question for determination.

There are two well-settled principles of law which may be here applied: First, the law abhors a multiplicity of actions; and, second, the law does not require needless things to be done. If this court should go to the extreme of upholding the defendants' contention, it would simply mean a change in the form or theory of the action in order to arrive at a determination of the same facts litigated here. It may be here noted that nowhere in the pleadings do the appellants set up any claim of estoppel against plaintiff's right to sue and maintain the action; and defendants themselves, by way of cross-complaint, set up their claim under the original contract regardless of the so-called arbitration agreement.

[3, 4] In this state of the record appellants will not be permitted, after a full determination of the claims of both parties, to set up that plaintiff should be deprived of the fruits of the litigation and sent back to force out an arbitration agreement which has long since failed. Where an agreement to arbitrate is entered into incident to the main agreement of the parties, and one of the said parties, without fault on the part of the other, fails and refuses to proceed with the portion of the agreement providing for arbitration, then such other party may proceed in court to enforce his demands regardless of the broken promise of the other.

The appellants next contend that as to defendant Sallie A. Mitchell there is no evidence upon which a judgment against her could lie, because she did not execute the agreement of June 1, 1920, and there is no written authority shown in W. D. Mitchell to sign for her. Sallie A. Mitchell did execute the original agreement of purchase, and did receive back the property as a co-owner under the terms of the agreement of June 1, 1920, rescinding the original purchase contract. Further than this, as a party defendant herein she asserted her rights and set up her claim arising out of an alleged violation of the original contract. In the cross-complaint filed herein by both defendants Sallie A. Mitchell and W. D. Mitchell the execution of the contract by both defendants is admitted and alleged. We conclude there is no merit in this contention of appellants that the evidence does not support the judgment against Sallie A. Mitchell. A party who accepts the benefits of a contract is bound thereby, even if he has not signed it. Remsberg v. Hackney Mfg. Co., 174 Cal. 802, 164 P. 792.

[5, 6] After the agreement of June 1, 1920, whereby the properties were turned back to the Mitchells, to wit, on June 21, 1920, Sallie A. Mitchell, together with W. D. Mitchell, entered into an agreement with a third party, whereby they agreed to sell the same properties that had been returned by plaintiff; also there appear three other transactions, later in date, wherein defendant Sallie A. Mitchell joined in agreements to convey the property as co-owner. The evidence conclusively shows that, after the contract of rescission of June 1, 1920, defendant Sallie A. Mitchell accepted the benefits thereof and accepted the properties returned thereby. There is here shown not a mere voluntary compliance with the conditions of the contract by one who has not previously assented to it. There is distinctly shown part performance under it and an accession to its terms by both parties. Such an accession to the terms of the contract and such a performance under it would make it inequitable to permit appellant to avail herself of this defense, and she is estopped from doing so under familiar principles. Sparks v. Mauk, 170 Cal. 122, 148 P. 926.

Appellants further complain that the trial court erred in admitting certain testimony relative to the value of the properties involved in the original contract of purchase. It was appellants' claim that they had been damaged by the failure of plaintiff to consummate the sale, and that the measure of such damage was the difference between the price agreed to be paid and the value of the property to them. This claim they base upon the terms of the agreement of June 1, 1920, wherein it is provided that there shall be determined the amount of damage, if any, due defendants sustained and accrued by the failure if any, of plaintiff to comply with the terms of said contract. Necessarily in this issue evidence of value was material and necessary. However, the trial court expressly found:

> "That plaintiff has fully complied with the terms and conditions of the agreement entered into by and between plaintiff and defendants for the sale of said real estate and personal property."

[7] This finding is not attacked nor is any reference made to the insufficiency of the evidence upon which it is based. Therefore, if there was no violation of the contract no damage for breach thereof would result. And if the court erred in its method of attempting to ascertain the amount of damage, in case damages might have been awarded, it is of no interest here.

[8] Lastly, appellant claims that the judgment is erroneous, in so far as it allows plaintiff interest on the amount found due him. The judgment decrees plaintiff interest on the amount awarded him, to be compounded from June 2, 1920. We think appellants are correct in their contention. Plaintiff himself in his complaint admitted an accounting necessary by reason of the failure to arbitrate, and pleaded his willingness and ability to pay any and all amounts found due from him to defendants. The answer and cross-complaint of defendants presented many unliquidated demands concerning which testimony was required to be taken and evidence adduced. That the claims of defendants were to a large extent meritorious appears from the allowance made by the court of $5,667.74. The plaintiff had paid $5,000 on the contract of purchase, and had expended $5,486.34 in improvements to the property and in additions to the store and mill. The court found, after much evidence, that plaintiff was liable to the defendants in the sum of $5,667.74 on account of many items, including value of personal property used, taken, and destroyed, and also on account of goods sold. The defendants by their cross-complaint asked for $30,000. The entire purpose of the action was to strike an account between the parties. The agreement of June 1, 1920, disclosed that each party held unliquidated demands against the other. To say that, because plaintiff paid $5,000 at the commencement of his possession under the contract, and therefore that represented a liquidated claim, is not accurate. The amount may be definite as an item of demand, but as to its validity or payment it still rested subject to account. The plaintiff was in possession of property of the value of in excess of $100,000. A large amount of personal property was turned over to him, of a portable nature and easily removed. In comparison with the potential liability the cash payment was indeed small.

[9, 10] In the arbitration agreement, the working out of which the court assumed, all of these things were provided for and understood by the parties. The matter of adjusting the rights of the parties was not a mere matter of calculation. It involved careful estimate and application of legal principles and judicial determination. Whether plaintiff had taken from the property more than he had expended thereon or paid to defendants could be ascertained only through examination and inventory. Whether or not he had permitted liens to accumulate against the property was likewise conjectural. Where, as here, the court finds that the defendants did have a substantial claim and demand, controversial in character, we think the case falls within the doctrine, announced in Curtin v. State of California, 61 Cal. App. 377, 215 P. 689, that interest is not allowable upon the theory "that the person liable does not know the sum he owes, and therefore can be in no default for not paying." Interest has relation to an ascertained principal sum. Morris v. Standard Oil Co., 192 Cal. 356, 219 P. 998, 30 A. L. R. 1103. The general rule is that interest is allowable from the time the sum in suit becomes due, if the same is certain or can be made certain by mere calculation. Gray v. Bekins, 186 Cal. 389, 199 P. 767; McNutt v. City of Los Angeles, 187 Cal. 259, 201 P. 592; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164.

The case of McCowen v. Pew, 18 Cal. App. 482, 487, 123 P. 354, does not control the instant case, for the reason that the plaintiff's claim did not represent a loss of a pecuniary value ascertainable certainly as of a definite time. The agreement of June 1, 1920, unmistakably suggests the uncertainty surrounding the adjustment necessary to restore the original status, and presents such an actionable controversy as to negative any claim of interest as here allowed.

The judgment is modified, by striking therefrom all allowance of interest to date of judgment. As thus modified, it will be affirmed, but without costs to appellants, and respondent to recover his costs.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 451

PEOPLE v. MORLEY. (Cr. 1518.)

District Court of Appeal, Second District, Division 1, California. Feb. 25, 1928.

1. Embezzlement 🔑5—Larceny 🔑3(3)—Claim that money was taken to offset claim constitutes defense to charge of larceny, but not to embezzlement (Pen. Code, § 511).

Claim that money was taken in satisfaction of claims against person from whom it was taken constitutes a defense to charge of larceny, though not applicable, under Pen. Code, § 511, to charge embezzlement.

2. Embezzlement 🔑11(1)—Agreement authorizing defendant to use money to trade in stocks held not to authorize wager on golf tournament, precluding prosecution for embezzlement where money was lost.

Written agreement authorizing defendant to use certain moneys for trading in stocks in any way whatsoever meets with his best judgment, that all trading was being done by defendant for sole benefit of donor of money, and that agreement should convey to donor title to all accounts, moneys, etc., growing out of the arrangement, did not authorize defendant to make a wager on result of golf tournament, precluding prosecution for embezzlement when money was lost, since defendant's authority was strictly limited to trading in stocks.

3. Criminal law 🔑390—Sustaining objection to question asked defendant as to belief that he was acting within authority in taking money held erroneous.

In prosecution for embezzlement, ruling sustaining objection to question asked defendant relative to whether at time of taking money he thought he was acting within scope of authority *held* erroneous; fraudulent intent being an essential element in offense of embezzlement.

4. Criminal law 🔑1170(1)—Error in sustaining objection to question asked defendant whether he believed he was acting within authority in taking money held prejudicial.

In prosecution for embezzlement, error in sustaining objection to question asked defendant relative to whether at time of taking money he thought he was acting within scope of his authority *held* prejudicial, because, if defendant believed that he was so acting, jury might have been led to acquit on charge of embezzlement.

5. Criminal law 🔑1137(6)—Defendant, failing to avail himself of subsequent ruling of court to introduce evidence of subject previously excluded, cannot thereafter complain of ruling.

Where court, after sustaining objection to certain questions, thereafter stated that defendant might introduce testimony thereon, and defendant did not avail himself of permission thus given to repeat question, he was in no position thereafter to complain of ruling.

6. Criminal law 🔑675—Testimony as to expenses incurred by defendant claimed as offset as defense to larceny charge held properly excluded, in view of other evidence of expenses.

In prosecution for larceny, wherein defendant alleged money had been taken to offset claim for expenses incurred in purchase of stock, testimony relative to expenses incurred in purchase of each of several hundred units *held* properly excluded, in view of other evidence as to such expenses.

7. Larceny 🔑44—Sustaining objection to question asked complaining witness as to total amount paid defendant for expenses claimed as offset in larceny prosecution, held erroneous.

Where defendant, in prosecution for larceny, claimed that money taken was to offset expenses incurred by him for complaining witness, ruling, sustaining objection to question of complaining witness relative to total amount paid defendant for expenses, *held* error.

8. Criminal law 🔑1170(2)—Excluding defendant's details of claim against complaining witness, as defense to larceny charge, held not prejudicial, in view of other evidence.

In prosecution for larceny, wherein defendant claimed money was taken to offset expenses incurred in purchase of stock for complaining witness, error in not allowing defendant to show all details of claim for expenses, as defense to larceny charge, *held* not prejudicial, in view of evidence relative thereto, and that the result would have been the same if defendant had been allowed to testify.

9. Witnesses 🔑282½—Sustaining objection to question on cross-examination which had been answered in another part of examination held not error.

Where question asked complaining witness in cross-examination had in another part of cross-examination been asked and answered without objection, sustaining objection thereto was not error.

10. Larceny 🔑43—Testimony as to price for stock purchased for complaining witness in larceny prosecution held properly excluded, as irrelevant to defense of offset for expenses incurred in such purchase.

In prosecution for larceny, wherein defendant claimed money was taken to offset expenses incurred in purchase of stock for complaining witness, objection to question to complaining witness on cross-examination as to price fixed for purchase of stock *held* properly sustained, as irrelevant.

11. Criminal law 🔑412(1)—Declarations by defendant are original evidence against him and rules as to impeachment do not apply.

Declarations and statements made by defendant are original evidence against him, and rules as to impeachment of witnesses do not apply to proof thereof, even if he takes stand in his own behalf.

12. Criminal law 🔑680(1)—Order of proof is in trial court's discretion.

Trial court has discretion as to order of proof.

13. Criminal law 🔑829(3)—Refusal of instruction that failure to comply with pecuniary obligation is not embezzlement held not error, in view of charge given.

In prosecution for embezzlement, refusal of instruction that mere failure to comply with pecuniary obligation, such as to pay promissory note, did not amount to embezzlement, *held* not error, in view of instruction given fully stating law relating to embezzlement.

14. Criminal law 🔑829(16)—Refusal of instruction that witness can be impeached by testimony as to reputation held not erroneous, in view of general instruction.

In prosecution for embezzlement, wherein defendant produced witnesses testifying to reputation of complaining witness, refusal of request for instruction that witness can be impeached by showing that his reputation for truth and veracity are bad *held* not erroneous, in view of general instruction relating to credibility of witnesses stating that character of witness, as shown by the evidence, should be taken in consideration for purpose of determining credibility.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Joseph J. Morley was convicted of embezzlement and larceny, and he appeals. Affirmed as to conviction for larceny, and reversed as to charge of embezzlement.

Cantillon & Hamilton and Frank A. Sievers, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty Gen., for the People.

PER CURIAM. Defendant was convicted of each of the offenses of embezzlement and larceny as respectively charged in the second and fourth counts of the information, and appeals from the judgments and from the order denying his motion for a new trial.

About March, 1925, the defendant was employed by the complaining witness William A. Bartholomae, Jr., as bookkeeper or office manager for Bartholomae Oil Corporation, which was owned by Bartholomae and of which he was president. Some time in the summer of 1925, an arrangement was made between Bartholomae and the defendant for dealing in stocks and speculating on the stock markets through the firm of A. A. Housman & Co., brokers doing business in Los Angeles, by which Bartholomae was to furnish the money necessary for that purpose and defendant was to have charge of the operations. Pursuant to this arrangement, an account was opened with Housman & Co. in the name of defendant, with funds furnished by Bartholomae. About the time this account was opened, a written agreement under date of August 26, 1925, was entered into between Bartholomae and defendant in regard to it, the terms of which will be referred to later. On October 16, 1925, this account was transferred to Bartholomae by written instructions from both parties to Housman & Co., but no change was made in the method of handling the account. Some time in 1925 Bartholomae made an oral arrangement with defendant for the latter to go out and purchase units in the Bartholomae Oil Syndicates for Bartholomae or the Bartholomae Oil Corporation, Bartholomae furnishing the money for this purpose. These syndicates were common-law trusts which had been promoted by Bartholomae and a large number of persons owned interests, or "units," in them. Defendant spent considerable time in this business, and incurred traveling expenses in connection with it.

In August and September, 1925, or 1926, the defendant withdrew from the Housman account several sums, aggregating $2,600, which he wagered on the result of a golf tournament and lost. There is some confusion in the evidence with regard to the year of this transaction. Bartholomae and defendant each mentioned both 1925 and 1926 as the year, but the books of Housman & Co. showed that it was in 1926. Some time after this wager was lost, defendant gave Bartholomae a note dated November 17, 1926, for the sum of $2,500, to cover this loss. This note had been partly paid at the time of the trial. The withdrawal and use of this money by defendant is the basis of the charge of embezzlement made in the second count.

In August, 1926, defendant obtained from Housman & Co. a $1,000 Liberty bond, which had been deposited with them as collateral to the above-mentioned account and belonged to Bartholomae. Defendant pledged this bond to a bank to secure a loan of $800, which he used for his own personal affairs. Later the bank sold this bond at defendant's request and credited the proceeds of the sale to his account. This transaction is the subject of the larceny charge made in the fourth count.

[1] Defendant admitted both of these transactions as above stated. His defense as to the embezzlement charge was that the golf tournament wager was within the scope of the arrangement between him and Bartholomae for handling the Housman account, and he had therefore the right to use the funds in this account for that purpose, or at least that he believed this to be true, and therefore had no fraudulent intent. As to the larceny charge, his claim was that Bartholomae owed him a considerable sum of money for expenses incurred by defendant in connection with the purchase of units in the oil syndicates, and also for a share which defendant claimed of the profits made on the Housman account, and that defendant had, or believed he had, a right to take the Liberty bonds in satisfaction of these claims against Bartholomae. His theory is that these circumstances show the absence of the felonious intent necessary to constitute the offense of larceny and he relies on the case of People v. Eastman, 77 Cal. 171, 19 P. 266, in support of his contention. That case does declare such a rule in larceny cases. This defense cannot be applied to the embezzlement charge, for by the provisions of section 511 of the Penal Code the appropriation of property to satisfy an offset against the owner is not a defense to such a charge.

[2] With reference to the charge of embezzlement, the evidence clearly shows that the parties entered into a written agreement in relation to the Housman account, which provided in effect that Bartholomae had given certain sums of money to defendant for the purpose of trading in various stocks, principally with Housman & Co.; that defendant should have "the right to use said moneys for said trading in stocks in any way whatsoever which meets with his best judgment"; that all trading was being done by defendant "for the sole benefit" of Bartholomae; and that the agreement should convey to Bartholomae the title "to all of the accounts, moneys, stocks and funds on hand, growing out of this arrangement." This clearly did not expressly authorize defendant to

make the wager on the result of the golf tournament, his authority being strictly limited to trading in stocks. There was no other written agreement between the parties in this matter. Bartholomae testified that there was no other oral agreement, that he gave defendant no permission to withdraw cash or securities from the Housman account, and that he had a conversation with defendant regarding the $2,600, as follows:

> "He told me that he had something to tell me, and went on to say that he had withdrawn some $2,600, as evidenced by the Housman statements, which were in his possession, and that he had bet the money on a golf championship, British-American golf championship, that was to be played abroad somewhere, and he asked me to give him another chance, that he would make good, and that if I would take his note he would pay me out of his salary at the rate of $100 per month."

Defendant admitted on the stand that he "assumed the responsibility for that $2,500," and gave his note to Bartholomae for that amount, and that he had paid of a part of it and orally agreed at a later date to pay the remainder. He also testified that when he and Bartholomae were going over the accounts they came to this $2,500 and Bartholomae objected, saying, "I don't see why you should make a speculation like that." Defendant's reply to this objection, as testified to by him, while justifying the wager as a good one, did not include any claim that it was within the scope of his authority. Defendant also testified that, when they made the arrangement about the Housman account, Bartholomae agreed that they would divide anything they made. Bartholomae denied making any such agreement, and, of course, it is inconsistent with the written agreement, which would supersede any such oral statement. But it does not appear that defendant in his testimony sought to justify the taking of the $2,600 on the ground that he was a partner, or otherwise jointly interested in the funds in the Housman account, and for that reason entitled to take and use those funds. As to his justification for using the money, he testified as follows:

> "Q. Did you have Mr. Bartholomae's permission to withdraw the $2,500 cash from that account? A. I didn't need his permission.
>
> "Q. You had no written authority, did you? A. That money was handed over to me to speculate as best I thought. * * *
>
> "Q. Yes; your instruction didn't say anything about the use of the money? A. The instructions that I followed were the verbal instructions when the account was opened—to make money any way I could."

This testimony does not go directly to defendant's belief, yet it attempts to state a justification of his acts as being within the scope of his authority.

[3, 4] While defendant was on the stand and next after he had admitted taking $2,500 from the Housman account and using it for the golf wager, his counsel asked him this question:

> "I will ask you what your belief was at that time with reference as to whether or not you were acting within the scope of your authority?"

The court sustained a general objection by the prosecution to this question, and the ruling is assigned as error. The objection should have been overruled. A fraudulent intent is an essential element in the offense of embezzlement. People v. Treadwell, 69 Cal. 226, 10 P. 502; People v. Mitchell, 74 Cal. App. 164, 240 P. 36. "A witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action." Fleet v. Tichenor, 156 Cal. 343, 348, 104 P. 458, 460 (34 L. R. A. [N. S.] 323), quoted and followed in People v. Moore, 48 Cal. App. 245, 251, 191 P. 980, 982. To the same effect, People v. Farrell, 31 Cal. 576, and other cases.

This court is of the opinion that the action of the trial court in sustaining the objection was prejudicial error, because, if the question had been answered and a positive statement made that defendant did believe that in the transaction in question he was acting within the scope of his authority, such testimony, in addition to the testimony concerning oral authorization or oral statements by Bartholomae to the defendant that defendant should use the money to speculate as he thought best and make money any way he could, might have easily turned the scale, and might have led the jury to acquit on the charge of embezzlement. The case does not seem to be one of such positive and clear proof of guilt that we can properly disregard the error committed by the trial court and its probable effect.

[5, 6] Defendant testified, in support of his defense to the larceny charge, that Bartholomae gave him a list of unit holders in the Bartholomae Oil Syndicates, with directions to go out and purchase units from them; that Bartholomae delivered to him approximately $40,000 to $50,000 for that purpose; that defendant paid in the aggregate between $40,000 and $50,000 for the purchase of units; that his total expenses in making these purchases were between $1,600 and $2,000; and that he used about $200 of his own money for these expenses and the remainder was paid out of the money received from Bartholomae. He offered in evidence the list above mentioned, and on objection by the prosecution it was excluded. He also sought to show by his own testimony how many and what units he had purchased, and how much he had paid for the various units; but objections to the questions on these points were sustained. He also attempted, but was not permitted, to show by another witness from whom he purchased units at

San Jose how many visits defendant made him on this matter. He now assigns all these rulings as error, arguing that if he had been allowed to show the details of his claim against Bartholomae for expenses it would have appeared in a more favorable light to the jury. The court, after discussing with counsel in the absence of the jury its rulings on defendant's own testimony, stated that it would allow a reasonable investigation into this claim, and that for this purpose defendant might state the aggregates of purchases made and of his receipts and expenditures for the purchase of units; also whether he spent more or less than Bartholomae gave him, whether he incurred expenses, and whether there was money enough to cover purchases and expenses. While the previous rulings as to the number of units purchased was inconsistent with this statement of the court, defendant did not avail himself of the permission thus given him to repeat the question, and is therefore in no position to complain of that ruling. As to the other matters, we do not find any error in the ruling of the court. Bartholomae had already testified that several hundred units were purchased; and to have embarked on an inquiry as to each of them would have introduced a multitude of collateral issues. In view of the other evidence hereinafter referred to, we do not see how it could have helped the defendant, unless by confusing the jury with these collateral issues. Under the circumstances the court was well within its discretion in thus limiting the inquiry.

[7] Defendant asked this question of Bartholomae on cross-examination:

> "Now, what was the total amount that you paid to Mr. Morley for the expenses he incurred in the purchase of these units, traveling expenses?"

An objection on the ground that this was immaterial and "gone into yesterday" was sustained. Neither of these grounds of objection was well taken. The matter gone into on the previous day was the total amount of money delivered by Bartholomae to defendant for the purchase of units, and not the matter of expenses. It was proper for defendant in support of his claimed defense to show how much had been paid him for expenses, as well as the amount of expenses he had incurred, and in view of the scope of Bartholomae's direct examination defendant should have been allowed to cross-examine him on this subject. The ruling was therefore erroneous, but this occurred before the above-mentioned statement made by the court while defendant was on the stand, in which statement the court also referred to its previous ruling on this question. Defendant made no request after that statement to have Bartholomae recalled for further cross-examination. In view of the change in its ruling indicated by the court, defendant should have made such a request, and, having failed to do so, he cannot now complain of the original ruling.

[8] Even if there were error in not allowing defendant to show all the details of his claim against Bartholomae for expenses, as a defense to the larceny charge, we cannot see that it was prejudicial or resulted in a miscarriage of justice. At the trial two statements signed by defendant were introduced in evidence as People's Exhibits. Each of these was headed "Summary. Statement of Unit Purchases by J. J. Morley." The first showed a balance in defendant's hands after paying certain expenses listed, and included these words: "Complete list of every transaction to date includes J. J. Morley's expenses to date. April 30, 1926." The second listed certain expenses and showed the account exactly balanced. In it were these words: "Complete list of every transaction to date 7/20/26 including all J. J. Morley's expenses." Defendant did not claim to have incurred any further expenses after the date of the second statement. He admitted making these statements, but said they related only to particular trips and were not complete. This explanation was in direct conflict with the wording of the statements, and the jury did not accept it. In this connection they may have considered the fact that, although defendant's total claim for expenses, as testified to by him, was only $200, the bond which he took was for $1,000. While he claimed to be entitled also to a share of the profits of the Housman account, he did not testify, and it was not otherwise shown, that there were any such profits. The facts tended strongly to discredit defendant's claim that he took the bond in satisfaction of his claim against Bartholomae. We think the result would have been the same if he had been allowed to testify as to the details of expenses claimed by him.

[9, 10] Defendant asked Bartholomae on cross-examination, when he was on the stand for the prosecution, whether he had given defendant a list of unit holders from whom to make purchases. An objection to this was sustained. In another part of this cross-examination substantially the same question was asked of Bartholomae, and he answered it in the negative without objection. Hence there was no error in the ruling complained of. Defendant also asked Bartholomae on cross-examination what was the price fixed for the purchase of units—Bartholomae having previously testified that there was such a price. The objection to this question was properly sustained, as the price of the units was not relevant to any issue in the case.

Defendant also complains of certain rulings of the court sustaining objections to questions on his redirect examination. We have examined the rulings complained of and find no error in them. The questions do not purport to call for any explanation of defendant's testimony given on cross-examination, and there is nothing in the record to indicate that answers to them would have changed the effect of that testimony.

[11, 12] After the defendant's case was closed the prosecution called in rebuttal G. P. Deane, who testified that in January, 1927, he was auditing Bartholomae's books, and at that time had several conversations with defendant about the Liberty bond, in which on one day defendant said he would "dig it up" and would bring it down the next morning, and on the next day said he had forgotten to bring it. This testimony was admitted over the objection of the defendant, who had taken the stand in his own defense, that it was impeaching testimony and that no foundation had been laid for it by asking the defendant when he was on the stand whether he had made the identical statements testified to by Deane. He now assigns the ruling admitting this evidence as error. Counsel for both sides seem to be agreed in the assumption that the testimony given by Deane was impeaching testimony for which a foundation must be laid by interrogating the defendant, as in the case of any other witness, but this assumption is erroneous. Declarations and statements made by the defendant are original evidence against him, and the rules as to the impeachment of witnesses do not apply to the proof thereof, even if he takes the stand in his own defense. People v. Ferrara, 31 Cal. App. 1, 5, 159 P. 621; People v. Sprado, 72 Cal. App. 582, 593, 237 P. 1087. It may be that in strictness this evidence was not rebuttal and should have been presented as a part of the prosecution's case in chief, but no objection was made on that ground. Moreover, since the order of proof is within the discretion of the trial court and no abuse of discretion appears here, the ruling would be sustained even against such an objection.

[13] Another error complained of was the refusal of the court to instruct the jury that "the mere failure to comply with a pecuniary obligation, such as to pay a promissory note when due, does not amount to embezzlement." This is a correct statement of the law. Defendant gave Bartholomae his note for $2,500 to cover the sum taken by him and lost on the golf wager, and that note was still partly unpaid even at the date of the trial. From defendant's testimony the jury might perhaps have found that he was acting within the scope of his authority in taking and using the $2,600, and hence no embezzlement was committed by him in so doing; and, no doubt, it would have been proper to inform them that, in case they so found, no embezzlement arose from the mere nonpayment of the note. While this instruction was not given, the court did quite fully instruct the jury as to the law relating to embezzlement, and the facts which must be proved to establish such a charge, and the jury must have understood from these instructions that the defendant could not be convicted of embezzlement merely by reason of his nonpayment of the note. The refusal of this instruction could not have worked him any harm.

[14] The verdict of the jury rests for support largely on the testimony of the complaining witness Bartholomae. Defendant produced at the trial several witnesses who testified, without objection, that Bartholomae's reputation for truth and veracity was bad. He requested the court to instruct the jury that a witness can be impeached in this manner. The court refused this instruction, but in the course of a general instruction relating to the credibility of witnesses informed the jury that "the character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility." We think this was sufficient to call the jury's attention to the purpose for which the evidence of Bartholomae's reputation was admitted. In fact, we do not see how the jury could have failed to discern that purpose, even without any instruction. As reasonable men they must have assumed that the evidence was before them for some purpose, and the only possible purpose would be to impeach the credibility of the witness.

For the reasons hereinbefore stated, it is ordered that the judgment and order denying defendant's motion for a new trial as to the charge of embezzlement, as set forth in count 2 of the information, be, and they are, reversed, and that the judgment and order denying defendant's motion for a new trial as to the charge of larceny, as set forth in count 4 of the information, be, and they are, affirmed.

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89 Cal. App. 336

HOROWITZ v. SACKS et al. (Civ. 6128.)★

District Court of Appeal, First District, Division 2, California. Feb. 20, 1928.

Hearing Denied by Supreme Court April 19, 1928.

1. Husband and wife 🔑324—Parent and child 🔑18—Abduction of wife from husband or child from parents is actionable whether done by force or by use of persuasion (Civ. Code, § 49).

Abduction of wife from husband or child from its parents is actionable whether abduction is done by force or by use of persuasion, under Civ. Code, § 49.

2. Husband and wife 🔑324—Whether abduction was by force or persuasion, intent is material; it being necessary that defendant acted with improper motives.

Whether abduction was committed by use of force or by use of persuasion, intent with which defendant acted is material point of in-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

quiry, since it must appear that defendant acted with improper motives.

3. Husband and wife 🔑324—Much stronger case must be made out where defendant is parent of spouse alleged to have been abducted.

In abduction, much stronger case must be made out where defendant is parent of spouse alleged to have been abducted.

4. Husband and wife 🔑324—Mother may advise child in good faith as to child's domestic affairs without becoming liable for alienation of affections.

Mother may advise her child in good faith as to child's domestic affairs without becoming liable for alienation of affections, especially when offspring is an infant or of unsound mind, and the same rights extend to persons in loco parentis.

5. Husband and wife 🔑326—In action for alienation of affections of wife, brought against mother and other relatives of wife, existence of justification for mother excuses others where complaint charges conspiracy.

In action for alienation of affections, where complaint charges conspiracy of mother with other relatives of wife, existence of anything which justified mother in bringing about separation will excuse other defendants.

6. Trial 🔑89—Striking testimony as to what wife said in presence of husband, in action for alienation of affections, held error (Code Civ. Proc. § 1870, subd. 3).

In action for alienation of affections of wife, testimony as to statement made by wife in presence and hearing of husband was admissible under Code Civ. Proc. § 1870, subd. 3, and granting motion to strike was error.

7. Evidence 🔑474(4)—Opinion testimony of intimate acquaintances as to insanity of wife held admissible in action for alienation of affections (Code Civ. Proc. § 1870, subd. 10).

In action for alienation of affections against wife's mother and other relatives, opinion testimony of intimate acquaintances as to insanity of wife prior to and subsequent to marriage *held* admissible under Code Civ. Proc. § 1870, subd. 10.

8. Husband and wife 🔑333(3)—In action for alienation of wife's affections, testimony of witness as to statements of husband previous to marriage held admissible to show whether husband had fraudulently procured marriage.

In action for alienation of affections against mother and relatives of wife, testimony of witness at whose house husband had lived prior to marriage as to conduct and statements of husband *held* admissible to show whether husband had abducted wife under fraudulent pretense that he was sent by her deceased father to take her in holy wedlock.

9. Evidence 🔑474(4), 537—Testimony of physician as to wife's insanity, in husband's action for alienation of affections, held admissible as expert and by intimate acquaintance.

In action for alienation of affections, brought against mother and relatives of wife, testimony of family physician as to insanity of wife *held* admissible both as expert and as intimate acquaintance.

10. Witnesses 🔑214—Testimony of physician as to information learned in others' presence concerning sanity of wife, in action for alienation of affections, held not privileged (Code Civ. Proc. § 1881).

In action for alienation of affections, brought against mother and other relatives of wife, testimony of physician who had attended wife as to her insanity *held* not privileged under Code Civ. Proc. § 1881, since statements by patient were obtained in presence of husband, mother, and brother of patient and were therefore not confidential.

11. Appeal and error 🔑204(7)—Objection to testimony of physician as to wife's sanity in action for alienation of affections held not available when first made on appeal (Code Civ. Proc. § 1881).

In action for alienation of affections brought by husband against mother and other relatives of wife, objection to testimony of family physician as to insanity of wife because communications were privileged under Code Civ. Proc. § 1881, *held* not available when first made on appeal, where wife attended trial, was called as witness by defendants, and she was not asked to give consent that doctor be examined and answer questions, since if objection had been made, privilege could have been removed.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Charles Horowitz against Olga Sacks and others for damages for alienation of affections of his wife. Judgment for plaintiff, and defendants appeal. Reversed.

Joseph P. Sproul and Henry G. Bodkin, both of Los Angeles, for appellants.

Halverson & Price, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment for damages, alleging that defendants had alienated the affections of his wife. The defendants appeared and answered, and a trial was had in the lower court before the court sitting with a jury. The jury returned a verdict in the sum of $15,000 in favor of the plaintiff. A motion for a new trial was made, and the trial court made a conditional order that unless the plaintiff waived $10,000 the motion would be granted; otherwise denied. The plaintiff thereupon filed a stipulation consenting to the reduction, and the motion for a new trial was denied. Thereafter the defendants appealed from the judgment under section 953a of the Code of Civil Procedure.

It was the theory of the plaintiff in the presentation of his case that the defendants entered into a conspiracy unlawfully and maliciously to alienate the affections of his wife, Bessie Horowitz, and that thereafter and on the 21st day of April, 1924, they did unlawfully and maliciously abduct the said Bessie Horowitz, and from that time on did unlawfully and maliciously alienate the affections of the said Bessie Horowitz, his said wife, to his damage in the sum of $35,000.

The defendants are Olga Sacks, the mother of Bessie Sacks, who is the same individual as Bessie Horowitz, the wife of the plaintiff; Bessie's brother Abraham Sacks and his wife, Sarah Sacks; Bessie's brother Ben and his wife, Betty Sacks, and also Bessie's sister, Etta Sacks. It was the theory of the defendants that Bessie at the time of her marriage and for several years prior thereto was demented; that at the time of their engagement, and continuously thereafter, no affection existed between Mr. and Mrs. Horowitz; that by fraudulent practices Mr. Horowitz fraudulently abducted Bessie, a demented girl, for the purpose of getting possession of her money; that Mr. Horowitz had no affection for his wife and therefore was not damaged in any sum whatsoever; and that the defendants did what they did, not maliciously, but for the sole purpose of protecting one of their kith and kin who was otherwise without any protector whatsoever.

Before proceeding to take up the particular points made by the defendants some of the evidence should be stated. The father of Bessie Sacks died in 1915. On or about the 14th day of February, 1924, Mr. Horowitz went to the house where Mrs. Olga Sacks, her daughter Bessie, and her daughter Etta resided. That house was 1913 Brooklyn avenue. He made the call on the ostensible mission of a real estate deal. After obtaining entrance to the house he had a conversation with Bessie. In that conversation he stated to her that he had had a dream in which her father had appeared unto him and had directed him to go to that house and there he would see a young girl with long black hair, whom he should marry. Before Mr. Horowitz left the house he and Bessie were engaged. When Bessie's brothers learned of the engagement they asked the plaintiff for references. He promised to furnish them, but from time to time delayed doing so. On the fifth day after the engagement Mr. and Mrs. Horowitz were married. When her brothers next asked for references the plaintiff said, "I don't have to give you any addresses now I am married." A day or so after the marriage the plaintiff moved his trunk into the house formerly occupied by Mrs. Olga Sacks and her daughters, and, when the mother-in-law remonstrated, the plaintiff informed her that the house belonged to his wife, that he was entitled to occupy it with her, and, in effect, he further advised Mrs. Sacks that if any one was to remonstrate it was the plaintiff. Thereafter Mrs. Sacks moved out and took up a residence on Michigan avenue. On the 21st day of April, 1924, according to the testimony of the plaintiff, Ben Sacks called at the house of the plaintiff and his wife and took them with him for an automobile ride. Later Abraham Sacks and his wife were picked up. Still later they drove to the mother's house on Michigan avenue. Those in the house came out, and Mrs. Horowitz was taken into the house, but Mr. Horowitz was left outside. There is a great deal of conflict in the evidence as to how much force was used.

After the trial the plaintiff changed his attorneys and the defendants also changed their attorneys. When the case was called in this court for argument the plaintiff earnestly contended that the brief of the defendants contained misstatements of the record. On being asked to specify, counsel kindly cited passages. As to whether such passages are supported by the record or are not supported by the record, we will not take time to discuss. On the other hand, we will pass those matters by and discuss only those portions of the record that are not at all in dispute.

[1-5] It is settled law that the abduction of a wife from her husband, or a child from its parent, is actionable whether the abduction is done by force or by use of persuasion. Civ. Code, § 49; Humphrey v. Pope, 122 Cal. 253, 256, 54 P. 847. Whether the alleged act was committed by the use of force or the use of persuasion a material point of inquiry is the intent with which the defendant has acted. It must appear that the defendant has acted with improper motives. The decisions require a much stronger case to be made out where the defendant is a parent of the spouse alleged to have been abducted. Cripe v. Cripe, 170 Cal. 91, 93, 148 P. 520; Bourne v. Bourne, 43 Cal. App. 516, 533, 185 P. 489. Without becoming liable a mother may advise her child in good faith as to the child's domestic affairs, especially when the offspring is an infant or of unsound mind. 30 C. J. 1130. The same right extends to persons in loco parentis. 30 C. J. 1131. As the complaint charges a conspiracy against all of the defendants, the existence of anything which justified the mother in bringing about the separation will excuse the acts of the other defendants. Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574, 581.

[6] The witness Benjamin Sacks had testified that when he asked the plaintiff for references as to his character the plaintiff made the remark, "Go ahead and trace me if you want to find out." That statement was made by the plaintiff in the presence of the plaintiff's wife, of the witness, and some other persons. Thereupon the witness was asked what was said. "A. I asked Bessie whether she knew who this man was; she said he told her he was a very wealthy man, always carried a lot of money around with him, that he was a contractor and builder and that he

was going to build 20 houses at one time and that they were both going into the real estate business together; and then I asked her if she knew who he was. Then she said, well, he was going to give me some addresses to write to." On motion the answer was stricken out. As the testimony was with reference to statements made by Mrs. Horowitz in the presence and hearing of her husband, the answer should not have been stricken out. Code Civ. Proc. § 1870, subd. 3.

[7] In points 4, 5, 6, 12, 13, and 14 the defendants challenge more than 28 rulings on the admission and exclusion of evidence. An examination of the record discloses that many other similar rulings were subject to the same attacks. It will serve no useful purpose to attempt to enumerate each one of these rulings. From the questions propounded by the defendants it is clear that they sought to prove that the insanity of Bessie Horowitz was a condition existing from birth. The court sustained objections, or granted motions to strike out, and declined to consider any evidence prior or subsequent to the date of the marriage. When defendants sought to show the bodily health of the same individual at different periods of time, the same rulings were made. When they sought to show the condition of her nerves at different periods of time, the same rulings were made. The evidence disclosed that Mrs. Horowitz at times was most unnaturally exhilarated and at other times most decidedly melancholy. Claiming that the condition had existed from birth and that the condition was evidence of unsoundness of mind, the defendants sought to introduce the proof. Objections thereto were interposed by the plaintiff, or motions to strike out were made, and the rulings were all against the defendants. In their endeavor to show the insanity of Mrs. Horowitz they called many witnesses, and, having shown such witnesses to be intimate acquaintances, they propounded questions to such witnesses asking for their opinions respecting the mental sanity of Mrs. Horowitz. Code Civ. Proc. § 1870, subd. 10. In nearly every instance the evidence was ruled out. In justification of the ruling it is asserted that the individual was not an intimate acquaintance. An examination of the record discloses that the rulings are not sustained by the facts. When the nature of the issue is considered it is patent that the rulings mentioned were erroneous and highly prejudicial to the rights of the defendants.

[8] Mrs. Fannie Black was called as a witness by the defendants and testified as follows:

> "I have known Mr. Horowitz since the first day he came to Los Angeles. It was a year ago last February. He came to my house. I had a vacant room, and he came and asked for it. He stayed there just one month. I had a conversation with Mr. Horowitz with respect to his getting married. The first thing he came in he started talking about his marriage. That was the first day he came to my house. I never knew him before that.
>
> "Q. What did he say?
>
> "The Court: But I do not see any relevancy in testimony that is called for by the question. It doesn't help the jury to determine whether the husband's wife's affections were alienated.
>
> "Mr. Engelhardt: It is introduced for the purpose of showing a motive for getting married.
>
> "Mr. Redmond: I object to it.
>
> "The Court: The objection must be sustained.
>
> "Mr. Bearman: The testimony of this witness is offered, your honor, for the purpose of showing that Mr. Horowitz made statements that he did not care whom he married, as going to show whether there was any affection to be alienated.
>
> "The Court: The objection has been sustained.
>
> "Q. Did he talk to any other woman in your presence? A. Well; outside anybody passing the street he asked everybody if they knew any woman with money.
>
> "Mr. Redmond: I object to that as incompetent, irrelevant, and immaterial, and move to strike out the latter part of the answer.
>
> "The Court: The objection is sustained."

A most cursory reading of the foregoing proceedings shows, we think, that the evidence offered was relevant as to whether the plaintiff had abducted from her family Bessie Sacks, under the false and fraudulent pretense that he was sent by her deceased father to take her in holy wedlock.

[9] Dr. George B. Walroth was called as a witness on behalf of defendants and testified as follows:

> "My name is George B. Walroth. I am licensed to practice in the state of California. I have been practicing in Los Angeles for 30 years. I know Bessie Horowitz, formerly Bessie Sacks, and have known her 20 years. I have had occasion to treat her at various times. Within a week after her marriage I was at the home of Bessie Horowitz and her husband. I do not know what time of day it was. Bessie, her husband, Bessie's mother, and her brother Abe were present. I called professionally, and I observed her condition. I observed her mental condition.
>
> "Q. What was it? Mr. Redmond: I object to that as incompetent, irrelevant, and immaterial and not within the issues.
>
> "The Court: The objection is sustained.
>
> "Mr. Engelhardt: Q. Was she rational or irrational at that time?
>
> "Mr. Redmond: I make the same objection, and no foundation laid as to the qualification of the witness.
>
> "The Court: The objection is sustained.
>
> "Witness (continuing): I have had experience in treating nervous conditions and experience in treating mental conditions. I had that experience in Los Angeles. I have had no special training in mental work. I have treated a number of cases of mental diseases in the ordinary course of a general practice extending over a period of thirty years. At the time I was there I examined Bessie Horowitz. I talked to her.
>
> "Q. What did she talk about? A. She talked in a rambling way about everything.

"Mr. Redmond: I object to that answer as not responsive and incompetent, irrelevant and immaterial.

"The Court: Strike it out.

"Mr. Engelhardt: Q. From the conversation you had with her and the examination you made, would you be able to testify whether at that time she was rational or irrational?

"Mr. Redmond: I object on the ground that there is no proper foundation laid as to the qualifications of the witness. It is a conclusion of the witness. It is incompetent, irrelevant, and immaterial and not within the issues.

"The Court: The objection is sustained."

Similar questions, objections and rulings were made with reference to subsequent visits, and finally the trial court stated:

"The Court: You need not ask the question. The ruling will be the same. As I understand it, under the law, the only times when a person can give information on that subject are when he is a personal acquaintance who comes in frequent contact with the person, such as members of the family, and the doctor does not come within that classification. The other class of testimony of that character is an expert in mental diseases who has had experience and claims to be an expert in that line, and the doctor does not make any claim, according to his testimony, to be an expert and is not qualified. The objection will be sustained."

The reasons assigned by the trial court for its rulings were not applicable to the facts before it. On the record as made the witness had qualified himself both as an intimate acquaintance and as an expert. If counsel had desired to weaken his testimony the plaintiff should have asked permission to take the witness and cross-examine him.

[10] At this time the plaintiff asserts for the first time that the doctor's testimony was privileged. Code Civ. Proc. § 1881. However, there is no doubt the rulings were erroneous. All of the information the witness obtained from his patient was obtained in the presence and hearing of three third parties, the husband, mother, and brother of the patient. Such communications of the patient were not confidential and therefore were not privileged. Code Civ. Proc. § 1881; Gallagher v. Williamson, 23 Cal. 331, 333, 83 Am. Dec. 114; Hager v. Shindler, 29 Cal. 47, 64; Sharon v. Sharon, 79 Cal. 633, 678, 22 P. 26, 131; Ruiz v. Dow, 113 Cal. 490, 498, 45 P. 867; Murphy v. Board of Police, etc., Com'rs, 2 Cal. App. 468, 470, 83 P. 577; 4 Jones on Evidence, § 761; Wigmore on Evidence, § 2292.

[11] If the plaintiff had made the specific objection that the communications made to the witness were privileged, it would appear from the record the privilege could either have been fortified or removed speedily. Mrs. Horowitz attended the trial and was called as a witness by defendants. She was not asked to give her consent that Dr. Walroth might be examined and might answer the questions recited above because the specific objection was not made. Furthermore, the record discloses affirmatively that neither court nor counsel considered that the objection as made involved the provisions of section 1881, Code of Civil Procedure.

Because of the errors enumerated above, the judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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89 Cal. App. 526

PEOPLE v. MILBURN. (Cr. 1562.) ★

District Court of Appeal, Second District, Division 1, California. Feb. 28, 1928.

Rehearing Denied March 23, 1928.

1. Robbery 🔑20—Jury need only determine gun was dangerous weapon where accused, having denied robbery, questions sufficiency of proof to show gun was loaded.

Where evidence was sufficient to justify jury in finding that accused committed crime of robbery, although accused denied participation, and question was raised as to whether or not crime was first degree robbery by questioning proof that gun was loaded at time of offense, *held*, that jury only had to determine that gun was dangerous weapon.

2. Criminal law 🔑1169(1)—Admission of evidence that accused in robbery prosecution had dagger on person when arrested nine days after alleged offense held error.

In prosecution for robbery, introduction of evidence that accused at time of arrest, nine days after commission of alleged robbery, was armed with dagger, where accused was convicted upon the evidence of one man and codefendant testified he did not participate in crime, *held* error; evidence being so evenly balanced that admission of accused's carrying dagger was prejudicial.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

John Milburn was convicted of robbery in first degree, and he appeals. Reversed, and new trial ordered.

Frederic H. Vercoe, Public Defender of the County of Los Angeles, and G. A. Benedict, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, J. [1] This is an appeal from a judgment of conviction of first degree robbery and from an order denying defendant a new trial. The defendant, together with one Walter Wright, was accused by information filed by the district attorney of Los Angeles county of the crime of robbery. Defendant

★Rehearing denied.

Wright entered a plea of guilty and was sentenced to San Quentin. The evidence was legally sufficient to justify the jury in finding that the defendant Milburn committed the crime of robbery, but as to whether it was first degree robbery or not is the question raised by his counsel, as he questions whether or not there was any proof that the gun used was loaded at the time of the offense. However, this is amply met by the record in that the evidence shows that the gun was used by the defendant in such a manner as would justify the jury in finding that the same was loaded. The denials of the defendant were not that the gun was not loaded, but only that he did not participate in the robbery at all. If he had actually testified that he was present and used the gun in an unloaded condition, then we would have to pass upon a question that has not definitely been determined as to just how far the proof must go to show a gun is a dangerous weapon. The old decisions holding that a pistol or revolver is not a deadly weapon unless it is proved to have been loaded at the time it was used in the commission of a crime did not discuss the question of the manner or way in which the gun was used and as to how far the jury may consider such evidence in determining whether the same was a deadly weapon. In the instant case the jury had only to determine that the gun used was a *dangerous weapon*. People v. Freeman et al. (Cal. App.) 260 P. 826.

[2] A more serious question is raised by the objection of the defendant as to the introduction of certain evidence in reference to his arrest nine days after the robbery, which evidence showed that he was then in the company of the defendant Walter Wright, who entered a plea of guilty herein. Evidence was also introduced to the trial court, but later stricken out, that the said Walter Wright was armed with a gun at the time of arrest. There was evidence also introduced in this connection showing that the defendant was armed with a dagger at that time. This evidence should never have been brought before the jury, and it is problematical as to the effect it had upon them. In case evidence was forthcoming that at the time of his arrest the defendant was armed with a gun similar to the gun with which the holdup occurred, such evidence would probably be competent and proper evidence for the jury to consider. However, the court, after admitting the evidence, struck out that portion thereof that referred to any gun or guns on the other party or parties at the time the defendant was arrested.

The court, however, did not strike out the evidence as to a dagger being found upon the defendant. The evidence does not show whether the same was concealed upon his person or not. Juries are not always amenable to the instruction of a trial court to disregard the evidence which the trial court has stricken out. In the instant case, the evidence on which the defendant was convicted was the evidence of one man (Sparks), and there was the positive and direct evidence of the defendant and his codefendant Walter Wright that he did not participate in the robbery charged. The error of the trial court in allowing the evidence to remain as to a dagger being found upon him at the time of his arrest (People v. Wong Ah Leong, 99 Cal. 440, 34 P. 105), taken with the difficulty that the jury would probably have in fully obeying the order of the trial court to disregard certain of the evidence ordered stricken out, was more than likely to cause a miscarriage of justice, in that the jury might not have found the defendant guilty as charged if it had not been for the prejudice which probably resulted from such evidence. The jury might have believed the evidence of the people's prosecuting witness Sparks in all particulars and upon that determined the guilt of the defendant, or they might have been induced to render their judgment and to have believed the witness Sparks only by reason of the error referred to or by reason of prejudice caused only by their inability to disregard the evidence as to the companions of the defendant at the time of his arrest being armed with guns. Where the evidence was so evenly balanced, even though we have but the cold record before us, we believe the defendant is entitled to a trial on the facts as to the robbery only.

Therefore the order denying the motion for a new trial is reversed and a new trial ordered herein.

We concur: CONREY, P. J.; HOUSER, J.

HANNA et al. v. RODEO-VALLEJO FERRY CO et al. (Civ. 3429.) ★

District Court of Appeal, Third District, California. Feb. 25, 1928.
Hearing Denied by Supreme Court April 23, 1928.

1. Deeds 🔑175—Breach of condition subsequent as to restrictions pursuant to general scheme held waived by vendors' selling other lots without restrictions.

Where vendor sold lots to plaintiff containing building restrictions "pursuant to general scheme or plan of building up said locality," breach of condition as to such building restrictions *held* waived by vendors' selling numerous other lots within the original scheme without insertion in the deeds of such restrictive provisions.

2. Deeds 🔑175—Vendors' alleged right to declare forfeiture for breach of restrictions held waived by delay for more than year, while lot was being improved, to assert right.

Where vendors apparently had abandoned general scheme of selling lots restrictively, their delay for more than a year to assert alleged right of forfeiture for breach of such restrictions, contained in deed, while defendants were making valuable improvements on the lot, constituted waiver of any right to declare forfeiture.

3. Covenants 🔑103(3)—Waiver of restrictive covenants need not, to be invoked, partake of technical estoppel.

Waiver, as to restrictive covenants in deed, need not, in order to be invoked by owner of land, partake of technical estoppel.

4. Contracts 🔑318—Equity will not enforce forfeiture in favor of party to agreement who has violated it in same manner as adversary.

A court of equity will not enforce forfeiture in favor of a party to an agreement who has himself violated its terms in same manner as party of whom he complains.

5. Eminent domain 🔑45—Restrictive covenants or conditions in deed are no bar to proceeding in eminent domain.

Restrictive covenants or conditions in a deed are no bar to acquisition of property for a public use by a proceeding in eminent domain.

6. Deeds 🔑204—Refusal to permit plaintiffs seeking land forfeiture to show corporation receiving deed without restrictions was plaintiffs' alter ego, hence general restrictions had not been waived, held proper, where immaterial because of other sales.

In suit to declare forfeiture of title to property for violation of restrictive covenants in deed, relative to buildings to be placed on land, court's refusal to permit plaintiffs to show corporation was their alter ego, and hence that plaintiffs' deeds to such corporation, which did not contain such restrictions as allegedly were part of a general scheme, were not waiver of all restrictions, *held* proper, where it would have been immaterial, since plaintiffs had sold to others also, without including restrictions in deeds.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Thomas R. Hanna and another against the Rodeo-Vallejo Ferry Company, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Courtney L. Moore, of San Francisco, for appellants.

Rodgers & Bray, of Martinez, for respondents.

FINCH, P. J. In the year 1916 the plaintiffs subdivided a tract of land owned by them and filed a map thereof on which the tract was designated as "Bay Addition to the Town of Crockett." May 20, 1917, they conveyed lot 5, block 3, of the tract to Rudolph Normandsen. The deed of conveyance contained the following provisions:

> "That prior to the first day of July, 1936, no building or structure shall be erected or constructed upon said real property or any part thereof which shall be used for, or designated for or intended to be used for any other purpose except that of a dwelling house or a private garage for the owner or occupant of said dwelling house, together with the usual outhouses erected as appurtenant and solely appurtenant to said residence building. * * * If ony one or more of the foregoing conditions be violated or broken in whole or in part by the said party of the second part, their heirs, or executors, administrators or assigns, then and in that event all the right, title, estate, claim and interest of the said party of the second part, his heirs, executors, administrators or assigns, in and to the above-described real property or any part thereof, arising under this conveyance, shall forthwith cease and terminate and said premises and the whole thereof shall at once revert to and vest in the said parties of the first part, their heirs, executors, administrators or assigns forever."

October 14, 1920, Normandsen conveyed the lot in question to Hans A. and Alice Miller, who conveyed the same to defendant Rodeo-Vallejo Ferry Company October 20, 1923. At the time of the latter conveyance there was no building or structure upon the lot except a dwelling house. Shortly thereafter the Rodeo-Vallejo Ferry Company and the defendant American Tollbridge Company commenced the construction on lot 5 of "a terminal of a bridge to span or cross the Carquinez Straits, and * * * the erection of large concrete pillars and abutments * * * to support said bridge and said terminal." The concrete abutment was completed in July, 1924. It was about 25 feet high and 40 feet long, "in the form of an ordinary bridge abutment, narrow at the top and sloping down as a retaining wall," and was designed to "carry the end of the steel viaduct that forms the end bearing for the end girders of the viaduct approach to the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

main bridge." January 28, 1925, the Rodeo-Vallejo Ferry Company conveyed lot 5 to the American Tollbridge Company.

Prior to July 15, 1918, the plaintiffs had conveyed to various persons other than Normandsen six lots in block 3 of the Bay addition and one in block 2, and they thereafter conveyed one lot in block 2, and one in block 3. These conveyances all contained restrictive provisions similar to those in the Normandsen deeds. July 15, 1918, the plaintiffs conveyed to the Crockett Land & Cattle Company, a corporation, of which Thomas R. Hanna was president and Wanda Hanna secretary, six lots in block 1, eight in block 2, and five in block 3, without any restrictions. August 20, 1920, they conveyed to the same company two additional lots in block 1 without restriction. Thereafter, and prior to October 20, 1923, the Crockett Land & Cattle Company conveyed to various persons, without any restrictive conditions or covenants, five lots in block 1 and four in block 2. During the same period of time that corporation conveyed to various other persons two lots in block 1, one in block 2, and four in block 3, the conveyances of which contained restrictive clauses similar to those in the Normandsen deed.

The complaint alleges that the restrictive conditions mentioned were inserted in the deeds referred to, "and in particular the deed" to Normandsen, "pursuant to a general scheme or plan of building up said locality, and for the benefit of the lots located in said locality, and for the benefit of persons who purchased lots therein, and as an inducement for persons to purchase the same; * * * that, shortly after the defendant the Rodeo-Vallejo Ferry Company acquired title to said lot, the said Rodeo-Vallejo Ferry Company commenced the erection and construction, or permitted the American Tollbridge Company to commence the erection and construction, on said lot No. 5, without the consent of these plaintiffs, of a terminal of a bridge to span or cross the Carquinez Straits, and * * * did erect and * * * complete the erection of large concrete pillars and abutments on said lot No. 5 to support said bridge and said terminal; * * * that plaintiff notified the said Rodeo-Vallejo Ferry Company and said American Tollbridge Company * * * that said concrete pillars and abutments * * * must be removed from said lot," and that said defendants refused to remove them; and "that thereafter, on or about the 3d day of February, 1925, plaintiffs demanded * * * a reconveyance of said lot No. 5," but the defendants refused to make such reconveyance. The prayer is for a decree "compelling said defendant the American Tollbridge Company * * * to convey said lot No. 5 to the plaintiffs."

The court found the foregoing allegations of the complaint to be true, and further found, in accordance with the allegations of the answer:

> "That subsequent to the 20th day of October, 1920, the said plaintiffs have not been and are not now nor are either of them, the owners, or owner, of any lot, piece, or parcel of land in the vicinity of the above-described property or located in any part of the said Bay addition to the town of Crockett; * * * that said plaintiffs did not pursue said general scheme and plan of building up said locality, in this, that said plaintiffs executed deeds to purchasers in said tract without any restrictions or conditions therein and permitted their successors in interest, to wit, Crockett Land & Cattle Company, to convey portions of said Bay addition to the town of Crockett without any conditions or restrictions; that on or about the 5th day of February, 1923, the board of supervisors of the county of Contra Costa * * * granted to defendant Rodeo-Vallejo Ferry Company, a corporation, a franchise for the construction and maintenance of a tollbridge, together with the right to take tolls, across Carquinez Straits, * * * at a point approximately opposite to lot 5; * * * that thereafter and prior to the commencement of the above-entitled action said Rodeo-Vallejo Ferry Company, a corporation, transferred and assigned the said tollbridge franchise to said defendant American Tollbridge Company, a corporation, which said corporation is now the owner and holder thereof; that said defendants, * * * at all of the times in the said complaint mentioned, were and are corporations organized for the purpose among other things of constructing and operating said tollbridge across Carquinez Straits, and had at all times in said complaint mentioned and now have the right of eminent domain; * * * that the use for which said lot was purchased was at all times herein mentioned and now is a public use, and that the purchase of said property by said Rodeo-Vallejo Ferry Company * * * was solely for a public use, to wit, the construction thereon of a portion of the approach to said tollbridge; * * * and that the use for which said land was obtained by said defendant American Tollbridge Company * * * was and is a public use, to wit, the construction thereon of a portion of the approach to said tollbridge; * * * that on or about the 20th day of October, 1923, said defendant Rodeo-Vallejo Ferry Company constructed on said real property * * * certain piers and abutments; * * * that the construction thereof and the use of said land for said public use as aforesaid was at all times subsequent to the 20th day of October, 1923, known to said plaintiffs and each of them; that the purchases of said lands by said defendants * * * were and are the exercise by said corporations of their right of eminent domain."

Judgment was entered in favor of defendants, and the plaintiffs have appealed.

[1] As alleged by the plaintiffs and found by the court, the restrictive conditions in question were inserted in the Normandsen deed "pursuant to a general scheme or plan of building up said locality, and for the benefit of the lots located in said locality, and for the benefit of persons who purchased lots therein." This general scheme, of course, contemplated the insertion by the plaintiffs of

similar restrictive conditions in all their subsequent conveyances of lots in the tract for the benefit of the successive owners of lot 5 as well as the purchasers of other lots. The plaintiffs themselves prevented the consummation of the "general scheme" by selling numerous lots without the insertion of such restrictive provisions in the deeds of conveyance thereof, and they thereby waived the restrictions contained in the Normandsen deed. Brown v. Wrightman, 5 Cal. App. 391, 90 P. 467; Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 133, 200 P. 1051; 18 C. J. 377; City of Barnesville v. Stafford, 161 Ga. 588, 131 S. E. 487, 43 A. L. R. 1050; Brown v. Huber, 80 Ohio St. 183, 88 N. E. 322, 28 L. R. A. (N. S.) 709.

[2-4] The complaint, verified by plaintiff Thomas R. Hanna alleges positively that the construction of the "large concrete pillars and abutments on said lot 5" was commenced "shortly after the defendant Rodeo-Vallejo Ferry Company acquired title to said lot." He could not truthfully have verified the complaint containing that allegation unless he knew from the beginning when such work was commenced. Plaintiff Wanda Hanna, as secretary of the Crockett Land & Cattle Company, executed the deeds of that company referred to herein. A number of such deeds recite that the Crockett Land & Cattle Company has "its principal place of business in Crockett." It is a fair inference that any resident of the small town of Crockett was not without knowledge of the construction of a structure of the magnitude of the Carquinez bridge. The court was warranted in finding that the work of construction thereof "was at all times subsequent to the 20th day of October, 1923, known to said plaintiffs and each of them." The complaint herein was filed February 25, 1925. After the apparent abandonment by the plaintiffs of their restrictive scheme, their delay for more than a year to assert their alleged right, knowing that the defendants, on the faith of the title acquired by them, were making valuable improvements on the lot, constituted a waiver of plaintiffs' alleged right to declare a forfeiture. 18 C. J. 378. The defendants did not plead a technical estoppel, but "the doctrine of waiver is somewhat different from that of estoppel, and in order to be invoked need not partake of a technical estoppel." Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 67, 73 P. 740, 743. The plaintiffs first and frequently violated the restrictive agreement in question. A court of equity will not enforce a forfeiture in favor of a party to an agreement who has himself violated its terms in the same manner as the party of whom he complains.

[5] The defendants were engaged in a public use, and, therefore, as found by the court, they were vested with the power of eminent domain. Of course no restrictive covenant or condition is a bar to the acquisition of property for a public use by a proceeding in eminent domain. 20 C. J. 588. The defendants had acquired title to the lot in question, subject to any subsisting restriction, prior to the time they actually applied it to a public use. Some authorities hold that, when property subject to a restrictive condition is taken for or applied to a public use inconsistent with the restriction, the owner of property for whose benefit the restriction is imposed is entitled to compensation. Lewis on Eminent Domain (3d Ed.) § 224; 20 C. J. 654. In this case, however, even if the restriction were still subsisting, the plaintiffs could not recover damages, because they neither alleged nor proved any damage.

[6] Appellants contend that the court erred in sustaining respondents' objection to their offer to prove that "the Crockett Land & Cattle Company was a corporation, organized, controlled, and owned solely by the Hannas, and in fact was their alter ego." If that proof were made, it would in no manner change the result. If the conveyance from the plaintiffs to the corporation be ignored and the conveyances of the corporation to various purchasers of lots be treated as the deeds of the plaintiffs, their failure to insert any restrictive clause in so many of such deeds constitutes a clear waiver of the restrictive conditions in the Normandsen and other deeds. The other points made by the appellants are not deemed of sufficient importance to require discussion.

The judgment is affirmed.

We concur: PLUMMER, J.; HUGHES, Justice pro tem.

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89 Cal. App. 445

COOK v. BRYSON, Public Adm'r. (Civ. 6152.)

District Court of Appeal, First District, Division 2, California. Feb. 25, 1928.

1. Partnership 🔑83—Partner held not entitled to recover compensation for services in managing partnership hotel from deceased partner's estate (Civ. Code, § 2413).

Partner *held* not entitled to recover compensation for services in managing partnership hotel from deceased partner's estate, where there was no agreement for compensation, under Civ. Code, § 2413, providing that partner is not entitled to compensation for services to partnership.

2. Executors and administrators 🔑205(1)—Services in nursing partner and intimate friend held gratuitous under circumstances, and hence not to warrant recovery from his estate.

Services in nursing and caring for partner and intimate friend during illness of two years

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

held gratuitous under circumstances, where there was no express agreement for compensation, and hence partner rendering services was not entitled to recover therefor from other partner's estate.

3. Partnership 🔑249—Partner held not entitled to recover from deceased partner's estate for board furnished nurses during deceased partner's illness, where board was paid for with partnership funds.

Partner *held* not entitled to recover from deceased partner's estate for board furnished special nurses who attended deceased partner during his last illness, where there was no agreement respecting payment for board, and board was paid for out of partnership funds.

Appeal from Superior Court, Los Angeles County; H. C. Lucas, Judge.

Action for services by John C. Cook against Frank Bryson, public administrator, acting as administrator of the estate of Harry Linthecum, deceased. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. T. Lightfoot, of Los Angeles, for appellant.

Edward T. Bishop, County Counsel, and W. Sumner Holbrook, Jr., Deputy County Counsel, both of Los Angeles, for respondent.

MURPHEY, Justice pro tem. This is an appeal from a judgment of the superior court of the state of California in and for the county of Los Angeles in an action brought by the plaintiff and appellant herein against the defendant and respondent, the public administrator of Los Angeles county, duly qualified and acting as the administrator of the estate of Harry Linthecum, deceased. At the conclusion of plaintiff's testimony, the case was submitted without evidence on the part of defendant. Judgment went for defendant; findings being expressly waived.

The action is based upon two distinct classes of services alleged to have been performed by the plaintiff for the decedent: First, the sum of $1,200 for services rendered by the plaintiff for managing a hotel business, being the partnership property of the plaintiff and the deceased, for a period of two years, during which time the deceased, on account of sickness, was unable to perform any considerable part of the partnership work. Two, the sum of $1,200 for services rendered by plaintiff to deceased in nursing and caring for him during the said period of two years' sickness; for an additional sum of $131 for the board of special nurses attendant upon the deceased during his last illness; and an item of $3.60 for telegrams and cleaning clothes.

[1] In support of the claim for services rendered to the partnership business, there is no allegation in the complaint and no suggestion in the record anywhere that any agreement for compensation had ever been entered into or discussed between the plaintiff and the deceased. Without such an agreement, the law is clear that no recovery can be had under such circumstances. Section 2413 of the Civil Code provides:

> "No compensation for services to firm. A partner is not entitled to any compensation for services rendered by him to the partnership."

In the case of Osment v. McElrath, 68 Cal. 471, 9 P. 731, 58 Am. Rep. 17, the Supreme Court of this state quotes from Collyer as follows:

> "'As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit of the partnership, it follows that he must do it without any reward or compensation, unless there is an express stipulation to that effect. And there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount.' * * * This is the rule of commercial partnerships. * * *"

The court quotes in support of this rule Denver v. Roane, 99 U. S. 359, 25 L. Ed. 476.

In Wright v. Robinson, 51 Cal. App. 461, 197 P. 149, the court says the court had before it an "appeal from a judgment rendered on a partnership accounting. The main question presented" was "the right of one partner to a salary for the management and conduct of the business. * * * The trial court awarded defendant Hulihan an allowance for such services." In reversing this judgment, the court uses the following language:

> "At the time of the new arrangement and when plaintiff was recognized as a partner by Hulihan nothing was said between the parties as to the payment of a salary to any one, and there is no evidence from which the existence of any such agreement can be inferred; the agreement simply being that Mrs. Wright thereafter was to receive one-quarter of the profits of the business. This being so, the case falls within the rule that in the absence of an agreement a partner is not entitled to compensation for services rendered to the partnership. Defendant Hulihan, having custody of the partnership assets, is accountable to plaintiff for her full share in the same, freed from any deductions on account of his claims for services."

It may be said in this connection that Mrs. Wright, the plaintiff, personally took no part in the conduct or management of the partnership business which was conducted at Taft, Kern county, while she resided in the city of San Francisco.

[2] With respect to the second charge for nursing and care of deceased and board of special nurses who attended deceased during the last few months of his illness, it may be said that during the two years of illness of the deceased immediately preceding his

death, the plaintiff did perform numerous services daily throughout said period of time, and that the services so performed were reasonably worth the amount claimed therefor, and that said services were performed with the consent, acquiescence, and, possibly in a few instances, at the request of the deceased. However, it must be said with respect to this item as was said supra, with regard to the partnership services, that there was no allegation in the complaint and no suggestion in the record that anything was ever said by either of the parties to each other or to any other person that the plaintiff expected compensation for his services, or that any intimation had ever been given to the deceased that a claim for compensation was accumulating against him. Under such circumstances no doubt the judge of the trial court drew the inference, and it was a perfectly reasonable inference, that the determination of the plaintiff in making a charge for his services was an afterthought, the subject-matter of which had never occurred to either of the parties during the lifetime of the deceased. The record discloses that the partners were intimate friends and business associates, and had been such during a long period of time. The deceased stated to his physician that he "looked upon Cook as a brother in business"; "that he would rather have him than anybody to wait upon him."

The law seems to be well settled that under the circumstances presented by the evidence in this case, where these services are performed without any express agreement for compensation, the natural inference is that the services were not rendered in expectation of remuneration, but, on the contrary, that they were spontaneous acts of courtesy and kindness, and that the presumption ordinarily prevailing that the services were to be paid for cannot be invoked and implied. Newbert v. McCarthy, 190 Cal. 723, 214 P. 442.

In Moulin v. Columbet, 22 Cal. 509, the Supreme Court said:

> "Where services were originally rendered gratuitously, they cannot afterwards be converted into a charge. A court will not permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand."

In the case of Smith v. Riedele, 60 Cal. App. 551, 213 P. 281, a case in which the parties were, as in this case, not related by consanguinity or affinity, Justice Works says:

> "In a recent case in which a niece had long resided with her uncle, practically in the capacity of a daughter and had brought suit against his personal representative to recover the value of services rendered, the Supreme Court approved the following language of a text-writer: 'Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessaries are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness, and the relationship between them. And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making compensation therefor.' * * * In an earlier case of the same nature the Supreme Court used the following language: 'It has been said many times that the question * * * is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered. * * * Our own decisions appear to support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made.' Crane v. Derrick, 157 Cal. 667 [109 P. 31]."

To the same effect is the case of Ruble v. Richardson, 188 Cal. 150, 204 P. 572. In the instant case, in addition to the extremely friendly relations existing between the parties, this significant circumstance bears directly on the intention of the parties. The record discloses that, during a portion of the time covered by the plaintiff's services, other nurses were employed and attended the deceased, for which services the deceased paid a stipulated weekly sum. Under such circumstances we think the trial court may have fairly inferred that the deceased, had he known that plaintiff was charging for his services, would have at the same time settled that obligation.

[3] As to the plaintiff's claim for an item of $131 for board of special nurses, the evidence is very indefinite, uncertain, and unsatisfactory. It may be assumed from the evidence that the parties boarded at the hotel constituting the partnership property, and the plaintiff did the cooking. The plaintiff cooked for and supplied the deceased with food, and there is also testimony that he furnished meals to one of the special nurses. There is no evidence that the deceased had agreed to board or pay for the board of these special nurses or any one of them. The most reasonable inference to be drawn from this situation is that the food supply was partnership property, and paid for out of partnership funds. The record discloses the fact to be that the plaintiff had full possession, control, and management of all the partnership funds.

We think that judgment of the trial court was correct, and it is therefore affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

89 Cal. App. 535

BONE v. DWYER. (Civ. 3440.) ★

District Court of Appeal, Third District, California. Feb. 28, 1928.

Hearing Denied by Supreme Court April 26, 1928.

1. Deeds 🔑58(1)—Custodian's manual delivery of deed without grantor's request held ineffective as against one to whom property was subsequently conveyed.

Where deed was not to be delivered until grantor requested, her deposit thereof with real estate company did not constitute delivery in escrow, and latter's subsequent manual delivery thereof without request was ineffective and inoperative as against one to whom she subsequently conveyed property.

2. Husband and wife 🔑267(8)—Grantee's want of knowledge that assignee of contract to purchase realty and deed erroneously delivered was married held immaterial in action to quiet title; "record title" (Civ. Code, § 172a).

Assignee's want of knowledge that assignor of interest in property and contract to purchase it before vendor's execution of deed to assignee was a married man was immaterial in grantor's action to quiet title; assignor not being holder of "record title," which means title officially of record, within proviso of Civ. Code, § 172a.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Record Title.]

3. Husband and wife 🔑267(8)—Statutory proviso that contract of husband holding record title to community realty shall be presumed valid as to purchaser without knowledge of marriage does not include cases not fairly within express terms (Civ. Code, § 172a).

Proviso of Civ. Code, § 172a, that sole contract or deed of husband holding record title to community realty to purchaser in good faith without knowledge of marriage relation shall be presumed valid, being exception to general rule prescribed by such section that wife not joining husband in execution of instrument may maintain or defend her interest as though instrument had not been executed, cannot be construed to include any case not fairly within its express terms.

4. Vendor and purchaser 🔑214(6)—Grantee to whom vendee had assigned rights took it subject to legal rights of vendee and his wife.

Assignee of vendee's interest in realty, subsequently conveyed to him by vendor on payment of remaining installments of price, took property with knowledge of sale contract, and hence subject to any legal rights which might be asserted by vendee or his wife thereunder.

5. Vendor and purchaser 🔑261(1)—Vendor's conveyance of legal title generally passes equitable right to receive unpaid purchase money and enforce vendor's lien.

So long as legal title remains in vendor, it may be conveyed by him, and such conveyance will pass all his right in land, including, generally, equitable right to receive unpaid purchase money and enforce vendor's lien therefor.

6. Vendor and purchaser 🔑228(2)—Vendor's grantee, taking with notice of sale contract may be compelled to convey land to vendee.

Vendor's grantee, not entitled to protection as bona fide purchaser for value, as where he takes with notice of sale contract, may be compelled at purchaser's suit to perform contract by conveying land in same manner and to same extent as vendor would have been liable to do.

7. Quieting title 🔑51—Vendee's wife, not alleging offer or willingness to pay balance due on property awarded her in support action, held not entitled to judgment quieting title after conveyance to vendee's assignee.

Vendee's wife, not alleging offer or willingness to pay balance due at time of vendee's attempted assignment of his rights, nor asking judgment requiring assignee to convey property to her on condition that she pay such balance, but merely denying ownership in assignee, alleging ownership in herself and filing cross-complaint to quiet title in assignee's action to quiet title after conveyance to him by vendor, *held* not entitled to such relief; legal title being in assignee.

8. Appeal and error 🔑1041(4)—Permitting amendment of complaint to conform to proofs that plaintiff had no knowledge of vendee's marriage at time of his assignment of rights to plaintiff held not prejudicial to wife (Civ. Code, § 172a).

Error in permitting plaintiff to amend complaint, after close of evidence in action to quiet title, to conform to proofs, that he had no knowledge of marriage relation between defendants at time of husband's assignment of his rights as purchaser of realty to plaintiff, *held* not prejudicial to wife; such want of knowledge being immaterial, in view of fact that husband did not hold record title within Civ. Code, § 172a.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Edward Bone against P. J. Dwyer and wife. Judgment for plaintiff, and Mrs. Dwyer appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Foltz, Rendon & Wallace, of Stockton, for respondent.

FINCH, P. J. July 20, 1922, the defendant P. J. Dwyer and Maria E. Lindahl entered into a written contract, by the terms of which the former agreed to buy and the latter to sell the real property in controversy in this action, subject to a mortgage indebtedness thereon of $1,400, for the sum of $1,100, of which sum $500 was paid in cash and the remainder was to be paid in monthly installments of $50 each. The contract was never recorded. At the same time Maria E. Lindahl signed and acknowledged a deed, dated July 15, 1922, purporting to convey the property to Dwyer, and left it in the custody of a real estate company. Dwyer paid three of such monthly installments, and thereafter "in the fall some time," of 1922, assigned all

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★Hearing denied by Supreme Court.

his "right, title, and interest" in and to the contract and the property described therein to the plaintiff, in consideration of the plaintiff's payment to Dwyer of $650 and his promise to pay the remaining installments as they fell due and his assumption of the mortgage indebtedness. This assignment was indorsed on the back of the contract and was not recorded. The plaintiff paid Maria E. Lindahl such remaining installments, and, in July, 1923, the aforesaid deed was delivered to him by the real estate company, and he caused it to be recorded, believing at the time, according to his testimony, that it was a deed from Maria E. Lindahl to himself. October 10, 1923, Maria E. Lindahl executed another deed purporting to convey the same property to the plaintiff, and it was duly recorded on the following day.

At all times since the year 1903 P. J. Dwyer and Elizabeth L. Dwyer have been husband and wife, but they have not lived together as such since 1918. October 6, 1922, without applying for a divorce, Mrs. Dwyer commenced an action for permanent support and maintenance on the ground of desertion. The defendant therein answered the complaint, and the case went to trial October 9, 1923, and judgment therein was entered in favor of Mrs. Dwyer October 26, 1923, which judgment awarded her the property in controversy in this action. Bone was not a party to that action, and it is not contended that the judgment therein is a bar to his maintenance of this action.

The complaint herein was filed October 19, 1923. It is in the usual short form of complaints to quiet title. The defendant P. J. Dwyer disclaimed any interest in the property. The defendant Elizabeth L. Dwyer filed an answer, denying the plaintiff's allegations of ownership, and a cross-complaint in the usual short form to quiet her title to the property. The plaintiff answered the cross-complaint, denying Mrs. Dwyer's alleged ownership and affirmatively alleging the aforesaid facts leading up to the execution of the deed from Maria E. Lindahl to himself. Judgment was entered in favor of the plaintiff, and Mrs. Dwyer has appealed.

In a former trial of the action judgment was entered in favor of the plaintiff, but the judgment was reversed on appeal. Bone v. Dwyer, 74 Cal. App. 363, 240 P. 796. At the second trial the plaintiff testified and the court found that plaintiff "did not know nor have any information" that P. J. Dwyer and Elizabeth L. Dwyer were husband and wife until about October 10, 1923. No such testimony was given at the first trial. At the former trial the court found that the deed of July 15, 1922, was deposited with the real estate company with instructions to deliver it to Dwyer when "both parties to said deed joined in a request for the delivery thereof." There appeared to be no evidence, however, to support the finding that the deed was to be delivered only when both parties joined in a request therefor. In the second trial the defendant Elizabeth L. Dwyer called as a witness a member of the real estate company, who testified, relative to the deed of July 15, 1922:

> "They placed the deed in escrow with me until such time as they would wish to turn it over. * * * At the end of the payments, whenever she was satisfied that it was all correct, then the deed which they drew up and signed at that time was left with me, and I should give it either to them both in person, or to the one who brought a letter to that effect. * * * The parties would come together and ask for the paper in my possession, I was holding in escrow, * * * the deed—ask for the deed. Or if in case they could not come together, one should write a letter just to let me know it was all right, and I would turn the deed over to him."

It cannot be said that the foregoing evidence is insufficient to warrant the finding that the deed was to be delivered to "Dwyer when he * * * paid for said real property pursuant to said agreement, and both parties to said deed then and there joined in a request for the delivery thereof."

[1] The court found, on sufficient evidence, that after payment of the full purchase price of the property to Maria E. Lindahl, she informed the real estate company "that she wished to convey said real property to plaintiff," but, instead of preparing a deed for that purpose, the said company "handed to plaintiff the deed dated July 15, 1922, * * * and plaintiff received the same believing that it was a conveyance of said real property from Maria E. Lindahl to himself, and, so believing, caused the same to be recorded; that the deed dated July 15, 1922, of said real property from Maria E. Lindahl to P. J. Dwyer was never delivered to said P. J. Dwyer nor to any one for him." Since the deed was not to be delivered until the grantor requested the delivery thereof, her deposit thereof with the real estate company did not constitute a delivery in escrow, and the subsequent manual delivery of the instrument by the custodian thereof without the grantor's request was ineffective and inoperative. 9 Cal. Jur. 175; Keys v. Meyers, 147 Cal. 702, 82 P. 304. That deed therefore may be dismissed from further consideration, and it follows that Maria E. Lindahl's deed of October 10, 1923, conveyed the legal title to the property to the plaintiff.

[2, 3] In the opinion filed on the former appeal, referring to the effect under section 172a, Civil Code, of Dwyer's assignment to plaintiff, it is said:

> "Under the facts of this case, the wife, not having joined her husband in the execution of the transfer and conveyance, under the terms of the section to which we have referred, the right of the wife to maintain or defend her interest

or title to the premises was left in the same condition as though the instrument had not been executed."

Respondent relies on the additional proof made at the second trial to the effect that he had no knowledge of the marriage relation until after he had purchased and paid for the property. Section 172a, contains the proviso "that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid." Dwyer, however, did not hold the record title to the property. The term "record title" clearly means a title officially of record. Brooks v. Black, 22 Colo. App. 49, 123 P. 131; Arnold v. Reed, 162 Mass. 438, 38 N. E. 1132; Ex parte Connolley, 168 Mass. 201, 46 N. E. 618. See, also, Hunt v. State, 110 Tex. 204, 217 S. W. 1034; Okanogan Power & Irrigation Co. v. Quackenbush, 107 Wash. 651, 182 P. 618, 5 A. L. R. 966. The proviso under consideration is an exception to the general rule prescribed by section 172a, and cannot be construed to include any case not fairly within its express terms. United States v. Dickson, 15 Pet. 141, 10 L. Ed. 689; Lewis' Sutherland on Statutory Construction (2d Ed.) § 352; 23 Cal. Jur. 743; 25 R. C. L. 985. Respondent relies on Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56, but the meaning of the term "record title" is not considered in that case. The judgment therein was reversed on the ground that: "The trial court erred in sustaining objections to evidence offered by appellant in support of the facts pleaded by him by way of estoppel, and that it also erred in failing to make specific findings upon the facts so pleaded." While in that case the defendant alleged his want of knowledge of the mariage relation as one of the facts constituting an estoppel, it obviously was not such and, at page 662 (239 P. 58) of the opinion, it is said: "This proviso cannot be regarded as an application of the doctrine of equitable estoppel." Since the facts proved at the second trial do not bring the case within the terms of the proviso in question, plaintiff's want of knowledge that Dwyer was a married man is immaterial, and he is in no better position than he would be if the assignment to him from Dwyer had never been made.

[4-6] The court found, on sufficient evidence, that Maria E. Lindahl consented to the assignment from Dwyer to the plaintiff and that the plaintiff thereafter paid her the remaining installments of the purchase price, amounting to $450. Thereafter she conveyed the property to him. The plaintiff took the property with knowledge of the contract between his vendor and Dwyer, and therefore subject to any legal rights which might be asserted under that contract. "So long as the legal title remains in the vendor it may be conveyed by him, and the conveyance will pass all his right in the land, including, as a general rule, the right in equity to receive the unpaid purchase money and enforce the vendor's lien therefor. * * * If the vendor's grantee is not entitled to protection as a bona fide purchaser for value, as where he takes with notice of the existing contract, he will take subject to the equitable rights of the purchaser, and may be compelled, at the suit of the purchaser, to perform the agreement by conveying the land, in the same manner and to the same extent as the vendor would have been liable to do had he not transferred the legal title." 27 R. C. L. 560; Lucy v. Davis, 163 Cal. 611, 126 P. 490; Day v. Cohn, 65 Cal. 508, 4 P. 511; Taylor v. McKinney, 20 Cal. 619.

[7] By the judgment for maintenance Mrs. Dwyer was given all the interest in the property which her husband had acquired therein, but no more. Her husband had paid $650 on the purchase price at the time of the attempted assignment, and there remained an unpaid balance of $450 and interest. Her remedy against the plaintiff herein, after the entry of the judgment for maintenance, was to compel him to convey the property to her upon her payment to him of such balance. Her answer, however, consists merely of a denial of ownership in the plaintiff, allegations of ownership in herself, and the usual short form of cross-complaint to quiet title in herself. She neither alleges an offer or a willingness to pay the balance which was due upon the contract at the time of the attempted assignment nor asks for a judgment requiring the plaintiff to convey the property to her on condition that she pay such balance, and there is no intimation in the record that she even desires such a judgment. The plaintiff holds the legal title to the property and the appellant holds, at most, the equitable title. She is in a position similar to that occupied by appellant Hannon in County of Los Angeles v. Hannon, 159 Cal. 37, 47, 112 P. 878, 883, where it is said:

> "If the appellant Hannon acquired any interest in the lots in question, it was purely an equitable one under the contract of sale between Glassell and Rogers. * * * The appellant is not asserting any rights under the contract of sale. His answer denies title in plaintiff and alleges that he is the owner in fee of these four lots. In effect his answer is in the nature of a cross-complaint to quiet his alleged ownership of this property in fee. But it is clear that he is not such owner; he has no legal title to it; that is in the plaintiff. While appellant averred in his answer a legal title he proved what is at best an equitable one, and this he seeks to have quieted against the legal title held by plaintiff. It is the settled law, however, that an action to quiet title cannot be maintained by the holder of an equitable title against one holding the legal title."

[8] Appellant contends that the court erred in permitting the plaintiff, after the close of the evidence, to amend his complaint to conform to the proofs to the effect that he had no knowledge of the marriage relation at the times stated herein. The allowance of the amendment, however, was immaterial, in view of the holding herein that such want of knowledge, under the circumstances stated, adds nothing to the plaintiff's case, and therefore the rights of the appellant were not prejudiced by the amendment.

The judgment is affirmed.

We concur: PLUMMER, J.; HUGHES, Justice pro tem.

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89 Cal. App. 469

LA PALOMA LAND CO. v. SHANNON et al.
(Civ. 3445.)

District Court of Appeal, Third District, California. Feb. 25, 1928.

1. Executors and administrators 🔑23—Administrator first in time of appointment is only person entitled to represent deceased's estate.

There cannot be two valid administrations of same estate at same time, and administrator first in time of petitioning for appointment is only person entitled to represent deceased's estate.

2. Executors and administrators 🔑23—Administrator first appointed may move to vacate second appointment, and may maintain action in equity therefor.

Administrator of deceased's estate first appointed may move court in which second appointment is made to vacate and annul second appointment, and may also maintain action in equity for same purpose.

3. Executors and administrators 🔑28—Evidence held to show appointment of administratrix of deceased's estate as set forth in affidavit.

Evidence *held* to show appointment of administratrix of deceased's estate, who was seeking to set aside judgment in action to quiet title against administrator subsequently appointed, as set forth in her affidavit.

4. Executors and administrators 🔑23—Administratrix of deceased's estate first appointed could move to vacate judgment in action to quiet title against administrator appointed by another court (Code Civ. Proc. § 473).

Administratrix of deceased's estate first appointed was party interested, and was entitled under Code Civ. Proc. § 473, to move to vacate judgment in action to quiet title against administrator of deceased's estate subsequently appointed by another court.

5. Executors and administrators 🔑28—Evidence sufficiently established that administrator of deceased's estate, who was defendant in action to quiet title, was not duly appointed administrator of estate.

Evidence sufficiently established that administrator of deceased's estate, who was defendant in action to quiet title, appointed after appointment of administratrix who was seeking to vacate judgment, was not the duly appointed, qualified, and acting administrator of deceased's estate.

6. Appeal and error 🔑204(2)—Evidence constituting collateral attack on judgment and order appointing administrator being admitted without objection, question could not be raised on appeal.

Evidence, showing that administratrix of deceased's estate moving to vacate judgment rendered against administrator subsequently appointed was administratrix of deceased's estate, having been admitted without any objections on ground that evidence constituted collateral attack on judgment and on order appointing administrator, it was too late to raise question on appeal.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action to quiet title by the La Paloma Land Company against Carl W. Shannon, as administrator of the estate of Duncan Campbell, deceased, and others. Decree for plaintiff. Cora B. Campbell, as administratrix of the estate of Duncan Campbell, deceased, moved to set aside the decree, and from an order granting the motion, plaintiff appeals. Affirmed.

Albert H. Elliot and Guy C. Calden, both of San Francisco, for appellant.

D. M. Maclean and Hugo McKinley, both of Modesto, for respondent.

PLUMMER, J. This is an appeal by the plaintiff from an order of the trial court granting a motion interposed after judgment by the respondent Cora B. Campbell to set aside, after judgment, a judgment obtained by the plaintiff in an action wherein the La Paloma Land Company, a corporation, was plaintiff, and Carl W. Shannon, as administrator of the estate of Duncan Campbell, deceased, John Doe, Richard Roe, and Jane Doe were named as defendants, and in which action dismissal was entered as to the fictitious defendants John Doe, Richard Roe, and Jane Doe.

The record in this action shows: That one Duncan Campbell died in the county of Stanislaus, state of California, on or about the 16th day of June, 1919. That thereafter Carl W. Shannon, the public administrator of the county of Stanislaus, on or about the 8th day of July, 1924, filed a petition in the office of the county clerk of Stanislaus county setting forth that the said Duncan Campbell was a resident of the county of Stanislaus at the time of his death, and left estate therein, and praying for his appointment as administrator thereof, the petition setting forth that there were no known heirs of said decedent residing in the state. Notice of this application was duly given as required by law, and thereafter, and on the 21st day of July, 1924, after hearing had upon said application, an order was duly made and entered by the superior court of the county of Stanislaus appointing the said Carl W. Shannon administrator of the estate of Duncan Campbell, deceased. On the 25th day of July, 1924, in pursuance of said order, the oath required by law was taken by said Carl W. Shannon as administrator of said estate, and letters of administration, under the seal of said court, were duly issued to him. Thereafter, and some time during the month of August, 1924, the La Paloma Land Company, a corporation, as plaintiff, began an action against said Carl W. Shannon as administrator of the estate of Duncan Campbell, deceased, and the fictitious persons named as defendants, as aforesaid, to quite title to certain real estate lying and being in the county of Stanislaus, particularly described in said complaint. That thereafter, and on or about the 18th day of August, 1924, a lis pendens or notice of action was filed by the plaintiff as provided for by law, in which the real estate involved was particularly described. Thereafter, and on or about the 20th day of October, 1924, Carl W. Shannon as administrator of the estate of Duncan Campbell, deceased, served and filed his answer to the plaintiff's complaint herein just referred to. On the 8th day of December, 1924, said action to quiet title came on regularly to be heard; the plaintiff appearing by his attorney, and Carl W. Shannon, as administrator of the estate of Duncan Campbell, deceased, appearing by his attorney. Upon motion of the plaintiff the action was dismissed as to John Doe, Richard Roe, and Jane Doe. Oral and documentary evidence was introduced and the cause submitted to the court for decision, and thereafter and on the 11th day of December, 1924, a decree was signed, filed, and recorded in said cause quieting title of the plaintiff to the lands and premises described in the complaint, the decree reciting the dismissal of the action as to John Doe, Richard Roe, and Jane Doe.

On the 10th day of June, 1925, Cora B. Campbell, as administratrix of the estate of Duncan Campbell, deceased, appeared by her attorneys, and on that date filed a motion to vacate and set aside the judgment theretofore entered in the case of the said La Paloma Land Company against Carl W. Shannon, and asked to be allowed to file her verified answer to the plaintiff's complaint on file in said action; said motion being based on the grounds that the judgment therein was made and entered through inadvertence and without the knowledge or consent of said Cora B. Campbell as such administratrix, and on the further ground that the said Cora B. Campbell, ever since the 29th day of July, 1919, had been and still was the duly appointed, qualified, and acting administratrix of the estate of said Duncan Campbell, deceased, and that the said Carl W. Shannon was not, and had not at any time been, the administrator thereof. Upon the filing of this petition an order was made directing the plaintiff La Paloma Land Company to be and appear before said court at a time designated in said order, then and there to show cause, if any there be, why said motion should not be granted and why said judgment should not be set aside and vacated, and why said Cora B. Campbell, as such administratrix, should not be permitted and allowed to appear and defend in said action. The order did not require the said Carl W. Shannon to appear and show cause why the letters of administration issued to him should not be vacated, though a copy of the papers filed by the respondent were directed to be served upon him. The notice of motion which we have referred to had attached to it certified copies of letters of administration issued to the said Cora B. Campbell upon the estate of Duncan Campbell by the superior court of Los Angeles county as follows: "Letters of administration issued to Cora B. Campbell by the clerk of the superior court of the county of Los Angeles, under the seal thereof, dated the 29th day of July, 1919," to which was attached the oath of office taken by the said Cora B. Campbell as such administratrix, dated July 29, 1919. Attached to the letters was a certificate of the clerk of the superior court of the county of Los Angeles that such letters had not been revoked, and that the same were in full force and effect. Attached to the notice of motion, the affidavits, and letters of administration to which we have just referred, was a copy of a verified answer by the said Cora B. Campbell as administratrix of the estate of Duncan Campbell, deceased, for which leave to file was requested. This answer appears to be word for word and figure for figure an exact copy of the answer filed by Carl W. Shannon as administrator of the estate of Duncan Campbell, deceased, in the action begun and prosecuted by the La Paloma Land Company, as aforesaid, save and except that the name of Cora B. Campbell was substituted in the place of Carl W. Shannon, and also that the said Cora B. Campbell purported to appear in said action as a person sued as and under the fictitious name of John Doe. Additional affidavits were filed in the matter by the respective parties relative to the residence of the said Duncan Campbell prior to and at the time of his death. Nothing, however, appears in the record indicating that there was any negligence on the part of Carl W. Shannon in the manner of conducting the defense in the action prosecuted against him by the La Paloma Land Company, nor is there anything in the record, motions, or affidavits in this case indicating any fraudulent action or suspicion of fraud nor is there anything in any of the pleadings, affidavits, or in the answer sought to be filed by the said Cora B. Campbell. After the filing of the papers to which we have referred, the motion to vacate was submitted to the court, and thereafter, and on or about the 30th day of November, 1925, the court made and entered its order vacating the judgment referred to and permitting the said Cora B. Campbell, as the administratrix of the estate of Duncan Campbell, deceased, to appear and defend in said action.

Upon this appeal six grounds are urged as causes for reversal:

(1) That the evidence is insufficient to justify the conclusion that the judgment in the action of La Paloma Land Company against Shannon was entered through inadvertence or without the knowledge or consent of Cora B. Campbell;

(2) That the evidence is insufficient to justify the conclusion that Cora B. Campbell was the administratrix of the estate of said decedent;

(3) That the evidence is insufficient to show that Cora B. Campbell, as administratrix of the estate of Duncan Campbell, deceased, or otherwise, was directly or indirectly a party to said action or interested therein, or that she could make any motion with respect thereto under section 473 of the Code of Civil Procedure, or otherwise;

(4) That the evidence is insufficient to show that the above-entitled court had any jurisdiction to set aside the judgment in said action;

(5) That the evidence shows Carl W. Shannon was, at the time of the entry of the judgment in the above-entitled action, the duly appointed, qualified, and acting administrator of the estate of Duncan Campbell, deceased, and that Carl W. Shannon, as such administrator, was the proper party defendant;

(6) That the evidence shows the order setting aside the judgment in the above-entitled action to be a collateral attack upon the order of the court appointing Carl W. Shannon administrator of the estate of Duncan Campbell, deceased.

[1] The law is well settled that there cannot be two valid administrations of the same estate at the same time, and that the administrator first in right, that is, first in time of petitioning for appointment, is the only person entitled to represent the estate. As said in 11 California Jurisprudence, 271:

> "Jurisdiction of proceedings for the settlement of an estate cannot exist in two superior courts at the same time. When, therefore, any court has acquired jurisdiction in such matters, that jurisdiction is exclusive, and no other court of co-ordinate jurisdiction can in any form review, reverse, nullify, restrain or in any way control any of the judgments, orders, proceedings of process of the court first acquiring jurisdiction. Accordingly, the appointment of one administrator is valid until it is set aside, and a subsequent appointment of another administrator of the same estate is void."

[2-5] The authorities in support of the text here quoted are practically uniform. The law is also well settled that the administrator first appointed may move the court in which the second appointment is made, to vacate and annul the second appointment, and may also maintain an action in equity for the same purpose. The evidence in this case shows beyond controversy that Cora B. Campbell had no knowledge of the entry of judgment in the case of La Paloma Land Company against Shannon until on or about the 10th day of June, 1925. Likewise, there can be no question but that the evidence shows the appointment of Cora B. Campbell, as the administratrix of the estate of said deceased, as set forth in her affidavit. If the evidence is sufficient to show that Cora B. Campbell was, during all the times mentioned, the administratrix of the estate of Duncan Campbell, deceased, then, as the administratrix of said estate, she is a party interested therein and entitled, as the administratrix of said estate, to move to vacate the judgment herein under the terms and provisions of section 473 of the Code of Civil Procedure. The evidence showing these facts likewise sufficiently establishes that Carl W. Shannon was not the duly appointed, qualified, and acting administrator of the estate of Duncan Campbell, deceased. The evidence does show that the papers filed herein constituted a collateral attack upon the order appointing Carl W. Shannon administrator of the estate of Duncan Campbell, deceased.

[6] In making the foregoing statements, we are taking the record at its face value, and which, by reason of the failure of the appellant herein to make any objection thereto in the trial court, must be considered as truthfully stating everything contained therein, as there is practically no denial of any of the material matters tendered for consideration by the trial court. While the evidence showing that Cora B. Campbell was the administratrix of the estate of Duncan Campbell, deceased, at all the times mentioned in these proceedings, might have been objected to on the ground that such evidence constituted a collateral attack upon the judgment and a collateral attack upon the order appointing Carl W. Shannon administrator of the estate of Duncan Campbell, deceased, the record is entirely silent as to any objection having been made to the consideration of the records, which we have herein

set forth, by the trial court. The evidence establishing all the facts necessary to show the invalidity of the appointment of Carl W. Shannon, and the fact that the court had no jurisdiction to make the appointment, having been allowed to come into the record without any objection and also without any motion being made to strike the evidence from the record or to exclude the same from the consideration by the trial court on the ground that it was a collateral attack, it is now too late to raise the question upon appeal. This has been definitely decided by the Supreme Court of this state. In Hill v. City Cap, etc., Co., 79 Cal. 188, 21 P. 728, the court, on page 191 (21 P. 728), considering the effect of testimony which constituted a collateral attack and which was admitted without objection, ruled as follows:

> "But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case, the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant. And none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way. The facts, therefore, must be taken to be established by the record beyond all controversy."

Again, in the case of People v. Harrison, 107 Cal. 541, 40 P. 956, a similar question was presented to the court, and it was there held that although a judgment not void upon its face cannot be impeached by evidence showing a want of service of summons, if such evidence is objected to, yet where evidence is admitted to that effect without objection or the parties stipulate or admit that there was in effect no service of summons, it is the duty of the court to declare the judgment void as a matter of law upon the admitted facts.

In the recent case of Akley v. Bassett, 189 Cal. 625, 209 P. 576, the Supreme Court, having before it a similar question where no objection was made to the testimony showing the invalidity of a judgment for want of jurisdiction, held as follows:

> "We dismiss appellant's objection, that respondent may not attack a judgment, regular on its face, by citing the former decisions of this court to the effect that the rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. But if the parties admit the facts which show that the judgment is void, or if they are established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where the judgment is void upon its face."

We are quoting from page 639 (209 P. 581), where a number of authorities are cited. See, also, Lake v. Bonynge, 161 Cal. 120, 118 P. 535.

In view of these cases, and in view of the fact that the testimony to which we have referred was all introduced without opposition and submitted to the trial court in the manner which we have stated, it is entirely unnecessary for us to review any of the cases cited relating to the subject of collateral attacks upon judgments. It therefore necessarily follows that the order appealed from should be affirmed, and it is so ordered. This renders it unnecessary to pass upon respondent's motion to dismiss the appeal.

We concur: FINCH, P. J.; HUGHES, Justice pro tem.

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89 Cal. App. 160

HERTTER v. ADDIS et al. ★

SEWARD v. SAME.

(Civ. 4678.)

District Court of Appeal, Second District, Division 2, California. Feb. 9, 1928.

Hearing Denied by Supreme Court April 9, 1928.

1. Exceptions, bill of 🔑41(2)—Bill of exceptions properly presented but not settled within time provided by statute could be considered, where delay was caused by court's requesting attorney to amend it (Code Civ. Proc. § 650).

Where bill of exceptions presented within time allowed by law was not settled within time provided by Code Civ. Proc. § 650, *held*, that it could be considered after such time, where the delay was caused by court's requesting attorney to amend it.

2. Appeal and error 🔑627(1)—Matter of diligence in presentation of record on appeal should be subject of investigation in trial court.

The matter of diligence in presentation of the record on appeal should be a subject of investigation in trial court.

3. Jury 🔑25(6), 26—Plaintiffs' failure to comply with court rules relative to time of request for jury trial and payment of fees held not waiver of jury trial (Const. art. 1, § 7; Code Civ. Proc. § 631, subds. 4, 5, as added by St. 1915, p. 649).

Where rule of superior court of San Bernardino county required demand for jury to be made at time stated therein, and another rule provided for payment of jury fees in civil cases at least five days before day of trial, plaintiffs' failure to comply with such rules *held*, under Const. art. 1, § 7, and Code Civ. Proc. § 631, subds. 4, 5, as added by St. 1915, p. 649, not to constitute a waiver of right to jury trial, where

★Hearing denied by Supreme Court.

rules did not state that failure to observe them would constitute a waiver of trial by jury.

4. Jury ⚷28(10) — Plaintiffs' going to trial after right to trial by jury had been denied held not waiver of right (Const. art. I, § 7; Code Civ. Proc. § 631, subds. 4, 5, as added by St. 1915, p. 649).

Plaintiffs *held*, under Const. art. 1, § 7, and Code Civ. Proc. § 631, subds. 4, 5, as added by St. 1915, p. 649, not to have waived their right to trial by jury by going to trial after it had been denied; they being within their rights to proceed to trial and to subsequently seek to have court's action reversed on an appeal from judgment.

5. Appeal and error ⚷1011(1)—Appellate court may not disturb findings based on conflicting evidence.

Appellate court may not disturb findings based on conflicting evidence.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Separate actions by Emma Hertter and by Lydia E. Seward against J. L. Addis and others. Judgment for defendants in each case, and plaintiffs appeal. Reversed.

Bertrand J. Wellman, of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondents.

THOMPSON, J. Two actions were commenced against the defendants and respondents arising out of an automobile collision, one by the plaintiff Emma Hertter for personal injuries, and the other by the plaintiff Lydia E. Seward for injuries to herself and damages to the automobile owned and driven by her. The two actions, by stipulation, were tried together by the court without a jury, resulting in judgments for the defendants, and each appellant prosecutes an appeal from the judgments rendered against her.

[1] Before reciting other facts we note that respondents object to the consideration of these appeals on the ground that the bill of exceptions was not settled within the time allowed by law. It appears that on March 28, 1923, and within the time provided for by section 650, Code of Civil Procedure, appellants served upon respondents' counsel a proposed bill of exceptions and that within ten days thereafter respondents served their proposed amendments, both of which were delivered to the trial judge on or about May 30, 1923, who fixed the 30th day of June as the day for the settlement thereof. On June 30th the judge declared that the proposed bill "was not a sufficient bill of exceptions because it did not contain all the evidence and granted plaintiffs until July 14 to present an amended bill." On July 14th the court fixed the time for the settlement as August 27, 1923. On August 13 appellants served their amendments and on August 27 the bill was settled. Defendants' counsel objected to the orders of June 30 and July 14 and now urge that counsel had no right, after presentation of their first proposed bill, to present "what would be a new proposed bill" and that the court had no power to extend the time for the presentation of "a brand new bill of exceptions long after the time within which same could be done had expired." The point made is without merit. In truth, the trial judge in this instance followed the procedure laid down by the Supreme Court speaking through Mr. Justice Works in the case of Sansome v. Myers, 80 Cal. 483, 22 P. 212, where it is said, in a mandamus proceeding to compel the settlement of a bill of exceptions:

> "If the attorney * * * had omitted anything material, the judge should have directed and required him to insert it, or if matter was incorrectly stated, he should have required him to correct it, if the district attorney had neglected his duty by failing to propose the necessary amendments, which he seems to have done. If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would no doubt have been justified in refusing to settle the same, but not otherwise."

[2] The language of the court in this opinion has been quoted with approval in the cases of Cohen v. Wallace, 107 Cal. 133–137, 40 P. 101, and Winters v. Buck, 121 Cal. 279, 53 P. 799, and the rule there announced is, beyond question, the settled practice. Furthermore, the rule is entirely consistent with the idea that the matter of diligence in the presentation of the record on appeal should be a subject of investigation in the trial court. Mill Valley v. Mass., etc., Co., 189 Cal. 52, 207 P. 253. Had the proposed bill of exceptions not been presented within the time allowed by law, a very different question might have been made out; but here we are not dealing with a "brand new bill," but with amendments suggested by the court instead of adversary counsel in order that the record might faithfully portray the proceedings below.

[3] The record before us shows that some time prior to December 6, 1922, the cases were set down for trial, at which time the appellants demanded a jury trial; that on December 4, a check for the jury fees was received by the clerk, contained in a letter mailed on December 2, 1922. It is also made to appear that there was at the time of the trial and for some time prior thereto two rules of court in San Bernardino county which read as follows:

> "*Jury, Demand for.*—Any party to a civil action in which trial by jury is guaranteed by law, desiring a jury, must announce that a jury is required at the time the cause is first set for trial, if it be set upon notice or stipulation, or

within five days after notice of setting if it be set without notice or stipulation.

> "*Jury, Fees of.*—In all civil cases where juries are summoned and in attendance upon the court, the party demanding the jury shall pay into court the sum of thirty dollars at least five days before the day of trial, and on each day of the trial thereafter, and before any testimony is taken on said day, each party shall pay into court one-half of the jury fees for said day. All jury fees shall be taxed as costs in favor of the party prevailing in the action unless otherwise agreed by the parties. The court may in its discretion, at any time, require the fees of the jurors in attendance to be paid into court, to abide the event of suit."

When the cases were called for trial a jury was demanded and refused. No jury was in attendance and after the jury was denied no application for a continuance was made. Respondents assert that appellants waived their right to a jury trial by failing to observe the rule. It will be noticed that nothing is said in the rule relative to whether a failure to observe the rules shall be deemed to constitute a waiver of the right to a trial by jury. In the recent case of Norland v. Gould, 254 P. 560, the Supreme Court determined that the failure to comply with a rule of court requiring an advance deposit, and providing, "If such sum is not so deposited a trial by jury shall be deemed waived," was a valid rule, and noncompliance therewith constituted a waiver. In view of the failure of the rule under consideration to so declare, we must advert to further authority for our guidance. The Constitution says:

> "The right of trial by jury shall be secured to all and remain inviolate. * * * A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." Const. art. 1, § 7.

Prior to the amendment of 1915 to section 631 of the Code of Civil Procedure (St. 1915, p. 649), which will be noted shortly, the case of People v. Metropolitan Surety Co., 164 Cal. 174, 128 P. 324, Ann. Cas. 1914B, 1181, was decided, in which it was declared that:

> "The Legislature is thus given the sole power of declaring what shall constitute a waiver of trial by jury (Exline v. Smith, 5 Cal. 112), and has exercised its power by the enactment of section 631 of the Code of Civil Procedure," etc.

In 1915 the Legislature added to the section subdivisions 4 and 5, which read as follows:

> When "trial by jury may be waived: * * * 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation. 5. By failing, at the beginning of each day's session, to deposit with the clerk the jury fees and, if there be any, the mileage for such days."

It is apparent that appellants' rights to a trial by jury were not waived in any of the manners provided by the section from which we have just quoted. Had the rule provided that a waiver should result by reason of noncompliance therewith, we should be bound by the declaration in Norland v. Gould, supra, notwithstanding that the opinion in the last-named case does not mention the amendments heretofore quoted. Having failed to so provide, we are not free in face of the constitutional provision and the legislative enactment requiring payment of the fees "at the beginning of each day's session" to indulge the presumption that it was the intention of the judges of the court to affix a waiver as a result of noncompliance rather than some other provision. In one of the earlier cases upon this subject, Biggs v. Lloyd, 70 Cal. 447, 11 P. 831, it is said with reference to rules of court:

> "Did the failure by defendants to demand a jury on the law day constitute a waiver of their right to a trial jury on the day for which the cause was set for trial? We think not. For the court had no power to declare by its rules what shall constitute a waiver of a constitutional right; and the rules themselves *do not declare* that the failure to demand a jury in a case upon the calling of the case on the law day to be set for trial *shall amount to a waiver*." (Italics ours.)

Again, in the case of Farwell v. Murray, 104 Cal. 464, 38 P. 199, the court says:

> "We see nothing in the record showing such waiver, and therefore conclude that the court erred in its ruling."

Expressing somewhat the same thought, although not in connection with a rule of court, is the language of Platt v. Havens, 119 Cal. 244, 51 P. 342, where it is said:

> "We think this too vague and uncertain a basis upon which, in the face of our Code, to found a waiver. It was held in an early case (Smith v. Polack, 2 Cal. 92) that the right of trial by jury cannot be waived by implication.'"

The case to which reference is made in this quotation is in fact a bit stronger than the quotation would lead us to believe, because it is there said: "This waiver must appear affirmatively, and not by implication." The authority of Adams v. Crawford, 116 Cal. 495, 48 P. 488, is not in point for the reason, as the court is careful to point out, that, while the court did require the fees to be deposited " 'within five days after making such demand,' the plaintiff did not then, nor had he at any time, made or offered to make such deposit." Further we might add that the Legislature had not exercised its legislative authority respecting the time when the fees should be deposited as it has at this time. The authority of Conneau v. Geis, 73 Cal. 176, 14 P. 580, 2 Am. St. Rep. 785, is likewise no authority here for the reason that the party demanding a jury in the case declined to deposit the first day's fees "before the commencement of the trial," arguing that the court could not require the fees to be advanced. We are of the opinion that the court here was in error in refusing to grant appellants' demand for a jury trial.

[4] Nor did appellants waive their right to a trial by jury by going to trial after it had been denied. The right having been denied, appellants were clearly within their rights in going to trial and seeking to have the action of the court reversed upon an appeal from the judgment. In re Robinson, 106 Cal. 493, 39 P. 862.

The remaining points urged by the appellants are that the court erred in not finding that the defendants were guilty of negligence as a matter of law in driving their automobile between 30 and 35 miles per hour upon the public highway when the plaintiffs were in an automobile only about 300 feet in front of them, and also that the court erred in not finding as a matter of law that the defendants had a last clear chance to avoid the collision.

[5] We have examined the testimony and are satisfied that the findings were based upon a conflict in the testimony, and, relying upon the rule that they should not be disturbed in such instances, we must decline to say that the defendants were guilty of negligence as a matter of law or that they had the last clear chance to avoid the collision.

The judgment in each case is reversed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

CARLSEN v. SECURITY TRUST & SAVINGS BANK. (Civ. 5889.)★

District Court of Appeal, Second District, Division 2, California. Feb. 27, 1928.

Hearing Granted by Supreme Court April 26, 1928.

1. Escrows 🔑6—Instruction that escrow holder have guaranty of title, showing "good and sufficient grant deed," required that marketable title be shown before completing escrow.

Provision in escrow instructions that escrow could not be completed until there was furnished "a guarantee of title showing agreement last above mentioned and assignment of same to me and a good and sufficient grant deed * * * conveying said property to me," *held* not to require merely a certificate showing an agreement for the sale of property and its assignment, but to require that bank, as escrow holder, have a guaranty showing ownership of property with marketable and unincumbered title on part of vendor, in suit by subvendee to recover damages from bank for failure to deliver muniments of title held in escrow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good and Sufficient Deed.]

2. Escows 🔑10—Pendency of vendor's suit to quiet title held to warrant escrow holder's refusal to transfer muniments of title to subvendee, where escrow instructions required guaranty of title showing good and sufficient grant deed.

Subvendee, suing escrow holder for damages for failure to deliver muniments of title deposited in escrow, *held* not entitled to recover, where instructions signed by plaintiff required guaranty of title showing contract and assignment and a "good and sufficient grant deed," and where suit by vendor to quiet title to the property was pending, since instructions in effect required that marketable title be shown before completing escrow.

3. Escrows 🔑5—Escrow instructions must be read together in determining escrow holder's liability to subvendee, where both purchase contracts were deposited in escrow.

Where original contract for sale of property and purchaser's contract with subvendee were deposited in escrow, escrow instructions must all be read together as forming an entire contract in determining liability of escrow holder for failure to deliver to subvendee muniments of title, during pendency of vendor's action to quiet title.

4. Escrows 🔑6—Attempted oral waiver by subvendee of escrow instructions, requiring marketable title and joint consent in writing to any modification of instructions, was ineffective.

Where escrow instructions, agreed on by purchaser of property, subvendee, and escrow holder, provided that no rescission or modification of terms should be effective without joint consent of parties in writing assented to by bank as escrow holder, subvendee, who made no attempt by way of execution of written waiver to waive provision in instructions to escrow holder requiring that marketable title be shown before completing escrow, was not entitled, on basis of mere oral statement, to demand closing of the escrow before marketable title was shown, though stipulation was inserted for his benefit.

5. Contracts 🔑143—Court may not redraft contract of competent parties.

It is not within the province of the court to redraft a contract which the parties have executed, where no question is raised to their contracting capacity.

6. Escrows 🔑6—Requirement that modification of escrow instructions be in writing and consented to by parties and escrow holder held reasonable.

Requirement that modification in escrow instructions be in writing, and consented to by parties and escrow holder, *held* reasonable requirement, which neither party could eliminate from purchase contract.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by F. C. Carlsen against the Security Trust & Savings Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 265 P. 303.

★For opinion of Supreme Court adopting opinion of Court of Appeal, see 271 P. 104.

Kelby & Lawson and Lester R. Godward, all of Los Angeles, and Edwin V. McKenzie, of San Francisco, for appellant.

Newlin & Ashburn, of Los Angeles, for respondent.

CRAIG, Acting P. J. This is an action for damages against the respondent bank, as an escrow depositary, for failure to deliver certain muniments of title admittedly deposited with it in the escrow. For purposes of brevity, the Security Trust & Savings Bank is referred to in this opinion as the bank, the Dominguez Land Corporation is termed the corporation, and the California Chemical Company is named the company.

The facts essential to a presentation of the appeal are that the corporation, as owner of certain apparently oil-bearing land, entered into an agreement to sell it to the company. In this connection an escrow was arranged with the First National Bank of Torrence. The company thereafter contracted to transfer its interest in said agreement of purchase to the plaintiff, Carlsen. In that behalf an escrow was opened with the bank, respondent herein. As is usual in such cases, escrow instructions were signed by the company and Carlsen. The dispute centers primarily on the construction to be placed upon certain parts of these instructions. After the second escrow had been opened, letters, notices, and demands, written and oral, were made by the parties herein mentioned. The instructions called for a certain guaranty of title. Soon after the escrow was begun, the corporation filed suit to quiet title against the company, and recorded a lis pendens of the same. Carlsen appeared in said last-named action, assuming to be a "John Doe" who had been made a party defendant therein. He asked affirmative relief by way of a judgment quieting his title to the premises in question. Under these circumstances, the bank did not complete the escrow, but held the documents and money which it had received, and finally, after demand therefor had been made by Carlsen, it refused to deliver to him the muniments of title which the escrow instructions, as well as the agreement with the company, contemplated that he should receive upon the close of the escrow. This stand of the bank was based upon the theory that the escrow instructions requiring that a guaranty of title be furnished to the vendee could not be complied with while the suit brought by the corporation was pending.

Many other facts are recited in the record and in the briefs, but, in view of our decision upon the two pivotal points presented, it would only tend to confuse the issues to recount such details, which we deem unessential.

[1-3] Without a waiver of certain provisions of the escrow instructions, the bank could not complete the escrow, because under such provisions it was necessary that before doing so it have "a guarantee of title showing agreement last above mentioned and assignment of same to me and a good and sufficient grant deed, executed by said California Chemical Co., conveying said property to me." The "agreement last above mentioned" is the contract between the corporation and the company, and the instruction from which we have quoted is signed by Carlsen. Appellant contends that by this provision nothing is required, except a certificate showing the agreement and its assignment. However, we think this interpretation is too narrow, and that both the language used and other stipulations in the agreement, which consist of the escrow instructions and the contract between the company and Carlsen, clearly indicate that it was the intention of the parties that the bank, as escrow holder, have in its possession a guaranty, in the sense that that term is ordinarily used, and which implies ownership of the property in question, with the title marketable and unincumbered. In the provision above quoted, that part which reads "showing agreement last above mentioned and assignment of same to me" merely indicates that the title is to be brought down to Carlsen, and not to terminate, as it often does, with a certification that the vendor has title at the time he transfers to the vendee.

That the parties understood that the vendee was to receive a definite and full title to the land, and not merely an assignment of whatever interest the company might have in it, is evidenced by the other documents involved in the transaction. In the agreement between the company and Carlsen, it is recited that the company has entered into a contract "covering the sale and purchase of certain real property," and that the company "agrees to sell" to Carlsen all of the rights of the company in and to its agreement with the corporation, and to execute the necessary assignment and deed to carry the transfer into effect, so that Carlsen should receive the deed contracted by the corporation to be delivered to the company through the escrow with the First National Bank of Torrence. These references direct us back for further explanation of the understanding of the parties to the agreement between the corporation and the company. That contract provided that the corporation should "deliver a certificate of title * * * showing title to said property to be vested in Dominguez Land Corporation free and clear of all incumbrances." When we consider that the contract from which we have last quoted was one of the documents required to be, and which was, deposited in the escrow, as was also the contract between the company and Carlsen, it is apparent that these instructions must all be read together as forming an entire contract. The corporation was required to furnish a certificate of title showing its ownership, free and clear of all incumbrances, the company contracted to transfer that same character of title to Carlsen, and his requirement in the escrow instructions with the defendant escrow holder requiring guaranty of title, etc., must be construed as calling for a certificate that the seller had title free and clear of all incumbrances, but, in addition to this, that a transfer of such title had been made to Carlsen.

[4-6] We now proceed to a consideration of the question which both appellant and respondent state to be of the most vital importance in determining this appeal, to wit, as to whether or not Carlsen waived the requirement as to guaranty of title. As we view the matter, this is not a difficult problem, nor one requiring any extended discussion. It is admitted that the only attempted waiver was an oral statement by Carlsen or his attorney. The escrow instructions agreed upon by the company, Carlsen, and the bank, and to which all are parties, provides:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing subscribed by the undersigned, and assented to by the bank."

Authorities cited by appellant announcing the general principle that a party to a contract may waive any provision contained within it and intended for his benefit, and also those holding such a waiver may be made orally, do not aid us in interpreting the agreement here in question. In the absence of the stipulation which we have just quoted, doubtless the vendee might have waived a direction to an escrow holder concerning the kind of guaranty required. It may be that under certain circumstances, and particularly where the modification of the contract has been acted upon by the parties, a waiver may be verbal. But here the parties have deliberately affixed their signatures to an agreement which is so clear that it has not been suggested that it can have any other meaning than that plainly expressed by it. This covenant is that there shall be no modification of the terms of the escrow instructions without joint consent in writing, subscribed by the company, by Carlsen, and also assented to by the bank. It is of no moment, and therefore we need not analyze the motive which may have actuated the parties in making this agreement. The language of this proviso clearly indicates that the escrow holder should not under any circumstances assume the burden of attempting to settle a dispute between the parties, except upon strict compliance with the letter of the instructions. However, we need not consider whether or not the requirement for a guaranty of title is one solely for the benefit of Carlsen, nor what present or future, actual or possible, interest the company or the bank might have had in such requirement. It is not within the province of the court to redraft a contract which the parties, as to whose contracting capacity no question is raised, have executed. It may be observed in passing that, in the face of such a provision in the escrow instructions, if the appellant had sincerely desired to waive the requirement as to guaranty of title, it would seem that he would at least have placed a written waiver signed by himself with the escrow holder. Had he even taken this step, he might be in a position to present the question for decision by this court as to the necessity that consent be joined in by the company and assented to by the bank; but, not having himself executed a waiver in the form required by his agreement with the other parties, he is not, and never has been, in position to demand the closing of the escrow, and this is true without regard to the necessity for the other parties joining with him in a waiver. The requirement that any modification in the escrow instructions be in writing is a perfectly reasonable one, quite obviously for the benefit of the escrow holder, and one which neither the vendor nor the vendee could eliminate from the contract.

In view of our decision upon the points discussed, it is not necessary to consider others presented.

The judgment is affirmed.

We concur: THOMPSON, J.; VALENTINE, Justice pro tem.

SECURITY TRUST & SAVINGS BANK v. DOMINGUEZ LAND CORPORATION et al. (Civ. 4880.)★

District Court of Appeal, Second District, Division 2, California. Feb. 27, 1928.

Hearing Granted by Supreme Court April 26, 1928.

1. **Interpleader ⟹10—Alleged right of escrow holder to bring interpleader action held not defeated by indebtedness due it from vendor asserting claim to property involved (Code Civ. Proc. § 386.)**

Fact that bank, as escrow holder, also held certain bonds and evidences of indebtedness of vendor, *held* not to defeat its alleged right, under Code Civ. Proc. § 386, to bring interpleader action to relieve itself of liability on account of conflicting claims between vendor and subvendee.

2. **Interpleader ⟹10—Escrow holder, assuming definite and independent liability to party to escrow, cannot have responsibility terminated by interpleader action (Code Civ. Proc. § 386).**

Where escrow holder has assumed a definite and independent liability to one of the

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★Superseded by opinion of Supreme Court, 271 P. 100.

parties in escrow, his right to bring interpleader action, under Code Civ. Proc. § 386, is thereby defeated, since judgment of court could not absolve him from performing his independent contract.

3. Escrows ⟹6—Provision in escrow instructions, preventing rescission of escrow without joint consent, rendered holder liable to maintain escrow, though conditions prevented immediate closing thereof.

Where escrow instructions provided that escrow could not be rescinded or modified without joint consent in writing, and subscribed by parties, and assented to by bank holding escrow, escrow holder was under liability to maintain the escrow, and duty was not affected by fact that conditions at time of filing interpleader suit were such that escrow could not then be closed.

4. Interpleader ⟹6—Escrow holder, required to maintain escrow by provision preventing rescission without joint consent, held not entitled to maintain interpleader to relieve itself of responsibility (Code Civ. Proc. § 386).

Where escrow holder was under duty to maintain escrow until such time as it could be closed by virtue of provision preventing rescission thereof without joint consent, escrow holder was not entitled to be relieved of its responsibility through suit in interpleader, under Code Civ. Proc. § 386, and motion for nonsuit therein was properly granted, since judgment could not have changed legal position of parties.

Appeal from Superior Court, Los Angeles County; Wm. H. Dehy, Judge.

Action in interpleader by the Security Trust & Savings Bank against the Dominguez Land Corporation, the California Chemical Company, and others, in which defendants named filed cross-complaints. From an order granting a motion for nonsuit and denying plaintiff's prayer, plaintiff appeals. Affirmed.

See, also, 265 P. 301.

Newlin & Ashburn, of Los Angeles (Clyde E. Holley, of Los Angeles, of counsel), for appellant.

Foster & Godward, Lester R. Godward, and Kelby & Lawson, all of Los Angeles, for respondent Carlsen.

Goodwin & Morgrage and W. I. Gilbert, all of Los Angeles, for respondent Petroleum Midway Co.

CRAIG, Acting P. J. This action is one in interpleader. The appeal is from an order granting a motion for nonsuit made by the defendants and respondents F. C. Carlsen and Petroleum Midway Company; also from an order denying the prayer of the plaintiff.

The circumstances out of which this litigation arose are that on April 22, 1922, the California Chemical Company, herein referred to as the company, and F. C. Carlsen opened an escrow with the plaintiff, hereinafter referred to as the bank. At the time the parties to the escrow signed and delivered to the bank certain written instructions as to the handling of the escrow. There was then placed with it certain deposits, to wit: (1) Written agreement between the Dominguez Land Corporation, hereinafter referred to as the corporation, and the company, by which the corporation contracted to sell certain land to the company; (2) written agreement between the company and F. C. Carlsen, in which it was agreed that the company would convey all of its interest in the instrument referred to as deposit 1, to Carlsen; and (3) written assignment by the company as stipulated in the written agreement last mentioned to be made by Carlsen.

Deposit No. 2 provided that the consideration to be paid by Carlsen for the assignment by the company of its interest in deposit No. 1 should be $16,000. The instructions signed by Carlsen required, among other things, that the bank, escrow holder, have delivered to it "a letter or report by the Title Insurance & Trust Company, subject to my approval, and showing that no assignment of said agreement last above mentioned appears of record, and that said Dominguez Land Corporation has not placed of record any declaration of forfeiture of or default in said agreement prior to April 22, 1922." Further, it was provided that upon such delivery the bank should pay to the company or order $2,000, etc. There was also contained in the instructions a provision which reads as follows:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing subscribed by the undersigned and assented to by the bank."

Without enumerating each step taken or act done, it may be said that Carlsen appears to have performed all of the conditions agreed to be performed by him. It is so stated in a letter dated March 21, 1923, written by the bank to the First National Bank of Torrence. Nor is there any claim that the company was in default, except that the bank, acting for it, was unable to secure the report from the Title Insurance & Trust Company, required by the escrow instruction. Considerable negotiations were had, and finally, according to the testimony of the witness Martin, an attorney for the bank, "Carlsen or his attorney representing him stated that they would waive these requirements." The bank then asked the other parties to the escrow to waive them also. However, Martin testified:

> "The other parties to the escrow, who were communicated with either by me or by Mr. Keyes at my suggestion, objected to the waiver."

Upon some occasion after the escrow was begun, and before suit was entered, Martin

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes further testified, a representative of the corporation "stated that so far as they were concerned we were at liberty to go ahead with the escrow according to the terms and conditions of it."

On May 15, 1922, the corporation brought suit against the company to quiet title of the former to the property involved in these transactions. It was because this suit had been filed that the bank was unable to secure from the Title Insurance & Trust Company the report required by the instructions. On June 19, 1922, the company demanded by letter that the bank close the escrow by delivering to the company the money and notes to which it was entitled under the escrow, or, if that was not possible, that the papers deposited by it with the bank be returned. On January 18, 1923, the corporation notified the company, Carlsen, and the bank of the termination of the contract referred to herein as deposit No. 1. On March 21, 1923, the bank received notice, directed to "F. C. Carlsen and to all whom it may concern," declaring with reference to the agreement dated April 21, 1922: "Whereas, the terms and conditions of said agreement have not been complied with," a forfeiture was claimed by the company; and the letter also directed that all documents executed in connection with that agreement be returned to it.

This suit resulted from the same disagreements of the parties in the transaction which also were the basis of the suit entitled Carlsen v. Security Trust & Savings Bank (a Corporation), numbered 5889, and reported in 265 P. 301. The escrow instructions here involved were construed in our decision upon the appeal of that case. We there held that the provision of the instructions calling for guaranty of title before the close of the escrow necessitated that the guaranty show the title in question to be unincumbered; that, because of the provision that no modification of the terms of the escrow could be made without "joint consent in writing subscribed by the undersigned and assented to by the bank," oral waiver by Carlsen of the requirements concerning guaranty of title was ineffectual, and hence that the bank acted within its rights in refusing his demand for delivery of the muniments of title agreed to be delivered to him under certain conditions.

The additional question is now presented as to whether or not upon these premises of facts and of law the bank was entitled to relieve its responsibility through an action in interpleader.

It is admitted by the respondent that, if the bank were not an escrow holder, it would be entitled to the relief asked by it. It is insisted, however, that the escrow holder is not a mere stakeholder, but has an interest in the transaction, and a legal duty to perform in connection therewith; further, that the bank can with perfect safety to itself determine which claimants are entitled to documents in controversy, and that under such circumstances it cannot require that the claimants interplead.

We know of no decision in this jurisdiction passing upon the exact question here presented. However, although the statement is obiter dictum, the Supreme Court of New Mexico, in Davisson v. Citizens' Nat. Bank, 15 N. M. 680, 113 P. 598, indicated that, in the opinion of that court, an escrow holder may secure relief from conflicting claims against the escrow through interpleader. Referring to the bank, escrow holder in that action, it is said:

> "And when it failed to secure appellant's consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance."

That a person holding personal property in escrow and having no interest therein may require conflicting claimants to interplead is directly held in Walker v. Bamberger, 17 Utah, 239, 54 P. 108.

Section 386 of the Code of Civil Procedure provides, in part, as follows:

> "* * * And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves."

[1] One objection to the right of the complainant to require the defendants to interplead in this action is the claim that the bank is so interested as to exclude it from the right to maintain this action. It is important to note that during all times involved the bank was also the holder of certain bonds and evidences of indebtedness of the corporation. It is claimed by respondent that under these circumstances the interests of the bank were such that because of this fact alone, any right to maintain interpleader which it might otherwise have had was defeated.

Upon this statement of facts, the interest which the bank had was not in the fund and muniments of title in dispute but merely an interest in a legal question, in that, if it were determined favorably to the corporation, the latter would be a better security for the payment of its debt to the bank. Such an interest does not defeat the right to interplead. Pomeroy, Equity Juris. § 51, p. 83. We know of no conflict of authority in the general acceptance of this rule.

[2] Another ground for denying an escrow holder the benefits of the remedy provided by this law would be, if in any case it appeared to be true, that the complainant in interpleader had assumed a definite and independent liability to one of the parties to the escrow.

In McGinn v. Interstate National Bank, 178 Mo. App. 347, 166 S. W. 345, the reason for the rule as to independent liability defeating a right of interpleader is explained to be that, where such liability exists, a decision as to which of the conflicting claimants was right would not absolve the party asking interpleader from performing his independent contract. However, if the relations of the parties are such that the court's decision would determine the responsibility of the escrow holder, he is for the purposes, and within the scope, of the Code section authorizing interpleader a mere stakeholder. In the instant case it is obvious that, had the defendants set up their respective claims, and had an adjudication of their rights been rendered, the judgment of the court could not have disposed of the liability of the escrow holder.

[3, 4] Unlike the situations presented in Davisson v. Citizens' National Bank, supra, and Walker v. Bamberger, supra, no time limit is fixed by the instructions for the closing of this escrow, and here also we are confronted with the provision discussed in Carlsen v. Security Trust & Savings Bank, supra, providing that:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing, subscribed by the undersigned, and assented to by the bank."

In that case the bank insisted that it was as much a party to the escrow agreement as was Carlsen or the company, and that as such party it had rights which Carlsen could not waive or ignore. This position we held to be sound. If so, it necessarily follows that the escrow holder also assumed certain obligations by virtue of the same stipulations of the contract out of which its rights accrued. The mere fact that at the particular date upon which suit in interpleader was filed, the conditions were not such that the bank could complete and close the escrow, did not relieve it of its solemn contractual legal duties to the other parties to the escrow agreement. In the absence of a time limit, and certainly while the possibility existed of conditions changing so as to remove the obstacle which prevented the bank closing the escrow, the clearly implied covenant is that the escrow holder shall maintain the escrow throughout the period, and while the conditions here under review might continue. But had this interpleader suit proceeded without interruption, the only judgment that could have been rendered would have left the rights of the parties and the legal position of the bank as undetermined as when the action was begun. At that time the bank was obligated to retain the money and documents which it had received. Because of its inability to furnish the necessary certificate of title, it could not then deliver these articles to the parties for whom they were intended. Any decree of the court must have so determined, and it could have decided nothing more. So, we think, the trial court properly held that the complainant was not entitled to be relieved of its responsibility through a suit in interpleader.

The judgment is affirmed.

We concur: THOMPSON, J.; VALENTINE, Justice pro tem.

89 Cal. App. 396

HARRIS et al. v. MINNESOTA INV. CO. et al.

(Civ. 6178.)

District Court of Appeal, First District, Division 1, California. Feb. 23, 1928.

1. Judgment 🔑106(7)—Defendants are entitled to notice of order overruling demurrer and, unless notice is waived, need not answer until ten days after receiving it (Code Civ. Proc. §§ 476, 1014; superior court rule 22).

Under Code Civ. Proc. §§ 476, 1014, and superior court rule 22, defendants are entitled to notice of order overruling their demurrer, and unless they waive notice, they are not required to answer until ten days after notice has been served, and judgment against them cannot be taken by default until time to answer has expired.

2. Attorney and client 🔑82—Where party has attorney of record, all statutory notices must be signed by attorney.

Where an attorney is retained to represent a party litigant, all statutory notices and legal proceedings must be signed or inaugurated by the attorney of record.

3. Judgment 🔑106(7)—Entry of default against defendant for not answering after overrruling of demurrer is improper, where statutory notice has neither been given nor waived (Code Civ. Proc. §§ 476, 1014; superior court rule 22).

Under Code Civ. Proc. §§ 476, 1014, and superior court rule 22, entry of default judgment against defendants who do not answer after their demurrer has been overruled is improper, where statutory notice has neither been given nor waived.

4. Pleading 🔑218(3)—Notice to defendant of overruling of demurrer should be personally served, unless that is impossible or greatly inconvenient (Code Civ. Proc. §§ 1011–1015 et seq.).

In view of Code Civ. Proc. §§ 1011–1015 et seq., notices to defendant of overruling of demurrer should be personally served, except in cases where such service is impossible or greatly inconvenient.

5. Notice 🔑10—One serving notice by mail must show statute has been followed (Code Civ. Proc. §§ 1011, 1012).

One serving notice by mail, under Code Civ. Proc. §§ 1011, 1012, must show that the circumstances permitted service by mail, and that the statute was followed.

6. Notice 🔑10—Proof of service of notice should be made by affidavit, unless proof by officer's certificate is authorized by statute.

Proof of service of notice should be made by affidavit, unless a certificate of service is made by an officer authorized to serve the notice, and to certify as to such service, and such certificate is made by statute sufficient proof of service.

7. Judgment 🔑381—Superior court may on own motion annul judgments inadvertently made.

Independent of statutory provisions, superior court has power on its own motion to correct mistakes in its proceedings and to annul, within a reasonable time, orders and judgments inadvertently made.

8. Judgment 🔑138(3)—Default judgment taken against defendant before he had notice that demurrer had been overruled held properly vacated.

Default judgment taken against defendant immediately after demurrer to complaint had been overruled and before notice of order overruling the demurrer had been served *held* properly vacated.

9. Pleading 🔑218(3)—Card mailed by clerk of court held not sufficient notice to defendant that his demurrer had been overruled (Code Civ. Proc. §§ 1011–1015 et seq.).

Card mailed to attorneys for defendant by clerk of court *held* not sufficient notice that demurrer to complaint had been overruled, in view of Code Civ. Proc. §§ 1011–1015 et seq.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by James T. L. Harris and another as executors of the last will of Sarah J. Wright, deceased, against the Minnesota Investment Company, the Southwest Mortgage Corporation, J. H. Scales, and another. From an order vacating the judgment entered by default against the defendant Southwest Mortgage Corporation and permitting the Southwest Mortgage Corporation and J. H. Scales to file their answer, plaintiffs appeal. Affirmed.

Samuel Lackman, of Long Beach, and Wilson & Snow, for appellants.

Sheran & Alvord and Sheran, Alvord & Hearn, all of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from an order vacating a judgment entered by default in favor of plaintiff and against defendant Southwest Mortgage Corporation in the sum of $4,950 and permitting defendants Southwest Mortgage Corporation and J. H. Scales to file their answer. There was also filed and submitted with the appeal on its merits a motion by Southwest Mortgage Corporation and J. H. Scales to dismiss the appeal.

The proceedings giving rise to this appeal were as follows: Plaintiffs filed an action against various defendants basally for moneys had and received for the use and benefit of plaintiffs in their capacity as administrators of the estate of Sarah J. Wright, deceased. Respondents demurred and the demurrer was heard and submitted on June 5, 1925. On June 9, 1925, an order overruling the demurrer was made, the order being silent as to defendants' right to answer, the minute order reciting:

> "Demurrer of certain defendants to complaint heretofore submitted on June 5, 1925, is now by the court overruled."

On June 9, 1925, the same day on which the demurrer was overruled, the attorneys for the demurring defendants were notified by cards mailed by the clerk of the department in which the cause was pending that the demurrer had been overruled and a certificate to that effect was filed on June 23, 1925, by the clerk. On June 25, 1925, judgment by default was entered by the court against Southwest Mortgage Corporation. On June 27, 1925, an order to show cause was obtained and served upon counsel for plaintiffs, requiring them to show cause why the default should not be vacated and the judgment by default set aside. This order was made returnable on July 2, 1925. On July 2d the matter was continued until July 9th, to permit the filing and service of motion to be relieved of the default under section 473 of the Code of Civil Procedure. Thereupon defendants Southwest Mortgage Corporation and J. H. Scales served and filed a notice of motion supported by the affidavits of John F. Sheran and J. H. Alvord and a copy of the verified answer proposed to be filed and which was based upon grounds prescribed in section 473 of the Code of Civil Procedure, viz., inadvertence and excusable neglect. The motion was noticed for hearing on July 9, 1925, the same day to which the order to show cause had been continued. Appellants claim that the continuance of the original motion was to enable counsel to procure proof that the clerk's notice was not received at the office of defendants' attorneys, but that defendants, without leave of court first had and obtained and without the consent of plaintiffs' attorneys, preferred to file a new motion based on new matter. In passing upon the matter, however, the court made the following order:

> "Order of certain defendants to show cause in revacating default and judgment, etc., came on for hearing, Wilson & Snow appearing as counsel for plaintiffs and Sheran & Alvord for defendants. Former motion above shown is ordered off calendar. Motion to vacate default and judgment, etc., is granted."

Section 1014 of the Code of Civil Procedure provides:

> "After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given."

Section 476 of the same Code provides:

> "When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order."

And rule 22 of the court rules of the superior court of the state of California, in and for Los Angeles county, makes the following provision:

> "When a demurrer to a complaint or cross-complaint shall be upon the law and motion calendar and no one shall appear in support of the same and the demurrer shall be overruled, or if in any case the court, in overruling a demurrer, shall decide that the same is frivolous, the party demurring shall be given leave to answer upon such terms as may be just. In all other cases (which includes the present case) upon the overruling of a demurrer to the complaint, the party demurring shall be allowed ten days in which to answer, unless otherwise ordered by the court. * * *"

Similar court rules have been upheld. In Callahan v. Hickey, 63 Cal. 437, the court says:

> "In the absence of defendant's counsel the court overruled a demurrer which had been interposed by the defendant to the plaintiff's complaint, without giving time to the defendant to answer. But there was a rule of the court which provided as follows: 'Rule 16. When a demurrer to any pleading is sustained or overruled the adverse party shall have five days within which to amend or answer after receiving notice of the ruling of the court.' * * * Instead of giving the notice required by the rule, the plaintiff, immediately after the overruling of the demurrer, took judgment against the defendant, and had the same entered against him. The taking and entry of the judgment were in violation of the rule of the court, and the judgment was irregular, and being irregular, upon the showing made by the defendant, the court properly set it aside and allowed the defendant to answer the complaint. Order affirmed."

Likewise, in the case of Winchester v. Black, 134 Cal. 125, 66 P. 197, the court made an order dismissing the demurrer for want of prosecution. There was in effect in that case a rule of court reading:

> "When a demurrer to a pleading is overruled or sustained, ten days after notice shall be allowed the adverse party to answer or amend, unless, upon some good cause shown, further time is given."

It appears further from the statement of facts that no notice of order for dismissing the demurrer was given the attorney for the defendant. In passing upon the facts as shown, the court says:

> "Under the rule of the court above quoted, the defendant was entitled to receive a notice of the order dismissing the demurrer before any default could be taken against her. It is not claimed that any notice was given, and although there are some statements in the affidavits on behalf of the plaintiff tending to show that the defendant's attorney was informed of the action of the court, they are insufficient to justify our interference with the discretion exercised in setting aside the default."

[1] It follows, therefore, that defendants were entitled to notice of the court's order overruling their demurrer and that the time given by the court rules, "ten days in which to answer, * * *" runs from the time of the service of notice of the order (section 476, Code Civ. Proc.), and, if required notice was not given or waived and the time to answer had not expired when the default was entered, the motion to set it aside was properly granted. Chamberlin v. County of Del Norte, 77 Cal. 150, 19 P. 271.

[2] This brings us to the question as to whether or not the card mailed by the clerk of the court is such a notice as is required by the statute. Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone. 21 Cal. Jur. 556; McMahon v. Thomas, 114 Cal. 588, 46 P. 732; Jansson v. National Steamship Co., 34 Cal. App. 483, 168 P. 151.

[3] "To authorize the entry of a default against the defendant, jurisdiction must have been obtained either by proper service of process or by appearance. And since, in entering default, the clerk exercises no judicial functions, but acts in a purely ministerial capacity, he cannot properly make the entry, unless the required proof of service has been made. Thus an entry on a void or insufficient certificate of service is improper." 14 Cal. Jur. 885; Reinhart v. Lugo, 86 Cal. 395, 24 P. 1089, 21 Am. St. Rep. 52. So in a case of default for failure to answer after the overruling of a demurrer, the record should be made to show the giving of the required notice of the decision or order, and any entry of default before the giving of such notice, unless notice be waived, is improper. 14 Cal. Jur. 886; Chamberlin v. County of Del Norte, supra; Callahan v. Hickey, supra. "Notice when required by a statute is not the equivalent of knowledge; it means the statutory instrumentality of knowledge—the formal process emanating from the source and served in the manner prescribed by statute." 21 Cal. Jur. 553; In re Central Irr. Dist., 117 Cal. 382, 49 P. 354; Williams v. Bergin, 108 Cal. 166, 41 P. 287.

Where notices during the course of proceedings in court are required to be given, they must be signed by the attorney of record. As was said in Jansson v. National Steamship Co., supra, where plaintiff himself gave notice in writing:

> "Even assuming that such paper was intended to apprise defendant's counsel of the fact and date of the entry of judgment herein, it was wholy inoperative for that purpose."

Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone. See, also, McMahon v. Thomas, supra.

[4] Sections 1011 to 1015 et seq., Code of Civil Procedure of California, relate to the manner of giving notice. Reading of these sections indicates that the Legislature intended that notices should be personally served, except in cases where that sort of service is impossible or greatly inconvenient. Section 1011 is detailed and specific as to the manner of giving notice to an attorney. It clearly indicates that every reasonable effort be exhausted to make a direct service upon the attorney or upon some one in his behalf, in person, before service by mail may be resorted to. It is only after unsuccessful attempts to serve the attorney in person or by leaving the paper to be served with some one of mature years, either at his office or his residence, have failed, that a notice to be served may be mailed to him at his office or residence. Even then the notice must be placed in a "sealed envelope." The only other circumstances under which service by mail may be made is that prescribed in section 1012 of the Code of Civil Procedure, which provides:

> "Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail."

[5] It is incumbent upon one serving notice by mail to show that the case is one in which such notice is permitted and that the mode pointed out by the statute has been followed. Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8.

The mailing of a card giving notice of trial, even though the residence of the attorneys would permit a notice by mail, has been held to be insufficient in McMunn v. Lehrke, 29 Cal. App. 298, 306, 155 P. 473, 476, where the court uses this language:

> "The clerk stated, in response to the inquiry of the court whether the defendant had been advised of the trial, that he 'had dropped him a card stating that the case was set for the 28th and if he had an attorney to advise him of the matter.' This was not legal service of notice such as the law requires."

In People v. Alameda Turnpike Road Co., 30 Cal. 182, the court says:

> "Where service is sought to be made by mail, it should appear that the conditions on which its validity depends had existence; otherwise, the evidence must be held insufficient to establish the fact of service."

And in Linforth v. White, 129 Cal. 188, 61 P. 910, the court reiterates the rule in People v. Alameda Turnpike Road Co., supra, and in Townsend v. Parker, 21 Cal. App. 317, 131 P. 766, the court uses this language:

> "In that case, as in this, the attempted service was by mail, and the court held that an affidavit of service by mail of the notice of appeal must show that the attorneys for the appellant, whose duty it is to make the service, and the attorneys for the respondent, upon whom it is to be served, reside in different places between which there is a regular communication by mail; and the affidavit of service by mail by a third person which fails to show the residence of the attorneys for the appellant is insufficient."

Service by mail cannot be made by a deposit of the notice in the post office where the attorney on whom service is to be made resides. Service must be made personally or constructively in the manner prescribed by section 1011 of the Code of Civil Procedure. Thompson v. Brannan, 76 Cal. 618, 18 P. 783; Koyer v. Benedict, 4 Cal. App. 48, 87 P. 231; 21 Cal. Jur. 564.

[6] In the present case, even if the clerk of the department of the court in which the action was pending had authority to serve the notice in question, the record does not show that in doing so the statute was complied with. Proof of service of notice should be made by affidavit, unless a certificate of service is made by an officer authorized to serve the notice and certify as to such service. Unless a certificate is made by statute sufficient proof of the fact of service, it has no standing as proof. Murphy v. Sumner, 74 Cal. 316, 16 P. 3; Reinhart v. Lugo, 86 Cal. 395, 24 P. 1089, 21 Am. St. Rep. 52; Glidden v. Packard, 28 Cal. 651; Kelly v. Van Austin, 17 Cal. 564; Stearns v. Aguirre, 7 Cal. 443. In Reinhart v. Lugo, supra, the court says:

> "This is not made as, and does not purport to be, an affidavit of service. Aguirre was not the sheriff of the county, and if he was deputy sheriff, or acting as such, as is now claimed, the fact is entirely immaterial. As proof of service the certificate was and is void."

And in this case the court further says:

> "The certificate being a nullity, it was as if no return or proof of service had been made. There was therefore no authority to enter the default of the defendant. The clerk in entering defaults exercises no judicial functions, but acts merely in a ministerial capacity, and unless he confines himself strictly within the statute, his acts can have no binding force."

[7, 8] Independent of statutory provisions the court has power on its own motion to correct mistakes in its proceedings, and to annul

within a reasonable time orders and judgments inadvertently made. Robson v. Superior Court, 171 Cal. 588, 154 P. 8; People v. Curtis, 113 Cal. 68, 45 P. 180. Rulings and even judgments inadvertently made are not the result of judgment, but of oversight, neglect, or accident, and are subject to correction by the court making them. Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646; Stewart v. Taylor, 68 Cal. 5, 8 P. 605. A judgment taken immediately after overruling a demurrer and in violation of a rule requiring notice and time to answer is irregular and is properly vacated on that ground. Callahan v. Hickey, supra.

[9] We have examined the cases relied upon by appellants to support their contention that the mailing of the card by the clerk of the department of the court in which the action was pending was a sufficient notice of the action of the court upon the demurrer. In none of those cases are the facts analogous to the facts in the present case, nor are they inconsistent with the views here expressed. In none was service attempted to be made by mailing a card. In all of them the condition as to residence of the parties serving and to be served justified the use of the mails and a substituted service thereby.

While the court had power on its own motion to correct the order here as it was prematurely made, it may further be said that the court did not abuse its discretion in setting aside the default upon the showing made on the ground of inadvertence and excusable neglect under section 473 of the Code of Civil Procedure.

Having disposed of the appeal on its merits, it becomes unnecessary to pass upon the points urged on the motion to dismiss. The trial court having made its order setting aside the default and permitting respondents to answer, an affirmance of that order permits the answer to be filed, and, as the same result would obtain should the appeal be dismissed, it would serve no useful purpose to take up the numerous points urged on the motion to dismiss and discuss them.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PEOPLE v. KEMPLEY et al. (Cr. 1482.)★

District Court of Appeal, Second District, Division 2, California. Feb. 21, 1928.

Hearing Granted by Supreme Court April 19, 1928.

1. Criminal law 🔑1144(12)—For purposes of passing on ruling on offer of proof rejected, reviewing court must assume truth of facts contained in offer.

For the purpose of passing on a ruling on an offer of proof, where such proof was rejected in the trial court, reviewing court must assume that facts contained in offer are true.

2. Grand jury 🔑5—Act of disqualified grand juror is void (Pen. Code, § 995, subd. 1).

Under Pen. Code, § 995, subd. 1, and in view of section 940, act of grand juror who is not qualified to be a grand juror is void.

3. Indictment and information 🔑137(2)—Substantial violations of Code provisions relative to indictments, and to acts and qualifications of grand jurors, are grounds for setting aside indictment (Pen. Code, §§ 900, 903, 906, 907, 919, 925, 940, 995).

Substantial violations of Pen. Code, §§ 900, 903, 906, 907, 919, 925, 940, 995, relative to indictments, and to the conduct and qualifications of grand jurors, are grounds for setting aside indictment thus illegally returned.

4. Grand jury 🔑5—Grand jurors' agreement to finance investigation of particular offense disqualifies them.

An agreement on the part of grand jurors to finance an investigation of a particular offense so prejudices them as impartial and unbiased members of the grand jury as to disqualify them.

5. Criminal law 🔑1144(2)—Reviewing court must presume grand jury foreman performed duties in regular manner, in absence of contrary showing.

In absence of showing to the contrary, the reviewing court must presume grand jury foreman performed his official duties in a lawful and regular manner.

6. Grand jury 🔑25—Grand juries are not authorized to hire detectives or receive evidence collected by them, except as provided by law (Pen. Code, § 925).

In the matter of ferreting out crime, grand juries have no authority to hire detectives, or to receive evidence collected and produced by such agencies, except through the means and methods sanctioned by Pen. Code, § 925.

7. Grand jury 🔑23—Grand juries should be advised of legal limitations on authority.

Grand jurors should be advised of legal limitations on their authority, and, if they exceed such limitations, the court should not be hesitant in declaring such to be the case.

8. Grand jury 🔑25—It is not within province of grand juries to prosecute.

It is not within the province of grand juries to prosecute.

9. Indictment and information 🔑140(2)—Refusal to permit defendants to give evidence relative to prejudice and bias of part of grand jurors held reversible error.

Refusal to permit defendants on bribery charge to introduce evidence to show that indictment was improperly returned, because of prejudice and bias of enough jurors that there were not 12 unprejudiced and unbiased members to return an indictment, *held* reversible error.

★Superseded by opinion of Supreme Court, 271 P. 478.

10. Criminal law 🔑423(2)—In prosecution of district attorney and deputy for soliciting and accepting bribe, coroner's evidence relating conversation with alleged conspirator relative to bribe held admissible, though conversation was in absence of defendants.

In prosecution of district attorney and deputy for soliciting and accepting a bribe, evidence of coroner relative to his conversation with a third person, alleged to be conspirator of defendants, relative to procuring bribe, *held* admissible, though conversation was held when neither defendant was present.

11. Criminal law 🔑404(4)—In prosecution of district attorney and deputy for soliciting and receiving bribe in connection with murder prosecution, photographs of dead body of murdered man and other objects introduced at trial held admissible.

In prosecution of district attorney and deputy for soliciting and accepting bribe relative to prosecution of certain defendants for murder, photographs of dead body of murdered man and other objects, introduced at trial for such murder, *held* material and competent evidence, as constituting a part of exhibits in controversy.

12. Grand jury 🔑34—Special counsel, appointed pursuant to statute to represent people before grand jury, acts for district attorney, and not as such officer, hence is not disqualified by omission of official oath or bond (Pol. Code, § 472).

Special counsel, appointed pursuant to Pol. Code, § 472, to represent the people in proceedings before the grand jury, acts for the district attorney, but not as such officer, hence is not disqualified by omission of official oath or bond.

13. Indictment and information 🔑10—District attorney's expressing opinion before grand jury as to effect or sufficiency of evidence does not invalidate indictment found.

Although a district attorney should refrain from expressing an opinion before grand jury as to effect or sufficiency of evidence, the fact that he may have done so, and that his opinion was acted on by them, does not invalidate the indictment found.

14. Criminal law 🔑1144(2)—Presumption is that special counsel before grand jury used only proper means of obtaining information (Pol. Code, § 472).

In absence of a showing to the contrary, it must be presumed that special counsel, appointed pursuant to Pol. Code, § 472, to represent the people in proceedings pending before the grand jury, used only proper means of obtaining information.

15. Grand jury 🔑34—Special counsel, appearing before grand jury for bribery hearing, who consulted with detectives regarding his employment, discussed matter with several grand jurors, interviewed witnesses, and examined them before grand jury, held not to have disqualified himself (Pen. Code, § 995).

Special counsel, appointed to represent the people in proceedings pending before grand jury, who consulted with detectives regarding his employment, discussed the matter with several grand jurors, interviewed witnesses, and examined them before the grand jury, *held* not to have disqualified himself, under Pen. Code, § 995, and was not an improper person before such grand jury.

16. Indictment and information 🔑137(2)—Indictment will be held void and set aside, where prejudice and bias of grand jurors are shown.

An indictment will be held void and set aside, where prejudice and bias of members of the grand jury are shown.

Appeal from Superior Court, San Diego County; Edwin F. Hahn, and S. M. Marsh, Judges.

Chester C. Kempley and C. G. Shelleck were convicted of having solicited and accepted a bribe, and they appeal. Reversed, with directions that the indictment be set aside.

Dempster, McKee, Adam Thompson, and Edgar A. Luce, all of San Diego, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and W. A. Sloane, E. J. Kelly, and Fred A. Steiner, all of San Diego, for the People.

CRAIG, J. Appellants were convicted in the superior court of San Diego county, Hon. Edwin F. Hahn presiding at the trial, of having solicited and accepted a bribe. They were charged by indictment with having asked and received a bribe upon representations and promises that they could and would by suppressing evidence aid in procuring acquittals of four persons who had previously been indicted for murder.

The indictment consists of two counts, in each of which it is alleged that appellant Kempley was on or about March 20, 1925, the district attorney of San Diego county, California, and that appellant Selleck was a deputy district attorney of said county. In the first count it is charged that appellants on the date above mentioned solicited and received from one William R. Johnson a bribe of $40,000, for promising, representing, and agreeing to obtain possession of, alter, and withhold from the jury, to be selected upon the trial of Thomas A. Johnson and Hugh McGovern for murder, certain material evidence, including a confession; that at the close of the trial they would cause the court to order delivered to counsel for Johnson and McGovern all exhibits in the case, so that Mae Johnson and Dan McGory, their codefendants, could not be convicted, if apprehended; that appellants herein then and there represented that they had sufficient in their possession to obtain the conviction and execution of all four defendants, and that, unless the $40,000 should be paid, they would "certainly be hanged for the murder of said George McMahon."

The second count is based upon the same set of facts, and also alleges that appellants as such public officers did receive a bribe of $40,000 upon an agreement and understanding that their actions would be influenced in favor of said four defendants; that the murder charges against the defendants Johnson and McGovern thereafter came on for trial, at which time Kempley and Selleck, as such district attorney and deputy district attorney, withheld from the jury the evidence mentioned; that Johnson and McGovern were acquitted, and that in furtherance of said unlawful agreement and understanding, and in order to prevent the trial and conviction of Mae Johnson and McGory, the prosecuting officers filed a written motion, praying that all exhibits introduced by the people be delivered to counsel for the defendants.

Before the trial appellants herein moved the court, before S. M. Marsh, a judge thereof, for an order setting aside the indictment, basing their motion upon three grounds: (1) That it was not found, indorsed, or presented as prescribed by the Penal Code, in that it was not voted, passed upon, or concurred in by 12 grand jurors; (2) that the names of witnesses examined before the grand jury, and of witnesses whose depositions were read to the grand jury, were not inserted at the foot of, nor indorsed upon, the indictment; and (3) that certain persons, other than those authorized by section 925 of the Penal Code to appear before the grand jury, were present during its sessions, when the charges embraced in the indictment were under consideration.

The most serious charge presented by appellants' motion to set aside the indictment is that the grand jurors were active in employing detectives to obtain evidence against the defendants; that they furnished their own funds therefor, personally talked to prospective witnesses, formed fixed opinions, which they expressed, as to the defendants' guilt, and, in effect, thus procured their indictment, prosecution, and conviction. The secretary of the grand jury was sworn, and while he was on the stand objections of the special prosecutor to certain questions bearing upon the evidence before the grand jury were sustained, whereupon the court suggested that the defendants make an offer of proof.

Counsel for the defendants accordingly offered, and requested that they be permitted, to show the following alleged facts: That prior to the appointment of any special counsel, and prior to the first regular meeting of the grand jury, certain members of that body who thereafter participated in the deliberations, personally interviewed witnesses for the prosecution, expressed opinions concerning the case, and with their own and solicited funds, employed detectives to obtain evidence against the defendants; that, through detectives and political enemies of the defendants, members of the grand jury offered assistance, comfort, and support to one Agnes Keller, the principal witness for the people, then confined in the penitentiary, and promised to procure her release if she would assist the prosecution; that a campaign manager of Kempley's former opponent for the office of district attorney, with the approval, knowledge, and consent of certain grand jurors, promised Agnes Keller her release, if she would assist the detectives employed by the grand jurors; and that at least two of the grand jurors had stated, before they heard any evidence, that they would indict them. It was further offered that defendants would, if permitted to do so, prove that a clear majority of the grand jurors were disqualified by the acts and statements specifically offered to be proved, so that 12 of the 16 jurors who returned the indictment were without the authority or qualification to participate. Hence it was urged that the indictment was not found, indorsed, or presented as prescribed by the Penal Code, to wit, by 12 grand jurors.

[1] Appellants assert that, had they been permitted to do so, they could have proven all of the foregoing gross irregularities, and that they could have shown thereby that about three-fourths of the 16 grand jurors were disqualified. However, the objection of the prosecution that all of the evidence and proof thus offered was irrelevant, incompetent, and immaterial, was sustained. Of course, for the purposes of passing upon the ruling on the offer of proof, it must be assumed that the facts contained in it are true. The respondent insists that, since the amendment of section 995 of the Penal Code, in 1911 (St. 1911, p. 435), a defendant may not set aside an indictment upon certain grounds which were at that time eliminated; that the right to challenge grand jurors was abolished. Hence it is argued that, the Legislature having eliminated as ground for quashing an indictment those to which reference is above made, even if all of the offered evidence were admitted as true, it would not justify an order granting the motion to set aside the indictment in this case under existing California laws.

[2] We think it is obvious that, under section 995, subdivision 1 of the Penal Code, if a grand juror should in fact be not qualified to act, his attempted act would be void, and if a sufficient number of grand jurors be so disqualified as to leave less than 12 of the body without power to present any person for a criminal offense, an indictment returned by such a grand jury would be invalid and ineffectual. It was so held in People v. Lensen, 34 Cal. App. 336, 167 P. 406, wherein an indictment returned by a grand jury consisting of 11 men and 8 women was involved.

This was prior to the Act of May 29, 1917 (Stats. 1917, p. 1282), empowering women to serve upon such inquisitorial bodies. The opinion quotes with approval from State v. McClear, 11 Nev. 39, 46, as follows:

> "'Jury,' as the term is used in the clause of the Constitution providing that the right of trial by jury shall not be denied, 'means 12 *competent* men, who are free from all ties of consanguinity, and all other relations that would tend to make them dependent on either party. It means 12 men who are *not interested* in the event of the suit *and who have no such bias or prejudice* as would render them partial towards either party.'" (Italics ours.)

It was held that as the statute then read, the indictment was void and should be set aside, because not found as prescribed by law, in that it was not returned by 12 qualified grand jurors. It is impossible to consider the sections of our Penal Code providing for the formation, powers, duties, and conduct of grand juries, and the exercise of their jurisdiction to indict, without recognizing that the entire plan is permeated with the principle requiring utmost secrecy of the proceedings, and the maintenance of every other possible safeguard to protect jurors from all taint of bias, and to insure freedom from partisanship or prejudice in their official acts.

Section 940 of the Penal Code negatives the possibility of an indictment being returned, except by the concurrence of 12 jurors. This, of course, means 12 jurors qualified to act as such. It is provided that a grand jury will "present no person through malice, hatred, or ill will"; they must "retire to a private room and inquire into the offenses cognizable by them"; and "before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith, and direct that any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire." Pen. Code §§ 903, 906, 907. In People v. Brown (Cal. App.) 253 P. 735, unwarranted interest and unauthorized activities of grand jurors, which tend rather to instigate and foster prosecutions than to impartially inquire into alleged offense, were indicated to be in contravention of section 919 of the Penal Code, wherein the reception of "other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or by deposition," is prohibited. In People v. Bright, 157 Cal. 663, 109 P. 33, the Supreme Court held that the word "consideration," contained in section 900 of the Penal Code, meant the investigation of the charge, and that a disqualified grand juror has not the right to participate even in the investigation.

[3] Section 919 of the Penal Code limits the evidence which may be received by a grand jury to that given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in certain cases, and the same Code, in section 925 thereof, designates who, and who only, may appear before the grand jury. In this section also is contained the provision authorizing the Attorney General under the circumstances therein stated to employ special counsel and special investigators "to investigate and present the evidence in such investigations to the said grand jury." These Code provisions all have to do with the manner in which indictments are found. Hence substantial violations of their provisions are grounds for setting aside an indictment thus illegally returned. Assuming the truth of the facts offered to be proved, a comparison of them with the provisions and inhibitions contained in the sections of the Code above mentioned establishes gross and flagrant infractions of the law in this behalf.

[4] We agree with the reasoning in the opinion in Wm. J. Burns International Detective Agency v. Doyle, 46 Nev. 91, 208 P. 427, 26 A. L. R. 600, which seems incontrovertible, and from which we quote:

> "The allegation negatives the idea that plaintiff was employed to investigate the commission of crimes generally, but that its activities were limited to particular offenses. The inference deducible from this language is that it was especially desirable to fix the liability for certain offenses. That purpose was so earnestly desired that the defendants were willing to obligate themselves for a large outlay. Is it possible for frail human nature to lend its support to the ferreting out a crime without being influenced in reaching a conclusion as to the guilt or innocence of the party? We think not. Would any one be so audacious as to say that a detective who has been active in investigating an alleged crime could be an impartial grand or petit juror? The inquiry suggests the answer. One who furnishes the money to induce the activity of a detective in such an inquiry is but slightly, if any, less liable to be prejudiced. In fact, the detective is working for the reward, and is paid for his services, regardless of results, whereas the one who puts up the money to induce the activity of the detective is in a position to use his influence to get the results he hopes for. His only reward is in finding a victim. Is he likely to be impartial toward the one who is the fruit of his own activity? A knowledge of human nature answers, 'No.' The experiences of the ages answer, 'No.' The words of St. Luke, 'Where your treasure is, there will your heart be also,' state a truism. An agreement on the part of grand jurors to finance an investigation of a particular offense inexorably prejudices them as impartial and unbiased members of the grand jury. Such a contract not only tends to create prejudice, but, unless the persons so agreeing are superhuman, it is safe to say that it in fact has that effect."

And quoting from Burns Detective Agency v. Holt, 138 Minn. 165, 164 N. W. 590, it is further said:

"'* * * Moreover, the finding of an indictment calls for the judgment of fair-minded, unprejudiced men. It is against the general consensus of opinion that ordinary men can act fairly and impartially when their purse has been placed on one side of the scale.'"

But the defense in this case, upon the suggestion of the judge, offered to prove that certain members of the grand jury, from their own funds and funds which they solicited, paid the Firman detective agency to investigate the charges against them; that the number of grand jurors who took this action was such that there were not 12 who were not thus biased. No authority need be cited to support the patent proposition that even a public prosecutor would be subject to serious criticism should he attempt to secure evidence through unethical negotiations such as here charged against members of this grand jury, to wit: That certain members sanctioned and approved offers of aid being given to a witness then in the penitentiary to secure her escape from punishment which had been meted out to her if she would give information and assistance to the detective agency which these grand jurors employed. Further, the defendants offered to show that the grand jurors themselves furnished money, and attempted to bargain with the witness, and afterwards participated in the deliberations upon the indictment, and voted on it.

[5] Had the defendants in this case been permitted to show that certain grand jurors, preceding and during the investigation of the charges, took into their own hands the functions both of sheriff and prosecutor, threatened the defendants with indictment, and sanctioned the offer of aid to freedom to a convicted felon in order to enlist her assistance in making a case against the officials who had previously prosecuted her, such evidence would undoubtedly have disqualified any member or members so imbued with interest, prejudice, or malice as to thus disregard the plain mandates of the Code. In the absence of a showing to the contrary, we must presume that the foreman performed his official duties in a lawful and regular manner, and directed that any partial or prejudiced juror retire. People v. Meraviglia, 73 Cal. App. 402, 407, 238 P. 794. This being the rule, it becomes obvious that, if legal and competent evidence were produced, as offered, the members affected would not only have been disqualified, but utterly unfit to participate in proceedings which vitally concern the rights of society and its constituents to consider and vote upon the charges before them in violation of their foreman's statutory direction that they retire. As was said of laymen by the New York criminal court in an early case, we think may be said of grand jurors with equal force:

"Let any reflecting man, be he layman or lawyer, consider the consequences which would follow, if every individual could, at his pleasure, throw his malice or his prejudice in to the grand jury room, and he will necessarily conclude that the rule of law which forbids all communication with grand juries engaged in criminal investigations, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of *safety* to the community. What value could be attached to the doings of a tribunal, so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies." People v. Sellick, 4 N. Y. Cr. R. 329.

Indeed, it is unthinkable that men under such compelling belief in the guilt of an accused person, or so filled with malice and hatred of him, as the case may be, as thus to finance a prosecution and participate in immoral bargaining for convicting evidence, should also assume the rôle of jurors, and pretend to fairly, impartially, and judicially weigh that same evidence. Yet the defendants' offer of proof involved all of this, and much more.

If the defendants are innocent, irreparable injury has been done them through being forced to stand trial and having been pronounced guilty by a verdict of a trial jury of a serious felony, made possible by illegal procedure. If they are guilty, the rights of the public have suffered equally. Delays and retrials are known to almost invariably be of advantage to those charged with crime, and in many instances to result in their ultimate unmerited escape. All of these consequences follow from an apparent too great anxiety on the part of the prosecution to secure a verdict of conviction and a laxity in taking precautions against serious prejudicial error. Had the defense been permitted to make their proof of the astounding charges contained in their offer, and such accusations were found to be untrue, and the defendants found guilty, no question of escape of possible felons would now exist. Had the charges been found true, even the prosecution should have been the last to desire to proceed to trial upon an indictment so conceived in prejudice and born of malice.

[6-8] In the matter of ferreting out crime, grand juries have no authority to hire detectives, or to receive evidence collected and produced by such agencies, except through the means and methods sanctioned by law. Section 925 of the Penal Code contains the only authority provided for the employment of investigators to procure evidence and place it before a grand jury. It does not cover the

case here presented by the offer of proof. Grand juries should be advised of the legal limitations upon their authority. If they exceed these limitations, the court should not be hesitant in declaring such to be the case, and in thus protecting the rights of individuals violated thereby. It is not within the province of grand juries to prosecute. The judicial attitude and functions which are peculiarly theirs are wholly inconsistent with such advocacy of the guilt of a person accused of crime as evidenced by the acts of partisanship offered to be proved against the members of the grand jury which voted the indictment upon which this prosecution was founded.

[9] The conclusion is inevitable that, had the appellants been permitted to introduce the evidence which they claimed to have, and had they been able to show that 11, or even 5, of the 16 grand jurors who indicted them were legally disqualified to participate in the proceedings, the indictment would necessarily have been set aside. Hence the refusal to permit them to do so was error, and a reversal is necessary.

Appellants assert many alleged errors, but upon a thorough and careful examination of the record we think the only points requiring special attention at this time consist of certain rulings upon alleged hearsay evidence and the appointment and acts of a special counsel designated by the attorney general.

The witness Agnes Keller testified at great length regarding visits to the district attorney's office, at the solicitation of the defendants, and related conversations which she had with Selleck, or with Kempley, or both, regarding the Johnson-McGovern Case. It appears that one of the appellants herein made a trip to Chicago during the pendency of the murder case for the purpose of cross-examining certain witnesses upon the taking of depositions in that case; that he had interviews with William R. Johnson, a brother of the defendant Johnson, in Chicago. Mrs. Keller testified to the effect that upon visiting the defendants at San Diego she was informed by them that William R. Johnson had considerable means, and that he was expected in San Diego soon; that Johnson was anxious to clear his brother of the murder charge, and was desirous of obtaining certain exhibits, including a knife which had been taken from the body of McMahon, and which had been connected with a previous murder in Chicago; that the defendants instructed her to interview the coroner of San Diego county, obtain from him all information possible regarding any evidence which he might have, view the remains of McMahon, and report back to the defendants the result of her efforts; that she did as instructed, returned, and related the events and conversations, the latter of which she purported to quote in her testimony.

She further testified that appellant Selleck instructed her to arrange interviews with William R. Johnson upon his arrival at San Diego, to inform him of the evidence in possession of the authorities, and to propose to Johnson that for at least $10,000 being paid to each of four persons the knife and other evidence material to inevitable conviction would be suppressed, and an acquittal assured; that she arrange to introduce or connect Johnson with Coroner Kelly. This witness swore that she complied with all such instructions, and stated upon the stand the somewhat extensive conversations which she had, or claimed she had, and reported back to the defendants in this instance. There is much of the foregoing conversations which we need not here delineate, but it is sufficient to say that Mrs. Keller's transactions and conversations with the various parties, to which she swore, and which the jury doubtless believed, were accomplished at the instance of one or the other, or both, of the appellants, embraced a complete and exhaustive scheme of connivance by Kempley, Selleck, Johnson, and the witness to solicit and collect a bribe, and to defeat justice, which the evidence also strongly tends to show was fully consummated.

Coroner Kelly, called as a witness for the people, testified that both Mrs. Keller and Johnson "tried to get hold of the exhibits," particularly the knife, and in other respects corroborated Mrs. Keller's testimony in much detail. He was asked: "Q. Who was the first to make you an offer to pay for the delivery of these exhibits—Miss Keller or Mr. Johnson?" To which he answered: "A. Mr. Johnson." During his redirect examination, over objections that it was irrelevant, incompetent, and immaterial, hearsay, and not redirect examination, and upon consent of the court that the objections were understood as going to the entire testimony in that regard, the following evidence was given by the witness:

"He [Johnson] says, 'My name is Johnson. I am from Chicago, and my brother is here charged with murder. You know it's my brother on trial for murder. It's my own flesh and blood, and I'll go the limit for him.' 'Well,' I said, 'just what is it you want?' And he says, 'You have got this certain evidence, haven't you?' I says, 'Yes.' * * * If I remember right, he was interested about the knife; wanted to know if I had the knife. I told him, 'Yes; I had everything.' * * * And he wanted to know what the chances were to get it. And I says: 'Well, I couldn't turn that over to anybody. That's evidence, and I will have to turn that in when the trial comes up.' Well, he said, if I could see my way clear to turn it over, he would make it worth my while. And I told him I wouldn't turn it over to anybody. He chatted there, nothing special; and he said, 'Well, think it over, and I will get in touch with you again.' And he called me twice on the telephone after that, and wanted me to meet him; but I told him there wasn't any use of meeting him, that there wasn't anything doing."

[10] It is insisted that the reception of such conversations, which admittedly occurred without the presence of either of the appellants, was prejudicial error. The instant case is in this respect so strikingly analogous to that of People v. Stokes, 5 Cal. App. 205, 89 P. 997, decided in this district, and in which a hearing by the Supreme Court was denied, that we need but quote the rule therefrom. In affirming a judgment of conviction of robbery, it was said:

> "The first alleged error in the record to which our attention is directed was the ruling of the court in permitting the hotel clerk to state what was said by Kincaid upon the occasion of his paying for this room for Connolly's use. It was and is now claimed by defendant that the evidence sought to be adduced by the question calling for this conversation was irrelevant, incompetent, and immaterial to any of the issues in the case; that the conversation did not take place in the presence of the defendant, and that there was no evidence introduced that tended to show any relation between Kincaid and defendant and Connolly, who was robbed. * * * The same objection was interposed to like questions throughout the trial, and the rulings of the court were adverse to defendant. * * * There were three alleged conspirators here, but it was Kincaid's conduct, acts, and movements which were the subject of inquiry when the alleged errors were committed, and his conduct, conversation, and acts during the period covered by the inquiry were not only competent and material as tending to show the existence of a common design between him and the defendant to commit the robbery, but, at the same time, in case the jury found the conspiracy to be actually established, constituted evidence tending to establish defendant's guilt."

The same rule is upheld in People v. Holmes, 118 Cal. 444, 50 P. 675, People v. Bentley, 75 Cal. 407, 17 P. 436, and People v. Fehrenbach, 102 Cal. 394, 36 P. 678. We find no error in the rulings below as to such evidence.

[11] It is objected that certain photographs of the dead body of McMahon and other objects, introduced at the trial of the Johnson and McGovern Case, were erroneously admitted in the trial of the case at bar. They constituted a part of the exhibits in controversy, and obviously they were material and competent evidence.

[12] It is contended that the special counsel, appointed by the Attorney General, was not legally qualified to perform the duties of a district attorney, and had no authority to appear before the grand jury. It is insisted that he took no oath of office, furnished no bond, and hence was not even a de facto officer; that, while the special counsel as a de facto officer might otherwise legally conduct criminal proceedings, the person who acted was disqualified by excessive personal interest in the prosecution, and had "no business in there at all under any circumstances." It appears that on August 19, 1926, the Attorney General addressed a letter to Mr. Richard Kittrelle, an attorney and counselor at law of Los Angeles county, designating and appointing him as a special counsel to represent the people of the state of California in proceedings pending before the grand jury of San Diego county, in which the district attorney of San Diego county was disqualified, and therein stated such appointment was made pursuant to the provisions of section 472 of the Political Code, and at the request of the grand jury of the county last mentioned. Mr. Kittrelle testified, and it is conceded, that he took no oath of office before presenting the case to the grand jury.

It has repeatedly been held that, while an officer elected or appointed to an office created by statute or constitutional provisions is required to take an oath and furnish bond, special counsel act *for* an officer, but not *as* such officer, and is not disqualified by the omission of the official oath or bond. State v. Viaux, 8 La. Ann. 517; State v. Buhler, 132 La. 1065, 62 So. 145; Clinton v. State, 58 Fla. 23, 50 So. 580; Lindsay v. State, 138 Ga. 818, 76 S. E. 369; State v. Cato, 116 La. 195, 40 So. 633; People v. Wright, 89 Mich. 70, 50 N. W. 792; State v. Taylor, 98 Mo. 240, 11 S. W. 570; Johns v. State, 88 Neb. 145, 129 N. W. 247; Martin v. State, 16 Ohio, 364. It is to be observed, further, that section 472 of our Political Code does not require that such appointees take an oath or furnish a bond.

[13] As to his personal interest, Mr. Kittrelle testified that he consulted with detectives regarding his employment, and discussed the matter with 5 or 6 of the grand jurors; that he interviewed witnesses, examined them before the grand jury, and left the room upon every occasion when deliberations commenced; that subsequently the foreman telephoned him that an indictment had been voted, requesting that he prepare it; and that he drew the indictment, passed it to the grand jurors, and departed. He was asked as to whether or not he had interviewed witnesses outside the grand jury room, or had stated to the grand jury what he had learned, what his opinion was as to certain evidence, or that an indictment should or should not be returned against Kempley and Selleck. Upon objections by the prosecution the trial court excluded this evidence, and such rulings are assigned as prejudicial error. It has been held that a district attorney should refrain from expressing an opinion before the grand jury as to the effect or sufficiency of evidence, but the fact that he may have done so and that his opinion was acted upon by them, does not invalidate the indictment found. People v. Hatch, 13 Cal. App. 521, 109 P. 1097. And this is true, even though the opinion or information imparted be construed as evidence, and is incompetent. People v. Collins, 60 Cal. App. 263, 212 P. 701; People v. Schmidt, 33 Cal. App. 426, 165 P. 555.

[14, 15] Nothing further of any legal import appears which would tend to indicate that the special counsel utilized improper means of obtaining or introducing evidence in the case, and in the absence of a showing to the contrary it must be presumed that he used only proper means of obtaining information. People v. Ruef, 14 Cal. App. 576, 596, 114 P. 48, 54. It must be conceded that as a representative of the people, under his oath as a member of the bar and as an officer of the court, it was counsel's bounden duty to investigate the case, to examine witnesses, and, if he believed a crime had been committed, to submit to the grand jury such evidence as, from his diligent and thorough research, he deemed to be competent and material. More especially is this true when serious charges of corruption in public office are preferred against the guardians of public justice, with whom repose the power and the obligation to protect the sacred rights of the state and of its constituents. Section 925 of the Penal Code vests in district attorneys the authority and duty to "appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them," and, since the special counsel appointed in this instance appeared in the capacity of a state officer (Sloane v. Hammond [Cal. App.] 254 P. 648), for the district attorney, or in his stead, he was clothed with all the powers of that office. We think, therefore, that Mr. Kittrelle did not disqualify himself, and was not an improper person before that body, under the inhibition of section 995 of the Penal Code.

[16] It is unnecessary to consider and pass upon a number of points presented by the briefs, in which the evidence is reviewed and its weight discussed. No matter how strongly the evidence might indicate a defendant's guilt, it would be our clear duty to uphold the law safeguarding, not only these defendants, but every citizen, from indictment resulting from prejudice and bias on the part of grand jurors. It must be apparent that if a guilty person may thus be indicted, and the indictment stand, the same result may confront one who is innocent.

The judgment and order denying a new trial are reversed, with directions that the indictment be set aside.

We concur: WORKS, P. J.; THOMPSON, J.

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89 Cal. App. 610

KAUFMAN v. BELL. (Civ. 6270.)

District Court of Appeal, First District, Division 1, California. March 2, 1928.

Vendor and purchaser ⚷350—Finding, relative to measure of damages, of bad faith of vendor refusing to convey, held sustained by evidence.

Finding that vendor, refusing to carry out his agreement to convey land, was guilty of bad faith, making the applicable measure of damages that prescribed by Civ. Code, § 3306, *held* sustained by the evidence.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by Ella B. Kaufman against Fred Bell. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter C. Fisher, of Burbank, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

TYLER, P. J. Action for damages for refusal to convey certain real property. The complaint alleged an agreement on the part of defendant to sell the property in question at an agreed price, the payment on the part of plaintiff of a portion of the price, and a demand that defendant complete the transaction; that, notwithstanding such agreement and demand, defendant in bad faith conveyed the property to another. By his answer, defendant, among other things, alleged that when he informed his wife of the transaction she refused to join with him in the conveyance, and that such refusal on her part was against his express wishes and entirely without collusion or suggestion on his part, and that her refusal precluded and prevented him from carrying out his agreement. The trial court found, among other facts, that at the time of the entering into of the contract defendant knew the title to the lands was vested in himself and his wife as joint tenants with the right of survivorship, but, notwithstanding this fact, he made no effort to obtain her consent to the agreement, nor did he have any right to believe that she would join in the sale. Judgment followed for plaintiff, the court awarding damages in an amount representing the difference between the agreed sale price and the reasonable market value, as provided by the provisions of section 3306, Civil Code, such amount being the sum of $1,750. From this judgment defendant appeals, and he claims in support thereof that, where the failure of a contracted vendor to convey land is caused by the refusal of his wife to join in the deed, it is not evidence of bad faith as contemplated in section 3306 of the Civil Code. There is no merit in appellant's claim. Plaintiff pleaded bad faith on the part of the defendant, and the proof in support thereof fully supports the conclusion of the learned trial court upon this subject.

It appeared in evidence that defendant at no time tendered back the money plaintiff had paid and that he gave various excuses for being unable to complete the transaction. He informed plaintiff a mortgagee company had a lien upon the premises for a loan and that it objected to the transaction, and gave as a further excuse for his refusal to convey that the property was restricted in its use, as a building could not be erected within ten feet of the sidewalk, which building restriction destroyed its value, as she could not build upon it. It further appeared by uncontradicted testimony that defendant, while still retaining possession of plaintiff's deposit, joined with his wife in a conveyance by grant deed of the property to one M. E. Hurlbert, a brother-in-law of the defendant, thereby disabling himself from performing his contract. Where a vendor contracts to sell land and is guilty of bad faith, the measure of damage adopted by the learned trial court is the correct one, and the question of bad faith is one of fact for the court or jury to determine. The evidence fully supports the finding of the trial court upon this subject.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

89 Cal. App. 511

WAGNITZ et al. v. SCHARETG et al.★
(Civ. 6067.)

District Court of Appeal, First District, Division 2, California. Feb. 28, 1928.

Hearing Denied by Supreme Court April 26, 1928.

1. Master and servant 🔑305—Employer may be liable for chauffeur's acts within scope of employment, notwithstanding chauffeur was disregarding directions.

Where chauffeur acts within general scope of his authority performing acts that were expressly or impliedly authorized by contract of employment, employer may be held liable, notwithstanding that chauffeur may be disregarding directions of employer at time of accident.

2. Master and servant 🔑332(2)—Court may determine whether servant was about master's business, where evidence conclusively shows very slight or very great deviation from scope of authority.

In death action against automobile owner, in which evidence conclusively shows that defendant's servant deviated from general scope of authority in but slight and not unusual manner or in great or unusual manner, court may determine as matter of law that servant was or was not about his master's business.

3. Master and servant 🔑332(2)—Whether servant is about master's business is for jury, where evidence does not conclusively show very slight or very great deviation from scope of authority.

Where evidence in death action against automobile owner does not conclusively show that defendant's servant deviated from general scope of authority in slight and not unusual manner or in great and unusual manner, question whether servant was about master's business is for jury.

4. Master and servant 🔑330(1)—There is presumption that employee driving defendant's car which struck deceased was acting within scope of authority.

Where it is admitted in death action that automobile which struck deceased belonged to defendant, and that person driving was its employee, presumption arises that such person was acting within general scope of his authority.

5. Master and servant 🔑330(2)—Whether defendant's employee driving automobile which struck deceased was acting within scope of authority held for jury.

In death action, in which it was admitted that automobile striking deceased belonged to defendant, and that driver was defendant's employee, and employee testified that he was acting on his personal business, question whether he was acting within scope of his authority *held* for jury; employee's testimony not being sufficient to destroy, as matter of law, presumption that he acted within general scope of authority.

6. Master and servant 🔑330(3)—In death action against automobile owner, evidence held to support finding that driver was acting within scope of authority as driver of jitney, notwithstanding deviation from regular route.

In death action against owner of automobile, who contended that employee driving car was not acting within scope of authority at time of accident, evidence *held* to support finding that driver of car was acting within general scope of employment as driver of jitney, notwithstanding that he deviated from regular route to secure additional fare.

7. Death 🔑62—Dying man's statement that accident was unavoidable, in refusing to prosecute driver of car which struck him, will not preclude recovery of damages for death.

Refusal of dying man to prosecute criminally driver of car which struck him will not preclude his dependents from recovering civil damages for death, even though deceased in telling police officer he did not want driver of automobile arrested stated that accident was unavoidable.

8. Municipal corporations 🔑706(5)—Evidence that automobile on rainy night swerved from course to strike man about to board street car held to support finding that accident was avoidable.

In action for death of man struck by automobile, evidence showing that deceased was struck as he was about to board street car on rainy night, and that car striking him swerved from course to come directly toward him, *held* sufficient to support finding that accident was not unavoidable.

9. Municipal corporations 🔑706(5)—In death action, evidence held to support finding that man struck by automobile while crossing street to board street car after looking for approaching vehicles was not negligent.

In death action, evidence *held* sufficient to support finding that deceased was not negligent, where he was struck by automobile while cross-

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★Hearing denied by Supreme Court.

ing street to board street car, having looked for approaching vehicles before crossing.

10. Appeal and error 🔑1058(1)—Overruling objection to question intimating counsel had records showing automobile was registered in names of both defendants held not error, in view of letter from motor vehicle department subsequently produced.

In death action, overruling of objection to unfinished question intimating that counsel had records showing that automobile which struck deceased was registered in names of both defendants *held* not error, where counsel later produced letter from motor vehicle department reciting such to be fact.

11. Municipal corporations 🔑706(6)—Nonsuit held properly denied, where defendant's car driven by servant killed deceased.

In death action, motion for nonsuit was properly denied, where plaintiffs made prima facie case by showing defendant's ownership of automobile which struck deceased, relationship of master and servant between defendant and driver, and driver's negligence.

12. Municipal corporations 🔑706(8)—Trial 🔑191(7)—Instruction in death action held properly refused, as erroneously assuming looking for approaching automobiles would have averted accident, and as referring to "remarkable prudent person."

In death action, instruction to find for defendants, if driver of defendant's car used all means that "remarkable prudent person" could use to avoid collision, and that deceased proceeded over street intersection to board street car without looking for approaching automobiles, and could have seen defendant's car if he had looked, *held* properly refused, as assuming that accident would necessarily have been avoided had decedent looked for approaching cars, and as containing words "remarkable prudent person"; there being no such person known to law.

13. Trial 🔑260(8)—Instruction in death action covered by instructions given held properly refused.

Refusal of requested instruction in death action *held* not error, where court fully covered its subject-matter by general instructions given.

14. Municipal corporations 🔑706(5)—Evidence held to support finding that driver of car which killed deceased was negligent in driving over 20 miles per hour on rainy night at point where street car was stopped.

In death action, evidence showing that driver of defendant's car which struck deceased was driving more than 20 miles per hour on rainy night at point where street car was stopped to discharge and take on passengers *held* sufficient to support finding that such driver was negligent.

15. Death 🔑99(4)—$15,000 held not excessive for death of 56 year old man earning $240 per month and board.

$15,000 *held* not excessive damages for death of man 56 years old, in good health, with cash income of $240 per month besides his board, and who devoted all of income, with exception of $10 to $25 per month, to support of wife and children.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Katie E. Wagnitz and others against Robert Scharetg and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Duncan A. McLeod and Robert H. Countryman, both of San Francisco, for appellants.

Edward J. Lynch, of San Francisco, for respondents.

LUCAS, Justice pro tem. This is an appeal from a judgment on a $15,000 verdict in a suit for damages resulting from the death of plaintiffs' husband and father, who was struck and fatally injured by an automobile operated by one of the defendants.

About 10 o'clock on the night of December 21, 1919, Katie E. Wagnitz, one of the plaintiffs, and her husband, Edward J. Wagnitz, alighted from a west-bound McAllister street car, in the city and county of San Francisco, when it stopped at the northeast corner of McAllister street and Larkin street, walked around in front of it, and started straight across McAllister street toward the curbing at the southeasterly corner of the intersection of said streets, intending to board the northbound Larkin street car, which was standing at the southwest corner of the streets above named. It was dark and drizzling, and the streets were wet. They did not have an umbrella, there was nothing to obstruct their view, and as they started across McAllister street they both looked to see if any vehicle was approaching along Larkin street. There was none. Before reaching the sidewalk they started across Larkin street, walking rapidly toward the rear of the Larkin street car. They were not yet past a point opposite the front of said car when they first saw an automobile belonging to the defendants Scharetg and driven by defendant Oliver A. McCormick. The automobile was traveling northerly along Larkin street, and as it drew near them it swerved from the course it was pursuing and came directly toward them. Mr. Wagnitz, who had hold of his wife's arm, pushed her out of the way, was struck by the automobile, dragged a distance of approximately 50 feet, and was so badly injured that he died a few hours thereafter.

Plaintiffs brought suit, joining the Scharetgs and the said Oliver A. McCormick as parties defendant, but the said McCormick was never served with summons. In their amended complaint plaintiffs allege that at all times mentioned in said complaint the defendants were the owners of the said automobile, and that at all times therein mentioned the said Oliver A. McCormick was in charge of and operating the said automobile on behalf of the defendants Scharetg as owners thereof. These allegations are not denied by the answer. The plaintiffs plead carelessness and negligence on the part of McCormick. Defendants deny this, and allege that decedent's death was caused by his own negligence.

The cause was tried before a jury. At the conclusion of plaintiff's case defendants moved for a non suit. The motion was denied. At the close of the trial the jury returned a verdict for $15,000 against the two defendants Scharetg. A motion for a new trial was denied, and this appeal is taken from the judgment on the verdict.

In their specifications of error appellants complain: (1) That the driver of the automobile was not acting within the scope of his employment and that therefore they are not liable as owners; (2) that the accident was unavoidable; (3) that the record shows the deceased to have been guilty of negligence; (4) that the court erred in certain rulings on the admissibility of evidence; (5) that the motion for a nonsuit should have been granted; (6) that the court erred in its instructions to the jury; (7) that no negligence was shown on the part of the driver; and (8) that the verdict was excessive.

[1] As to the question of whether or not the said McCormick was acting within the scope of his employment, defendant Robert Scharetg testified that at the time under consideration he was operating two automobiles for hire, one in the taxicab service, and the other (driven by McCormick) in the jitney service; that McCormick's route was from the ferry to Haight and Stanyan, and from the ferry to Twenty-Ninth and Valencia and return; that he was not permitted to operate off of those streets; that he was instructed to run exclusively as a jitney; and that the automobile was insured for the jitney service. McCormick likewise testified that he had instructions not to drive as a taxicab driver, but was to drive a jitney exclusively. He received for his services one-third of the daily receipts.

It appears from the evidence that shortly before the accident the said McCormick, while driving his jitney along Market street, took on a passenger, who requested to be driven to his home on O'Farrell street. McCormick removed the jitney signs and started to take the passenger home. No fare was collected, as the trip was never completed. It may reasonably be deducted from the evidence, however, and in view of the instructions, the jury presumably found that McCormick in deviating a few blocks from his usual route was not engaged in a private enterprise, but, on the contrary, was on a mission, the fruits of which would be enjoyed by both himself and his employer.

It is well settled that the owner's liability for the acts of a chauffeur "is determined when a satisfactory conclusion is reached as to whether at the time in question the servant was acting within the scope of his employment; whether the acts which he was performing were expressly or impliedly authorized by his contract of employment. * * * Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding directions of the employer at the time, the employer may be held liable." Adams v. Wiesendanger, 27 Cal. App. at page 593, 150 P. 1017; House v. Fry, 30 Cal. App. 157, 157 P. 500.

[2-5] Where the evidence conclusively shows that a servant deviated from the general scope of his authority in but a slight and not unusual manner, the court may as a matter of law determine that the servant was about his master's business. If the deviation is great and unusual, the court may likewise as a matter of law determine that the servant was not about his master's business, but his own. Cases falling between these extremes will be regarded as involving merely a question of fact to be left to the jury. See Berry, The Law of Automobiles (4th Ed.) pp. 1078, 1079, and cases cited. Also Kruse et al. v. White Bros. et al. (Cal. App.) 253 P. 178.

Where it is admitted that the automobile which struck the plaintiff belonged to the defendant employer and that the person driving was its employee, the presumption arises that such person was acting within the general scope of his authority; and such presumption is not destroyed as a matter of law by the testimony of such employee that he was acting on his personal business. The question of whether he was so acting becomes a question of fact for the jury to decide. Grantham v. Ordway, 40 Cal. App. at page 758, 182 P. 73; Adams v. Wiesendanger, supra.

[6] To rebut the presumption that McCormick was acting within the general scope of his authority, the defendants offered the testimony of defendants Robert Scharetg and McCormick above referred to. The positive testimony of Scharetg, however, as to the registry of his automobile was contradicted by a communication from the motor vehicle department, while McCormick's testimony was in some respects contradictory of that given by him at the coroner's inquest. The jury may have considered this sufficient to discredit their testimony. In addition, two other facts may have been considered significant: (1) McCormick was employed on a percentage basis, itself an inducement to deviate from regular routes to secure additional fares; and (2) the jitney signs were easily removable, thereby permitting such deviation with but little fear of detection. In any event, the questions relating to scope of employment were questions for the jury to decide, and the record is such that we believe the jury was fully justified in concluding that McCormick

was acting within the general scope of his employment.

[7] Appellants base their contention that the accident was unavoidable upon a statement to that effect attributed to Mr. Wagnitz a short time before he died. When the circumstances under which it was uttered are scrutinized, however, it loses its effect as an admission against interest. Mr. Wagnitz was lying on an operating table at the hospital, suffering intense pain, when a police officer asked him if he wanted to have the driver of the automobile arrested. In reply it is said he answered, "No; the accident was unavoidable." A mere refusal of a dying man to prosecute criminally, although couched in such language, should not preclude his dependents from recovering civil damages.

[8, 9] A consideration of all of the evidence convinced the jury that the accident was not unavoidable, and an examination of the entire record convinces the court that the jury was justified in its conclusion. Neither do we find anything in the record to warrant disturbing the jury's verdict on the ground of negligence on the part of the deceased. Prior to crossing the streets both Mr. and Mrs. Wagnitz took precaution to look for approaching vehicles. There being none, they proceeded directly and with ordinary care along a course they had a right to pursue.

[10] Appellant assigns as error the action of the court in overruling an objection to an unfinished question which was never answered. It contained an intimation that counsel had records showing that the automobile in question was registered in the names of both the Scharetgs. As counsel later produced a letter from the motor vehicle department reciting such to be the fact, and as the allegation of joint ownership is not denied by the answer, the assignment of error is not well taken. Other objections to the court's rulings are equally without merit.

[11] So far as the motion for a nonsuit is concerned, it was properly denied. Plaintiffs' case contained sufficient evidence of negligence to warrant its submission to the jury. Ownership and the relationship of master and servant were both proven and admitted by the pleadings. This, in the light of Grantham v. Ordway, supra, established a prima facie case.

[12, 13] The following instructions were requested by the defendants and refused:

> "You are instructed to find a verdict in favor of the defendants.
>
> "If you believe from a preponderance of the evidence that defendants' operator after first seeing decedent and immediately prior to said collision used all means that a remarkable prudent person could use under such circumstances to avoid said collision, if you believe from a preponderance of the evidence that deceased after leaving the street car proceeded on to or over the intersection of the streets without looking to see whether there were automobiles approaching, and that, had defendant looked he would have seen the automobile of defendant Scharetg approaching, and thereby could have avoided said collision with said automobile, then I instruct you that you must render a verdict in favor of defendants.
>
> "If you believe from a preponderance of the evidence that, at the time that defendants operated their automobile over Larkin street at the intersection of McAllister street, the night was rainy or misty, and that thereby the operator of defendants' automobile could not see but a short distance ahead of said car, and that at that time, and as defendants' automobile approached said intersection, defendants' operator used such caution and care as an ordinarily prudent person would use while driving at such place and time, if you further believe from a preponderance of the evidence that deceased at such time proceeded across the intersection of said streets without taking due care to avoid the approaching automobile, and that, had defendant proceeded across said intersection in a careful manner, he could have avoided a collision with the automobile of defendants, then I instruct you that you must render a verdict in favor of defendants."

As to the first requested instruction, defendants were not entitled to an instructed verdict. The second was properly refused as there is no such person known to the law as a "remarkable prudent person," and because it assumes that the accident would necessarily have been averted had the decedent looked for approaching automobiles. As to the third requested instruction, the court fully covered its subject-matter by general instructions, including one as to the degree of care decedent was bound to use and one to the effect that, if the jury should find that defendants' servant was at the time of the accident exercising ordinary care, their verdict must be for the defendants.

[14] Appellants cannot seriously contend that there was not evidence sufficient to warrant the jury finding negligence on the part of the driver, in view of the testimony that the automobile must have been traveling more than 20 miles per hour at a point where a street car was stopped for the purpose of discharging and taking on passengers; that it almost struck another passenger who was about to board the car; that it was drizzling and the street was wet; that although there was plenty of space to have avoided hitting either the street car, Mr. Wagnitz, or the curb, the automobile swerved from its course and headed directly for Mr. Wagnitz; that the driver did not even see either Mrs. Wagnitz or the Larkin street car; and that after striking Mr. Wagnitz it dragged him approximately 50 feet.

[15] Neither can it be seriously contended that a verdict of $15,000 is excessive for the death of a man 56 years old, in good health, with a cash income of $240 per month besides his board, and who devoted all of his income, with the exception of from $10 to $25 per

month, to the support of his wife and children.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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88 Cal. App. 575

PEOPLE v. PLUM et al. (Cr. 1009.)

District Court of Appeal, Third District, California. Feb. 21, 1928.

1. Indictment and information 🔑110(18)—Information charging grand theft substantially in language and form of statutes held to adequately protect rights of accused (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1, and §§ 951, 952, as amended by St. 1927, p. 1043).

Information charging grand theft as defined by Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1, substantially in language of section 952, as amended by St. 1927, p. 1043, providing that allegation of "unlawfully took" shall be sufficient to charge all acts constituting theft in form provided by section 951 as amended by St. 1927, p. 1043, together with copy of all testimony taken at preliminary examination or given before grand jury, *held* to adequately protect rights of defendant, and contention that section 952 fails to allege elements of crime of theft and alleges an act which ordinarily does not constitute crime at all, requiring information to set forth particulars, has nothing but pretext to support it.

2. Criminal law 🔑730(14)—Prosecutor's statement that people awaited verdict in theft prosecution and court's comment on objection that people were interested in conviction of guilty held not prejudicial.

In prosecution for grand theft statement by district attorney that "if these defendants are not made to suffer the penalty of their crimes, what is use of you and me teaching our sons and daughters it is better to be honest, if one guilty of such crimes are not made to pay the penalty of the law? The people of this community are awaiting with interest your verdict in this matter," objected to by defendant, but not assigned as error, and commented on by court to effect that people are always interested in conviction of every man, if guilty, *held* not prejudicial to rights of defendant.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 263 P. 862.

Ray Manwell and W. E. Davies, both of Marysville, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. [1] In their petition for a rehearing the appellants, referring to the last sentence of section 952 of the Penal Code, as amended by St. 1927, p. 1043, quoted in the original opinion, say:

> "The enactment, providing that the allegation of 'unlawfully took' shall be sufficient to charge all the acts constituting theft, * * * not only fails to allege the elements of the crime of theft, but alleges an act which might and ordinarily does not constitute a crime at all."

Section 952, however, must be read in connection with section 951, as amended by St. 1927, p. 1043), both enacted at the same session of the Legislature. Section 951 provides:

> "An indictment or information may be in substantially the following form: * * * The grand jury (or the district attorney) of the county of ——— hereby accuses A. B. of a felony (or misdemeanor), to wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the ——— day of ———, 19–, in the county of ———, state of California, he (here insert statement of act or omission, as for example, 'murdered C. D.')"

The information in this case, the charging part of which is set out in the original opinion, is in substantial compliance with the prescribed form, and it is clear that "grand theft" always constitutes a crime. In an early case it was said:

> "Our Criminal Code was designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense." People v. King, 27 Cal. 507, 510, 87 Am. Dec. 95; People v. Cronin, 34 Cal. 191, 200; People v. Fowler, 178 Cal. 657, 661, 174 P. 892.

From purely theoretical considerations it might be exceedingly important for the indictment or information to set forth the manner in which the alleged murder was committed and the means by which it was accomplished, thereby informing the defendant of the particular facts against which he will be required to defend at the trial. Theoretically, a defendant may learn during the progress of the trial, for the first time, that the prosecution relies for a conviction upon proof that the alleged murder was committed by means of poisoned candy sent from a distant state, by some subtle process or means at or near the scene of the crime, or through an accomplice, but experience has demonstrated that, from a practical standpoint, the rule requiring an indictment or information to set forth such particulars has "nothing but the most flimsy pretext to support it," and it is now "the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case." People v. Witt, 170 Cal. 104, 107, 148 P. 928. There may be technical objections to the short form of indictment or information under discussion, but when a defendant, charged with grand theft as defined by section 484, as amended by St. 1927, p. 1046, § 1, has been furnished a copy of all the testimony taken at the preliminary examination or given before the grand jury, a rule requiring the indictment or information to state more than is required by sections 951 and 952 would have "nothing but the most flimsy pretext to support it."

The extreme technicalities of the old common law are no longer followed in the English practice. The English Larceny Act of 1916 provides for a short form of indictment in charging simple larceny and more particular averments in a charge of obtaining property by false pretenses. Archbold's Criminal Pleading, Evidence and Practice (25th Ed.) 491, 669. "The distinction between larceny and obtaining by false pretenses is now little more than academic, because of the provisions of 6 & 7 Geo. V, c. 50, § 44, subsecs. 3, 4." Id. 507. "On the trial of an indictment for stealing the jury may * * * find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be. * * * If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretenses with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretenses, and thereupon he shall be liable to be punished accordingly." Id. 488.

Appellants are in error in saying in the petition that the opinion filed herein "declares that the case below was erroneously tried upon the theory that a conspiracy existed between the defendants"; the statement in the opinion being that certain proposed instructions are framed on the erroneous theory therein stated. No further discussion of the matter appears to be necessary.

It is strenuously urged in the petition that the opinion incorrectly states that a remark of the trial court of which appellants complain referred to the September report of the defendant Christman. In support of their present contention, counsel cite pages 157 and 158 of the reporter's transcript, containing evidence relating to the August report. No statement of the trial court appears on either of those pages which has any semblance of an adverse comment, and on page 159 it clearly appears that the August report was admitted in evidence without objection. It is sufficient to call attention to pages 34 and 35 of appellants' opening brief, where counsel correctly set forth the court's statement of which they complain and the evidence in relation to the report referred to by the court, citing page 201 of the transcript. A perusal of that part of their brief or that page of the transcript will remove all possible doubt as to the report to which the court referred in the statement in question.

[2] Appellants again complain of certain statements made by the district attorney in his argument to the jury and the comment of the court in relation thereto, appearing on page 358 of the transcript, as follows:

> "If these defendants are not made to suffer the penalty of their crimes, what is the use of you and me teaching our sons and daughters it is better to be honest, if one guilty of such crimes are not made to pay the penalty of the law? The people of this community are awaiting with interest your verdict in this matter.
>
> "Mr. Manwell: We object to that, intimating that the public are interested in the conviction of these men.
>
> "Mr. Norby: There is your public.
>
> "The Court: The people of the state of California are always interested in the conviction of every man, if he is guilty.
>
> "Mr. Manwell: But we object to his making that remark in the manner in which he made it.
>
> "The Court: The objection is overruled."

Neither the remark of the court nor the statements of the district attorney were assigned as error, nor was the court requested to instruct the jury to disregard them. It does not appear that the rights of the defendants were prejudiced by what was stated by either the district attorney or the court.

Counsel again urge that a new trial should have been granted on the ground of the alleged bias of the juror Viola M. Downing. It is a sufficient answer to cite People v. Emmons, 7 Cal. App. 685, 700, 95 P. 1032.

The learned trial judge was scrupulously fair and impartial in the trial of the case and there is nothing in the record to indicate a miscarriage of justice.

The petition for a rehearing is denied.

We concur: HART, J.; PLUMMER, J.

89 Cal. App. 625

PEATFIELD v. PACIFIC GAS RADIATOR CO. et al. (Civ. 4889.)★

District Court of Appeal, Second District, Division 2, California. March 2, 1928.

Hearing Denied by Supreme Court April 30, 1928.

1. Municipal corporations ⟹706(6)—Negligence of automobile driver striking and injuring woman using street instead of sidewalk held for jury; car being improperly lighted (Motor Vehicle Act, § 13[a]).

Negligence of automobile driver, whose car was not properly lighted, as provided by Motor Vehicle Act (St. 1919, p. 206, § 13[a]), in that but one of its headlights was burning, in striking and injuring woman using street instead of sidewalk to avoid stream running along side of street, *held* for jury.

2. Municipal corporations ⟹706(7)—Woman, injured by improperly lighted automobile while using street to avoid stream running along street, held not contributorily negligent as matter of law (Motor Vehicle Act, § 13[a]).

Where woman was using street instead of sidewalk in order to avoid a stream of water running along side of street, and was struck and injured by an automobile, not provided with such lights as are directed by Motor Vehicle Act (St. 1919, p. 206, § 13[a]), *held* that she was not contributorily negligent as a matter of law, where she looked before she started, and was proceeding on right side of road.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Lucile E. Peatfield against the Pacific Gas Radiator Company, a corporation, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. P. Thomson and Henry W. Mahan, Jr., both of Los Angeles, for respondent.

W. I. Gilbert, of Los Angeles, for appellants.

STEPHENS, Justice pro tem. A jury returned a verdict in this case in the sum of $8,000 against defendants and in favor of plaintiff as damages resulting from an automobile accident, and defendants appeal upon a bill of exceptions. The salient facts are as follows:

The plaintiff, a woman nurse, left her home at about 6 o'clock p. m., on October 18, 1920, to walk to a branch post office in the city of Los Angeles. She wore a dark coat, which left 20 inches of her white uniform showing below. It was raining, and she carried open a dark umbrella. At the southeast corner of the intersection of Moneta avenue and Seventy-Third street she discovered water running in Seventy-Third street, flush with the curb, and, after looking up and down Moneta avenue, and observing no vehicles approaching, walked on a board into Moneta avenue, crossed Seventy-Third, and proceeded northerly along Moneta avenue to the right of the street car tracks, expecting to cross back out of the street at the first opportunity. When about 100 feet from Florence avenue, the next cross street, she was struck from the rear by an automobile, and seriously injured. The automobile was being driven by the defendant Ostrowsky for the defendant Pacific Gas Radiator Company. The left headlight was burning and a dashlight also. The right headlight was broken, and had not functioned for some three days previously. The automobile was moving, according to the driver, at a speed of 10 or 12 miles per hour, and, after hitting defendant, went at least the length of the car before stopping, although there is some evidence that it went further. The driver saw plaintiff but a very short distance before hitting her, and could not stop in time to prevent the accident. The car did not have skid chains on. There were street lights at the Moneta and Florence avenue intersection. Some store lights also gave light in the street. The windshield on the car was wet with rain, and the driver testified that he was looking ahead and around it.

[1] Appellants contend in their opening brief that these facts show no negligence chargeable to defendants, but withdraw this claim in their reply brief. Both upon the statement and this concession we hold that there was evidence to support the jury's determination of negligence. Appellants claim in their brief "that respondent was guilty of contributory negligence as a matter of law, and that the jury should have been instructed to return a verdict for appellants." They concede that, where there is a substantial conflict in the evidence, this court will not disturb the verdict, and cite Ivancich v. Davis, 186 Cal. 520, 199 P. 784, as authority; but they quote from Shade v. Bay Counties Power Co., 152 Cal. 10, 92 P. 62, as follows:

> "With respect to the principle of contributory negligence, it is well established 'that where the facts are clear and undisputed, and where no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may itself make the inference.' Studer v. Southern Pacific Co., 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39. In Thompson on Negligence (vol. I, sec. 1249) the rule, supported by ample authority, is stated to be that 'the traveler cannot recover if he could have avoided the accident by the exercise of reasonable care on his part.' See, also, Flemming v. Western Pacific R. R. Co., 49 Cal. 253."

[2] Under the circumstances, plaintiff had a right to use the street in a reasonable manner. She was avoiding the stream running along the side of the street, expecting to cross back out of the thoroughfare at the first opportunity. She looked before she started, and was proceeding on the right side of the road. A machine unlawfully equipped as to lights, in that but one of its headlights was

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★Hearing denied by Supreme Court.

burning (Motor Vehicle Act, Stats. 1919, p. 206, § 13a), approached from the rear and ran her down. It does not seem useful to go further. These facts do not constitute negligence as a matter of law on the part of respondent. The trial court did not err in denying the motion for nonsuit, and there was abundant evidence to support the verdict of the jury. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Warner v. Bertholf, 40 Cal. App. 776, 181 P. 808; De Vecchio v. Ricketts, 66 Cal. App. 334, 340, 226 P. 11.

No other assignments of error are pressed by appellants.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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89 Cal. App. 390

Ex parte LAKE. (Cr. 1513.)

District Court of Appeal, Second District, Division 1, California. Feb. 21, 1928.

1. Constitutional law 🔑208(1)—Statutes 🔑71, 77(1)—Statute operating on particular class which, in its specification, presents genuine differentiation from other classes is not unconstitutional as discriminatory and lacking uniformity of operation (Const. art. 1, §§ 11, 21; art. 4, § 25).

Any legislative enactment which is designed to operate upon particular class which, in its specification, presents a genuine or constitutional differentiation from other classes, either individual or considered as a whole, is not unconstitutional as discriminatory and lacking in uniformity of operation in violation of Const. art. 1, §§ 11, 21, and article 4, § 25.

2. Statutes 🔑72—If statute addressed to particular class bears equally upon each person classified, it is not unconstitutional as lacking in uniformity of operation (Const. art. 1, § 11).

If statute designed to operate upon particular class bears equally upon each person so classified, it cannot be said to be lacking in uniformity of operation in violation of Const. art. 1, § 11.

3. Hawkers and peddlers 🔑7—Complaint alleging that defendant sold articles contrary to act imposing license tax on itinerant vendors of drugs sufficiently informed defendant of charge (St. 1903, p. 284, as amended).

Complaint that defendant sold specified articles of merchandise "contrary to provisions of an act entitled, 'An act imposing a license tax upon itinerant vendors of drugs, nostrums, ointments, or appliances sold for the cure of disease, injuries, or deformities,' approved March 20, 1903, and amendments thereto," referring to St. 1903, p. 284, as amended by St. 1907, p. 765, and St. 1909, p. 419, *held* to sufficiently inform defendant of charge preferred against him.

4. Indictment and information 🔑71—Law merely requires that complaint inform defendant of charge preferred.

All that law requires is that complaint sufficiently inform defendant of charge preferred against him.

5. Constitutional law 🔑208(6)—Licenses 🔑7(2)—Statutes 🔑72, 81—Statute imposing license tax on itinerant vendors of drugs, etc., held not unconstitutional as discriminatory and lacking uniformity of operation (Const. art. 1, §§ 11, 21; art. 4, § 25; St. 1903, p. 284, as amended).

Stats. 1903, p. 284, as amended, St. 1907, p. 765, and St. 1909, p. 419, imposing license tax on itinerant vendors of drugs, nostrums, ointments, or appliances sold for cure of disease, injuries, or deformities, *held* not unconstitutional as discriminatory and lacking in uniformity of operation in violation of Const. art. 1, §§ 11, 21 and article 4, § 25, since such vendors may be resolved into a class, and statute places no greater or different burden upon one member of such class than it places upon any other member thereof.

6. Statutes 🔑109—Body of an act need not adhere literally to its title.

Body of an act need not adhere literally to its title, but if it appears that title of act is reasonably indicative of legislation contained within provisions of statute, objection that subject of act is not expressed in its title cannot be sustained.

7. Statutes 🔑121(7)—Title of act imposing license tax on itinerant vendors of drugs, etc., includes persons engaged in haranguing people on public streets and in public places referred to in body of act, and act is constitutional (St. 1903, p. 284, as amended; Const. art. 4, § 24).

Title of St. 1903, p. 284, as amended by St. 1907, p. 765, and St. 1909, p. 419, reading "An act imposing license tax upon itinerant vendors of drugs, nostrums, ointments, or appliances sold for the cure of disease, injuries, or deformities," *held* to include persons engaged in "haranguing people on public streets and in public places and by using various customary tricks * * * for attracting crowds," referred to in body of act, and statute is not unconstitutional under Const. art. 4, § 24, on ground that portion of act is not embraced within title.

Application by E. B. Lake for a writ of habeas corpus prayed to be directed to respondent, as Marshal of the Municipal Court of Los Angeles, to secure the release of petitioner from custody on conviction of violation of a city ordinance imposing a license tax upon itinerant vendors of drugs. Writ discharged, and petitioner remanded.

Hewitt, Ford, McCormick & Crump and J. F. Moroney, all of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, and Vernon S. Gray, Deputy City Prosecutor, both of Los Angeles, for respondent.

HOUSER, J. Habeas corpus.

The facts herein appear to be as follows: Based upon a complaint filed in the municipal court of the city of Los Angeles, petitioner was convicted of the commission of a misdemeanor in that within said city and on a specified date he did "willfully and unlawfully conduct and carry on the business of selling and disposing of drugs, nostrums, and ointments for the treatment of disease by then and there haranguing the people on public streets and in public places, * * * contrary to the provisions of an act imposing a license tax upon itinerant vendors of drugs, * * * approved March 19, 1903, and amendments thereto."

The statute (Stats. 1903, p. 284, as amended, Stats. 1907, p. 765, and Stats. 1909, p. 419) contains a provision to the effect that, in any prosecution for a violation of the terms of the act, "it need not be alleged in the complaint nor proved by the prosecution" that the defendant had no license to sell the articles specified in the act, but that such fact may be pleaded by the defendant as a matter of defense.

[1, 2] The principal point urged by petitioner is that such provision of the statute is discriminatory and lacking in uniformity of operation and consequently unconstitutional as violative of article 1, § 11, article 1, § 21, and article 4, § 25, of the Constitution. The books are overflowing with discussion relating to the general question presented, and it would seem to be well settled in principle that any legislative enactment which is designed to operate upon a particular class which in its specification presents a genuine or constitutional differentiation from other classes, either individual, or considered as a whole, is without the purpose and intent of the constitutional inhibition as contained within the provisions of the Constitution to which reference has been had. It is also thoroughly established that, if such a law addressed to a particular class bears equally upon each person so classified, it cannot be said to be lacking in uniformity of operation. 5 Cal. Jur. 823, and authorities there cited. If, then, applying such principles to the instant case, and without doing violence to judicial or statutory requirements, it may be determined that itinerant vendors of drugs, nostrums, and ointments may be resolved into a class, and that the statute here involved places no greater or different burden upon one member of such class than it places upon any other member thereof, it would result that the point made by petitioner is unavailing to him.

The case entitled In re Gilstrap, 171 Cal. 108, 152 P. 42, Ann. Cas. 1917A, 1086, in various ways involved the constitutionality of the statute here under consideration. In substance, relying upon numerous authorities therein cited, it is there held that the definition of an itinerant vendor as found in section 3 of the act is broad enough to include hawkers and peddlers; that from early times persons so occupied have been deemed a proper subject for special legislative control and restriction; and that there is no doubt "that hawkers and peddlers may be placed in a class by themselves for license purposes." It is also therein held that:

> The act in question "is a general law, enforceable in every part of the state, regulating 'the business of selling or in any manner disposing of drugs * * * within this state' by itinerant vendors, as that term is defined in section 3 of the act. * * * *The law applies uniformly upon the whole of a single class of clearly defined individuals, and the classification is founded upon a natural, intrinsic and constitutional distinction*" (citing authorities).

[3-5] On the part of petitioner no contention is made that, assuming the constitutionality of the statute so far as the classification of itinerant vendors of drugs is concerned, the Legislature was without power to regulate the procedure with reference to violations of the provisions of the law. So far as this proceeding is concerned, therefore, the fact that, considered from the ordinary standpoint, the complaint filed in the municipal court against the defendant was possibly defective in that it failed to specifically allege that he had no license to sell drugs, nostrums, ointments, etc., becomes of no importance. The complaint, however, does contain the allegation that defendant sold the specified articles of merchandise "contrary to the provisions of an act entitled 'An act imposing a license tax upon itinerant vendors of drugs, nostrums, ointments, or appliances sold for the cure of disease, injuries, or deformities,' approved March 19, 1903, and amendments thereto." While such manner of pleading is not to be commended for its directness or certainty, it is not impossible that the defendant was thereby sufficiently informed of the charge which was preferred against him, which, after all, is all that the law requires, and consequently constitutes everything to which the defendant was legally entitled. Relying upon the principles of law as announced in the authorities to which attention has been directed, it must be concluded that the objection of petitioner to the legislation in question is not well taken.

The constitutionality of the act is also challenged by petitioner for the alleged reason that the portion of the act under which the defendant was charged is not embraced within the title of the act. Article 4, § 24, Const. The specific claim of petitioner is that by the wording of the title to the act its provisions are limited to *itinerant vendors*, and that the definition of the term does not include persons engaged, as was defendant, in "haranguing the people on public streets and in public places, and by using various customary tricks * * * for attracting crowds," etc.

The title of the act is as follows:

> "An act imposing a license tax upon itinerant vendors of drugs, nostrums, ointments, or appliances sold for the cure of disease, injuries, or deformities."

By section 3 of the act, the term "itinerant vendors" is defined as follows:

> "Itinerant vendors under the meaning of this act shall include all persons who carry on the business above described by passing from house to house, or by haranguing the people on the public streets or in public places, or use the various customary devices for attracting crowds and therewith recommending their wares, and offering them for sale."

[6] While it is possible that, in accordance with a strict interpretation of the word "itinerant," the business conducted by defendant could not be so classified, it should be remembered that it is unnecessary that the body of an act should adhere literally to its title. Abeel v. Clark, 84 Cal. 226, 24 P. 383; Ex parte Liddell, 93 Cal. 633, 29 P. 251; People ex rel. Gerberding v. Superior Court of City & County of San Francisco, 100 Cal. 105, 34 P. 492; Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 P. 86; Ex parte Hallawell, 155 Cal. 112, 99 P. 490; Park v. Pacific Fire Extinguisher Co., 37 Cal. App. 112, 173 P. 615. In that regard, if it appears that the title of the act is reasonably indicative of the legislation contained within the provisions of the statute, the objection that the subject of the act is not expressed in its title cannot be sustained.

In the case entitled Ex parte Liddell, 93 Cal. 633, 637, 29 P. 251, 252, it is said:

> "If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms and with the fewest words, and the framers of the Constitution doubtless intended the Legislature to conform to that custom."

And in Abeel v. Clark, 84 Cal. 226, 229, 24 P. 383, it is ruled that:

> "It is not necessary that the title of an act should embrace an abstract or catalogue of its contents.
>
> "* * * The main object of this provision [of the Constitution] is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another."

In the case of People v. Jordan, 172 Cal. 391, 394, 156 P. 451, 453:

> It is said: "* * * Where the body of an act embraces provisions which are *germane to the general subject* stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and where the title *suggests to the mind the field of legislation* which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation. * * *"

[7] It therefore becomes manifest that, aside from the definition contained within the statute of the term "itinerant vendors," with which the accusation against the defendant accurately coincides, the title of the act, being in no wise misleading as to what reasonably might be expected to be embraced within the statute, but, to the contrary, being plainly indicative thereof, is not in conflict with the provision of the Constitution upon which petitioner relies.

It is ordered that the writ be and it is discharged, and that petitioner be and he is remanded to the custody of the marshal of the municipal court of the city of Los Angeles.

We concur: CONREY, P. J., YORK, J.

CAMPANELLA v. CAMPANELLA.★

(Civ. 4864.)

District Court of Appeal, Second District, Division 2, California. Feb. 20, 1928.

Hearing Granted by Supreme Court April 19, 1928.

1. Judgment 🔑518, 956(2)—On defendant's claim that previous judgment barred action, plaintiff's objection to judgment roll as evidence was collateral attack limiting court to judgment roll in determining whether judgment was bar.

Where, in action for damages for deceit in land sale by partner, defendant claimed that a previous judgment was a bar to the action, plaintiff's objection to introduction in evidence of judgment roll was in nature of a collateral attack, and for that reason the court was limited to judgment roll in determining whether judgment was bar claimed.

2. Judgment 🔑470—Presumption is that judgment is valid, and facts to sustain it will be presumed to have existed.

The presumption is that a judgment is valid, and facts to sustain it will be presumed to have existed.

3. Judgment 🔑489—Judgment is not void on face unless record shows court did not have jurisdiction to render it.

A judgment is not void on its face unless the record shows that the court did not have jurisdiction to render it.

4. Judgment 🔑562—Unless record shows judgment was on merits, judgment is not available as bar or estoppel (Code Civ. Proc. § 1911, and § 1908, subd. 2).

Unless it appears from the record of a judgment that it was given on a consideration of merits of the controversy, or if it affirmatively appears that the merits were not considered

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★Superseded by opinion of Supreme Court, 269 P. 433.

such judgment is not available, under Code Civ. Proc. § 1911, and section 1908, subd. 2, as a bar or estoppel to a subsequent action.

5. Judgment 🔑713(2)—As to conclusiveness of judgment on "matters which might have been litigated," judgment is conclusive on issues tendered by complaint.

The expression that a judgment is conclusive not only as to subject-matter in controversy, but also as to every other matter that was or might have been litigated, means that a judgment is conclusive upon the issues tendered by the complaint.

6. Judgment 🔑725(1)—Judgment on material and relevant matter involved and necessarily decided is conclusive as to that question in another suit between same parties (Code Civ. Proc. § 1911, and § 1908, subd. 2).

Under Code Civ. Proc. § 1911, and section 1908, subd. 2, a judgment of a court of competent jurisdiction on a material and relevant matter of fact or law involved and actually and necessarily decided in one suit, whether or not then directly the point in issue, is conclusive as to that question in another suit between same parties.

7. Judgment 🔑956(2)—Whole record may be examined to determine whether prior judgment may be bar or operates as estoppel to subsequent suit.

The whole record may be examined to determine whether prior judgment may be a bar or operate as an estoppel to a subsequent suit, and if it appear that judgment was on merits of matter involved in second suit, the judgment may be set up as a bar or estoppel; mere form of words in which judgment is framed not controlling.

8. Judgment 🔑720—Before plea of prior adjudication may be sustained, it must appear on face of record or by extrinsic evidence that precise question was raised and determined.

Before the plea of prior adjudication may be sustained, it must appear either on face of record or be shown by extrinsic evidence that the precise question was raised and determined in prior action.

9. Judgment 🔑649—To prevent further litigation, judgment should define parties' rights with certainty.

To prevent further litigation, the judgment should define parties' rights with certainty as parties are entitled to plain and explicit determination of their rights.

10. Judgment 🔑731—If judgment does not indicate on which of several distinct matters litigated it was rendered, all matters involved will be open to new contention (Code Civ. Proc. § 1911, and § 1908, subd. 2).

Under Code Civ. Proc. § 1911, and section 1908, subd. 2, if several distinct matters were litigated and the judgment may have passed on one or more of them without indicating on which it was rendered, general rule is that the whole of matters involved will be open to new contention in subsequent suit; the judgment not being a bar or an estoppel as to matters which might have been, but were not, litigated and determined.

11. Judgment 🔑728—Judgment is not evidence of any matter incidentally or collaterally in question, or inferable only by way of argument or construction.

A judgment is not evidence of any matter which came incidentally or collaterally in question, or that may be inferred only by way of argument or construction.

12. Judgment 🔑956(1)—Burden of establishing bar or estoppel by prior judgment is on him who evokes it (Code Civ. Proc. § 1981).

The burden of establishing a bar or an estoppel because of prior suit and judgment is, under Code Civ. Proc. § 1981, cast upon him who evokes it.

13. Dismissal and nonsuit 🔑58(4)—Dismissal of action on defendant's motion, based on ground complaint does not state cause of action, is error.

It is error for the court to dismiss an action on defendant's motion therefor, based on ground that complaint does not state a cause of action.

14. Pleading 🔑218(4)—On sustaining demurrer going to merits, court may dismiss without leave to amend where leave is not requested.

A judgment of dismissal of an action on sustaining demurrer to complaint may be an adjudication on the merits when demurrer goes to merits and leave to amend is not requested, and in such event it is not error for court to enter judgment of dismissal of action without granting such leave.

15. Judgment 🔑572(2)—Dismissal of action on sustaining demurrer to complaint when demurrer goes to merits and leave to amend is not requested is "judgment on merits" (Code Civ. Proc. § 582).

Judgment of dismissal of an action on sustaining a demurrer to complaint when demurrer goes to merits and leave to amend is not requested is, under Code Civ. Proc. § 582, and in view of sections 581–581b, a judgment on the merits.

16. Judgment 🔑572(2)—Order sustaining demurrer may be final if demurrer goes to merits.

An order sustaining a demurrer may be final if the demurrer goes to the merits of the action or determines the whole merits of the case.

17. Judgment 🔑656—Judgment on demurrer is conclusive of everything necessarily determined thereby.

A judgment on demurrer is conclusive of everything necessarily determined thereby.

18. Judgment 🔑656—Ruling sustaining demurrer to complaint does not preclude filing different complaint showing meritorious cause.

A ruling sustaining demurrer to complaint does not preclude filing different complaint showing meritorious cause of action.

19. Judgment 🔑570(6)—Judgment of dismissal pursuant to stipulation that each party pay own costs is "judgment on merits" (Code Civ. Proc. § 582).

A judgment of dismissal made pursuant to a stipulation of the parties which provides that each party pay his own costs, the defendant being under no obligation to pay costs, is a "judgment on the merits," within Code Civ. Proc. § 582.

20. Dismissal and nonsuit 🔑42—General entry of dismissal of suit pursuant to parties' agreement is no evidence of intention to abandon claim on which suit is based.

A general entry of dismissal of suit pursuant to parties' agreement is no evidence of intention to abandon claim on which suit is based, but rather of a purpose to preserve the right to bring a new suit if necessary.

21. Judgment 🔑570(5)—Generally, judgments of dismissal are not on merits and do not operate as bar or estoppel in subsequent proceedings unless it appears that judgment necessarily involves those matters.

Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits and do not operate as a bar or estoppel in subsequent proceedings involving same matters unless it appears that the judgment necessarily involves those matters.

22. Dismissal and nonsuit 🔑75—Where case is dismissed without evidence having been offered, it is error to render judgment on merits.

When a case is dismissed without evidence having been offered, it is error to render judgment on the merits as there is nothing before the court on which to base any findings determinative of issues.

23. Judgment 🔑560, 634—To constitute judgment a bar or estoppel to subsequent proceedings, there must have been a right adjudicated or released in first suit; "estoppel by judgment."

To constitute a judgment a bar or an estoppel to subsequent proceedings, there must have been a right adjudicated or released in the first suit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

24. Judgment 🔑570(5), 654—Dismissal because plaintiff has chosen wrong forum, form of proceeding, or remedy, for defects in pleadings or parties, for want of jurisdiction, or because suit was premature, will not operate as bar or estoppel.

A judgment of dismissal of a cause for the reason that plaintiff has chosen the wrong forum or form of proceeding or remedy, or because of defects in pleadings or parties or for want of jurisdiction, or because suit was prematurely brought, will not operate as a bar or an estoppel to subsequent suit.

25. Judgment 🔑570(5)—Dismissal for laches in prosecuting action is not "judgment on merits."

Notwithstanding the express provisions of Code Civ. Proc. § 582, a dismissal for laches in prosecuting an action is not a judgment on the merits; being a refusal to hear and determine on merits.

26. Judgment 🔑570(5)—Judgment dismissing action for plaintiff's failure to file cost bond when required is not on merits and does not bar subsequent action (Code Civ. Proc. § 581, and § 1908, subd. 2).

A judgment dismissing an action for plaintiff's failure to file cost bond when required, though not for one of the causes mentioned in Code Civ. Proc. § 581, is not, in light of section 1908, subd. 2, a judgment on the merits and does not bar subsequent action involving same subject-matter.

27. Judgment 🔑563(2)—Judgment for costs is not on merits and is not res judicata.

A judgment for costs is not based on merits and is not res judicata.

28. Judgment 🔑565—Judgment dismissing action at plaintiff's costs without prejudice on plaintiff's voluntary dismissal does not bar subsequent suit.

A judgment dismissing an action at plaintiff's costs without prejudice on plaintiff's voluntary dismissal does not bar a subsequent suit.

29. Dismissal and nonsuit 🔑62—Court may not dismiss action for disobedience to its orders.

Court may not dismiss an action for disobedience to its orders; remedy being by punishment for contempt.

30. Judgment 🔑570(1)—Doctrine of res judicata on judgment of dismissal will be invoked only in exceptional cases.

It is only in exceptional cases that the doctrine of res judicata on a judgment of dismissal will be invoked.

31. Appeal and error 🔑934(1)—No inference may be indulged in, on review, that judgment was on merits.

On review, no inference may be indulged in that judgment was on the merits.

32. Appeal and error 🔑934(1)—Reviewing court may not read into judgment assumed state of facts to make judgment a bar to subsequent action.

The reviewing court may not read into a judgment an assumed state of facts which would make the judgment a bar to a subsequent action.

33. Judgment 🔑570(5)—Judgment dismissing suit without findings of fact, without judgment roll's disclosing dismissal grounds, and without motion for dismissal being indicated by record, held no bar to subsequent action (Code Civ. Proc. §§ 581, 582).

Where one partner sued another in action for damages for deceit in selling land, and court dismissed suit without making findings of facts, and judgment roll did not disclose on what grounds dismissal was had, and no motion for dismissal was in any way shown or indicated by the record, such judgment, not being entered on consideration of facts involved nor on merits or issues shown by pleadings therein, *held*, under Code Civ. Proc. §§ 581, 582, relative to dismissal, not a bar to subsequent action involving same issues nor an estoppel against maintenance of suit.

34. Election of remedies 🔑9—Where plaintiff's election to rescind contract was wholly abortive because of dismissal of his action, he was not precluded from subsequently maintaining action in damages.

Where one partner brought action against another partner in which election to rescind land sale contract was a factor, but such action was dismissed, not on merits, so that parties stood in same relative position as they did before action and as if no action had ever been brought, such abortive election did not preclude plaintiff from maintaining action in damages for partner's fraud in land sale contract.

35. Election of remedies 🔑1—Courts will apply doctrine of election of remedies, where disadvantage which may be caused by change of remedy will be real injury.

Courts will apply the doctrine of election of remedies, when, under the well-settled principles of estoppel, the disadvantage which may be caused an adverse party by change in remedy amounts to a real injury.

36. Partnership 🔑121—Evidence held sufficient to sustain jury's finding of partner's deceit in selling land owned in common.

In action by one partner against another in damages for deceit for misinforming plaintiff as to prospects of selling and amount of sale of land owned in common with third person, evidence *held* sufficient to sustain jury's finding of deceit.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Felice Campanella against Victor Campanella. Judgment for plaintiff, and he appealed from an order granting a new trial. Order reversed.

Canepa & Castruccio and W. W. Wallace, all of Los Angeles, for appellant.

H. A. Massey and George S. Hupp, both of Los Angeles, for respondent.

HAZLETT, Justice pro tem. This is an action in damages for deceit. Judgment was entered against defendant for $3,958.33 and costs on the verdict of a jury. Defendant moved for a new trial, his motion was granted, and plaintiff appealed.

In his second amended complaint plaintiff alleged that he and defendant and one Giovanni Gai were the owners of 167½ acres of land as tenants in common, each owning a one-third interest; that they had been partners in manufacturing wine; that defendant was the managing partner and conducted most of the business of the partnership; that plaintiff and defendant were cousins; that the partners agreed to sell the land and that defendant should procure a purchaser; that defendant represented to plaintiff that he had received an offer of $29,312.50 for the land and that he could obtain no higher offer; that plaintiff reposed great confidence and trust in defendant, and believed defendant, and believed that the land was worth no more than the amount of the alleged offer, which confidence and belief were known to defendant; that so believing, and at defendant's solicitation, plaintiff conveyed his interest in the land to defendant for $10,000; that the representations were false and were made to deceive plaintiff, the facts being that before making them, defendant had an offer of $41,875 for the land and had agreed to sell it for that sum; that the land was worth $54,437.50; and that an accounting of the affairs of the partnership was had before plaintiff learned that the representations were false; and plaintiff prayed for judgment in the sum of $8,145 as the difference between the amount received by plaintiff from defendant and the value of the land, and for interest, costs, $3,000 exemplary damages, and general relief.

Defendant's answer denied that the three owners had agreed to sell the land; denied the alleged false representations and lack of knowledge on the part of plaintiff, and that defendant had an offer of $41,875 or had agreed to sell the land before plaintiff conveyed his interest to defendant, and alleged that plaintiff then knew of every offer defendant had obtained; denied that the land was worth more than $30,000, and alleged that before this action was commenced another action had been brought by plaintiff against defendant and Gai, wherein plaintiff had alleged the same matters pleaded by him in this action, and wherein the pleadings had raised the same issues raised in this action, and that after a trial was had therein, judgment on the merits was rendered against plaintiff, which judgment estopped plaintiff from maintaining this action.

In an amendment to his answer defendant alleged that by the prior action plaintiff elected to rescind his conveyance to defendant, and that thereby plaintiff was estopped and precluded from maintaining this action or to recover damages in this action.

At the trial defendant offered to introduce in evidence the judgment roll in the prior action, which offered evidence was objected to by plaintiff on the ground that it was incompetent, irrelevant, and immaterial, and the objection was sustained.

Defendant moved for a new trial on the minutes of the court on the grounds that excessive damages were given under the influence of passion or prejudice; that the evidence was insufficient to justify the verdict; that the verdict was against the law, and that error in law occurred at the trial and was excepted to. On this motion the court made its order granting a new trial and setting aside the verdict and judgment.

This appeal was taken from the order.

In support of the order defendant advances the propositions that (1) the judgment in the prior action was res adjudicata of the matters involved in this action, and is a bar to this action; (2) that in the prior action plaintiff elected to rescind and was thereby precluded from maintaining this action; and (3) that the jury, in awarding the damages, was under the influence of passion and prejudice.

The complaint in the prior action, which named Gai and defendant, Campanella, as defendants, alleged substantially the same matters pleaded by plaintiff in his second amended complaint in this action, and also that plaintiff had offered to return to defendant the money paid him by defendant for plaintiff's conveyance, and at the same time demanded a reconveyance from defendant, which demand was refused by defendant, and plaintiff prayed for cancellation of the conveyance, for a judgment requiring defendant to reconvey, and for general relief.

Gai did not attack this complaint, nor did he plead to it. Defendant, Campanella, demurred to it on the sole ground that it did not state a cause of action. His demurrer was sustained and plaintiff was permitted to amend.

There was an amended complaint predicated in damages, which omitted Gai as a party, and plaintiff alleged therein substantially the same matters pleaded in the original complaint, that plaintiff, as such partner, owned a one-third interest in the land of the partnership, and that he was damaged in the sum of $4,175, and he prayed for judgment against defendant, Campanella, in that sum, for $15,000 exemplary damages, for costs, and general relief.

Defendant, Campanella, answered the amended complaint denying that the partnership owned the land, admitted that he acted as agent for the other members of the partnership, but only with such powers as existed by reason of his membership in the partnership, alleging that the land was held as tenants in common by the partners, and denying the alleged false representations, the alleged sale or agreement to sell, the alleged offer of plaintiff to return the moneys paid for plaintiff's conveyance, and demand for a reconveyance, or that plaintiff suffered any damage.

No other attack was made on the amended complaint; but thereafter plaintiff filed his second amended complaint alleging substantially the same matters pleaded in the amended complaint, except that he pleaded that defendant sold the lands for $41,875, that the partnership affairs had never been settled and that large sums of money were due the partnership, and praying that the partnership be dissolved, that an accounting be had, that plaintiff be adjudged the owner of one-third of the partnership assets, that a receiver be appointed, that in the event plaintiff's conveyance to defendant cannot be canceled, that plaintiff "shall receive the difference between $175 per acre [the basis upon which plaintiff conveyed to defendant] and $250 per acre [the price at which defendant had sold the land] for his one-third interest" in the land, that the partnership's assets be sold and the net proceeds be divided, and for general relief.

Defendant demurred to this second amended complaint. This demurrer was ordered off calendar, and on the day the order was made, the court made its judgment as follows:

> "This matter coming on to be heard the 5th day of January, 1921, upon a motion to strike the second amended complaint from the files, Messrs. Canepa & Gastruccio appearing for the plaintiff, and H. A. Massey and Geo. S. Hupp, Esq., appearing for the defendants, and the court having heard the arguments:
>
> "Now, therefore, it is hereby ordered, adjudged, and decreed that the second amended complaint be stricken from the files and the said action be and the same is hereby dismissed, and that the defendants have and recover from plaintiff their costs herein expended, to wit, $ [written in ink] $58.15.
>
> "Done in open court this 8th day of January, 1921. Charles S. Burnell,
> "Judge of the Superior Court."

Thereafter, the court, without any showing in the judgment roll therefor except the recitals in the judgment, made another judgment as follows:

> "This cause coming on to be heard the 18th day of January, 1921, upon a motion to strike the second amended complaint from the files, Messrs. Canepa & Castruccio and Wallace appearing for plaintiff, and Messrs. H. A. Massey and Geo. S. Hupp appearing for the defendants, and the court having heard the arguments:
>
> "Now, therefore, it is hereby ordered, adjudged, and decreed that the second amended complaint be stricken from the files without leave to amend, and that the said action be and the same is hereby dismissed, and that the defendants, and each of them, have and recover from the plaintiff their costs herein expended, to wit, $31.50.
>
> "Done in open court this 24th day of January, 1921. Charles S. Burnell,
> "Judge of the Superior Court."

There were no findings of facts, and the judgment roll does not disclose upon what grounds the second amended complaint was stricken, nor for what reason the action was dismissed. No motion for dismissal of the action is shown or otherwise indicated by the record.

Defendant contends that the judgments of dismissal in the prior action were res adjudicata of the matters involved in this action, and barred and estopped plaintiff from maintaining this action.

Plaintiff contends that as neither of the judgments purports to have been made on the merits of the cause, neither is a bar to the present action.

The two judgments in the prior action are essentially the same in form and substance, and for the purposes of this opinion they will be referred to as "the judgment."

[1] Plaintiff's objections to the introduction in evidence of the judgment roll were in the nature of a collateral attack, and for that reason the court was limited to the judgment roll itself in determining whether the judgment was the bar claimed. 15 Cal. Jur. 46, and cases cited.

No question is raised in appellant's brief as to the validity of the judgment, but respondent argues at length the proposition that the judgment is not void.

[2, 3] The presumption is that the judgment is valid, and facts to sustain it will be presumed to have existed, and, unless the record shows that the court did not have jurisdiction to render it, the judgment is not void on its face. In re Eichhoff, 101 Cal. 605, 36 P. 11; Canadian, etc., v. Clarita, etc., 140 Cal. 672, at p. 674, 74 P. 301; Hogan v. Superior Court, 74 Cal. App. 704, at p. 708, 241 P. 584; and Williams v. Blue Bird Laundry Co. (Cal. App.) 259 P. 484. The judgment is not void on its face.

The judgment roll shows that the issues were joined in the former action by the amended complaint and the answer thereto, and that plaintiff thereafter voluntarily filed his second amended complaint, which was stricken on motion of defendant as shown *only* by the judgment, and also shows that the action was not tried on the facts, but there is nothing in the judgment roll to indicate that the judgment was on the merits, unless in and of itself the judgment imports a final determination of the matters of the controversy. The cause of action in the former action and in this action were substantially the same.

There is a distinction between a judgment operating as a bar against a second action upon the same cause of action and a judgment operating by way of estoppel in a later action upon a different cause of action, or as conclusive evidence of some fact or issue common to different causes of action determined in the first action. Horton v. Goodenough, 184 Cal. 451, 461, 194 P. 34. Thus, as announced in Detwiler v. Clune, 77 Cal. App. 562, 575, 247 P. 264, 269:

> "A former judgment may be conclusive evidence that no cause of action exists. * * * It may be offered not as estoppel to proof of any fact, but as proof of the non-existence of a cause of action at all. Or (2) treated from the standpoint of its use as a piece of evidence, it may be produced when specifically pleaded as an estoppel, * * * as evidence of some material fact in the cause of action on trial, the truth of which both parties are estopped from denying."

See, also, Price v. Sixth Agricultural Ass'n (Cal. Sup.) 258 P. 387.

Section 1908, subd. 2, of the Code of Civil Procedure, provides that:

> "* * * *The judgment* or order *is, in respect to the matter directly adjudged, conclusive between the parties* and their successors in interest. * * *"

And section 1911 of the same Code provides:

> *"That only is deemed to have been adjudged* in a former judgment *which appears upon its face* to have been so adjudged, *or which was actually* and necessarily included therein or necessary thereto." (Italics ours.)

[4] Our courts have uniformly held that *unless it appears from the record of a judgment that it was given upon a consideration of the merits of the controversy*, or if it affirmatively appears that the merits were not considered, *it is not available as a bar or estoppel.*

In Price v. Sixth District, etc., supra, the court said:

> "When an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters [within the issues] that could have been heard in support of or in opposition thereto. * * * 'Even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.' Freeman on Judgments (5th Ed.) § 677, p. 1432. To the same effect see Sullivan v. Triunfo Gold, etc., Min. Co., 39 Cal. 459."

The rules above announced relate to a prior and a subsequent action involving the same cause of action and the same parties.

In order that the above holding may not be given a narrower construction than intended, reference should be had to the rules laid down in the authorities cited in its support, and we should also consider the earlier and later decisions upon the subject, many of which are hereinafter cited.

In Freeman on Judgments, § 677, above referred to, the writer declared:

> "Where the causes of action in the two actions are different, * * * the estoppel does not extend to matters which might have been litigated in the first action, but is limited to those matters or issues common to both actions which were either expressly or by necessary implication adjudicated in the first."

However, Mr. Freeman, in section 678, p. 1433, of his work, defines a cause of action as:

> "Every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court

[citing English cases]. But in determining whether the causes of action are the same for the purposes of an estoppel or a bar, it is necessary to consider their essential elements rather than the identity of the facts which may have been pleaded or proved as evidence of those elements. * * * The facts which establish the existence of that right [a primary right] and its violation constitute the cause of action. * * *"

Also, in section 687, Mr. Freeman says:

"The best and most invariable test as to whether a former judgment is a bar is to enquire whether the same evidence will sustain both the present and the former action" (citing many cases, including Maddux v. County Bank, 129 Cal. 665, 62 P. 264, 79 Am. St. Rep. 143).

See, also, sections 668, 689, 693, and 727 of the same work.

In Sullivan v. Triunfo Gold, etc., Co., 39 Cal. 459, 466, also cited in above case of Price v. Sixth District, etc., it appeared that the ultimate fact at issue was that determined in a prior action between the same parties, and that the actions involved the same cause of action, but plaintiff endeavored to show in the latter case *probative facts*, supporting the issue, different from those shown in the prior action, which different facts existed when the former action was commenced. The court held that the judgment in the former action was a bar to the latter action. See, also, Wehle v. Price (Cal. Sup.) 260 P. 878.

[5] The expression that "a judgment is conclusive not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated," although generally true, is not always applicable literally. "What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint." Lang v. Lang, 182 Cal. 765, 768, 190 P. 181, 182. See, also, Hutchison v. Reclamation District (Cal. App.) 254 P. 606, and cases cited.

[6] The general rules more fully stated are the following:

A judgment of a court of competent jurisdiction upon a material and relevant matter of fact or law, involved and actually and necessarily decided in one suit, whether or not then directly the point in issue, is conclusive as to that question in another suit between the same parties. Sullivan v. Triunfo Gold, etc., Co., 39 Cal. 459; Oakland v. Oakland Water Front Co., 118 Cal. 160, 220, 50 P. 277; Horton v. Goodenough, supra; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; and Freeman on Judgments, § 688.

[7] To determine whether a prior judgment may be a bar or operate as an estoppel to a subsequent suit, the whole record may be examined, and if it appear that the judgment was on the merits of the matter involved in the second suit, the judgment may be set up as a bar or estoppel. The mere form of words in which the judgment is framed is not controlling. Hogeberg v. Ind. Acc. Com. (Cal. Sup.) 256 P. 413; Oakland v. Oakland Water Front Co., supra; Slaker v. McCormick-Saeltzer Co., 179 Cal. 387, 389, 177 P. 155.

[8] However, before the plea of prior adjudication may be sustained it must appear either on the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the prior action. Horton v. Goodenough, supra; Heine Piano Co. v. Bloomer, 183 Cal. 398, 191 P. 900; Russell v. Place, supra; Oakland v. Oakland Water Front Co., supra, p. 220 (50 P. 277); Freeman on Judgments, §§ 689, 727.

[9] To prevent further litigation, the judgment should define the rights of the parties with certainty so that they may know what they are to do or not to do under its terms. They are entitled to a plain and explicit determination of their rights. If the judgment fails in that regard, it may result only in laying the foundation for future litigation. Omnes v. Crawford (Cal. Sup.) 262 P. 722, and cases cited; Freeman on Judgments, § 727; Loose v. Cooper, 141 Iowa, 377, 118 N. W. 406.

[10] If several distinct matters were litigated and the judgment may have passed upon one or more of them, without indicating upon which it was rendered, the general rule is that the whole of the matters involved will be open to a new contention. For instance, the judgment may have been based upon a plea in abatement, or because the cause of action had not yet accrued, or because of some technical defect, or because of temporary disability of plaintiff to sue, or the like. Section 1908, subd. 2, and § 1911, Code Civ. Proc.; Gray v. Dougherty, 25 Cal. 266, 272; Heine Piano Co. v. Bloomer, supra, and cases cited; Oakland v. Oakland Water Front Co., supra, p. 221 (50 P. 277); Horton v. Goodenough, supra; Russell v. Place, supra; Taylor v. Darling, 22 Cal. App. 101, 133 P. 503; Wehle v. Price, supra. The judgment will not be a bar or an estoppel as to matters which might have been, but were not, litigated and determined. Linforth v. Montgomery, 195 Cal. 49, 56, 231 P. 735.

[11] A judgment is not evidence of any matter which came incidentally or collaterally in question, or that may be inferred only by way of argument or construction. An estoppel cannot be created by mere argument. Certainty is an essential element of every estoppel, and unless it appear that the judgment necessarily involved a determination of the fact sought to be established in the second suit, the record will not constitute an estoppel. Beronio v. Ventura, etc., Lumber Co., 129 Cal. 232, 236, 61 P. 958, 79 Am. St. Rep. 118; Oakland v. Oakland Water Front Co., supra, pp. 224, 225 (50 P. 277); Freeman on Judgments, § 691; Coke on Littleton, 352b.

[12] The onus of establishing a bar or an estoppel is cast upon him who evokes it. Sec-

tion 1981, Code Civ. Proc.; Oakland v. Oakland Water Front Co., supra, p. 221 (50 P. 277); Freeman on Judgments, § 768.

Our courts have held that when in an action for injunction, plaintiff procured the appointment of a receiver and subsequently dismissed the action, the judgment of dismissal was conclusive against the sureties on the receiver's bond that his appointment was wrongful, and they became liable for damages resulting from the receivership; and that when a writ of injunction had issued and the action was voluntarily dismissed by plaintiff, the sureties on the injunction bond became liable for damages arising by reason of the injunction. Also, that when the defendant moved to have the injunction dissolved and plaintiff dismissed the action, the judgment of dismissal was an admission that plaintiff was unable to maintain his injunction and the dismissal had the same effect as a decision that he was not entitled to the injunction. Heim v. Mooney, 23 Cal. App. 233, 236, et seq., 137 P. 616, and cases therein reviewed.

[13] It is error for the court to dismiss an action upon defendant's motion therefor based on the ground that the complaint does not state a cause of action. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 P. 352.

[14, 15] A judgment of dismissal of an action upon sustaining a demurrer to the complaint may be an adjudication on the merits when the demurrer goes to the merits and leave to amend is not requested, and, in such event, it is not error for the court to enter a judgment of dismissal of the action without granting such leave. Bell v. Bank of California, 153 Cal. 234, 244, 245, 94 P. 889. Under the provisions of section 582 of the Code of Civil Procedure, such judgment must be held to be on the merits. Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273, 90 P. 42; Los Angeles v. Mellus, 58 Cal. 16, 18.

[16-18] An order sustaining a demurrer may be final if the demurrer goes to the merits of the action, or determines the whole merits of the case. Robinson v. Howard, 5 Cal. 429. A judgment on a demurrer is conclusive of everything necessarily determined by such judgment (Peterson v. Weissbein, 75 Cal. 174, 177, 16 P. 769); but a ruling sustaining a demurrer to a complaint does not preclude filing a different complaint showing a meritorious cause of action (Andersen v. Charles, 52 Cal. App. 290, 293, 198 P. 641).

[19, 20] A judgment of dismissal made pursuant to a stipulation of the parties therefor which provides that each party pay his own costs, the defendant being under no obligation to pay costs, is a judgment on the merits (Merritt v. Campbell, 47 Cal. 542, 547; McCord v. Martin, 47 Cal. App. 717, 726, 191 P. 89); but a general entry of dismissal of a suit pursuant to agreement of the parties is no evidence of intention to abandon the claim on which it is based, but rather of a purpose of preserving the right to bring a new suit if necessary (Laguna Drain. Dist. v. Martin Co., 5 Cal. App. 166, 172, 89 P. 993).

Where the trial court dismissed an action on its own motion without any request for the dismissal from either party, and the ground of dismissal did not appear in the record, the Supreme Court said that when the court acts in such a case "on its own motion it is highly desirable that it should state the ground upon which it acts. The failure to do so gives an appearance of arbitrary action." Loose v. Cooper, 141 Iowa, 377, 118 N. W. 406.

Freeman on Judgments (5th Ed.) § 732, states the classes of cases in which judgments of dismissal are not on the merits, as follows:

> "1. Where the plaintiff fails for want of jurisdiction in the court to hear his complaint or to grant him relief. 2. Where he has misconceived his action. 3. Where he has not brought the proper parties before the court. 4. Where the decision was on demurrer, and the complaint in the second suit sets forth a cause of action in proper form. 5. Where the first suit was prematurely brought. 6. Where the matter in the first suit was ruled out as inadmissible under the pleadings."

Other causes for involuntary dismissals, mentioned in 9 California Jurisprudence, 518, are: Nonappearance of a party; failure to pay costs on change of venue; want of authority of attorney to bring the suit; plaintiff's abandonment of the suit; failure to prosecute the suit; and delay in issuing or serving summons.

Sections 581, 581a, and 581b of the Code of Civil Procedure provide under what circumstances the plaintiff or the court may dismiss an action, and section 582 provides in effect that in all other cases judgment must be rendered on the merits.

The law relating to the effect of dismissals has been more liberally construed than a casual reading of those sections might imply.

In Oakland v. Oakland Water Front Co., supra, p. 224 (50 P. 277), the Supreme Court announced that section 582 is "the declaration of a rule of procedure, rather than a principle of law."

[21] Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits and do not operate as a bar or estoppel in subsequent proceedings involving the same matters, unless it appears that the judgment necessarily involves those matters. Oakland v. Oakland Water Front Co., supra, p. 222 (50 P. 277); Hubbard v. Superior Court, 9 Cal. App. 166, 98 P. 394; Bell v. Solomons, 162 Cal. 105, 110, 121 P. 377; Johnston v. Baker, 167 Cal. 260, 263, 139 P. 86; 18 Cor. Jur. 1200; Freeman on Judgments, § 753.

[22,23] When a case is dismissed without evidence having been offered, it is error to render judgment on the merits. There is nothing before the court on which to base any findings determinative of the issues. The absence of proof on either side could not involve a judicial determination of the merits of the controversy. Freedman v. Sirota, 109 App. Div. 874, 96 N. Y. S. 812. See, also, Kruger v. Persons, 52 App. Div. 50, 64 N. Y. S. 841. There must have been a right adjudicated or released in the first suit to constitute the judgment a bar or an estoppel. Haldeman v. United States, 91 U. S. 584, 23 L. Ed. 433; Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 115 F. 543, 549, et seq. (Welborn, Dist. J.).

[24] If the record of a judgment of dismissal fails to show that the judgment was given upon a consideration of the merits of the controversy, it is not available as an estoppel. The fact that the judgment was made at the instance of the court gives it no greater weight than if it were merely a judgment of nonsuit. The dismissal for the reason that plaintiff has chosen the wrong forum or form of proceeding or remedy, or because of defects in the pleadings or parties, or for want of jurisdiction or because the suit was prematurely brought, will not operate as a bar or an estoppel to a subsequent suit. Oakland v. Oakland Water Front Co., supra; Hogeberg v. Industrial Accident Commission, supra.

[25] Notwithstanding the express provisions of section 582, a dismissal for laches in prosecuting an action is not a judgment on the merits but is a refusal to hear and determine on the merits. Johnston v. Baker, 167 Cal. 260, 263, 139 P. 86.

[26-29] A judgment by the court dismissing an action for failure of plaintiff to file a cost bond when required is not for one of the causes mentioned in section 581, but nevertheless in the light of the provisions of section 1908, subd. 2, Code of Civil Procedure, the judgment is not on the merits and is not a bar to a subsequent action involving the same subject-matter. The only matter adjudged is that security for costs had not been given. Rosenthal v. McMann, 93 Cal. 505, 509, 29 P. 121. A judgment for costs is not based on the merits and is not res adjudicata. Taylor v. Darling, 22 Cal. App. 101, 133 P. 503. A judgment dismissing an action at plaintiff's costs, without prejudice, upon plaintiff's voluntary dismissal is no bar to a subsequent suit. Hibernia Sav. Soc. v. Portener, 139 Cal. 90, 72 P. 716; Brown v. Shroeder (Cal. App.) 263 P. 325. When the court discovers that a contract sued on is illegal and void and should not be enforced, it will dismiss the action and leave the parties where it found them, although neither party moves for a dismissal. Kreamer v. Earl, 91 Cal. 112, 118, 27 P. 735; Bank of Orland v. Harlan, 188 Cal. 413, 421, 206 P. 75; MacRae v. Heath, 60 Cal. App. 64, 72, 212 P. 228. But the court may not dismiss an action for disobedience to the orders of the court. The remedy in such case is to punish for contempt. (9 Cal. Jur. 523, and cases cited.)

[30] It is only in exceptional cases that the doctrine of res adjudicata upon a judgment of dismissal will be invoked.

In Pyle v. Piercy, 122 Cal. 383, 55 P. 141, it appeared that when the action was called for trial the defendant made a motion to dismiss the action for the reason that plaintiff failed to appear. Plaintiff's attorney then appeared and declined to further prosecute the action, and the court thereupon ordered the action dismissed and gave judgment for defendant for costs. Thereafter plaintiff commenced a new action, and defendant pleaded former adjudication. The Supreme Court said:

> "When there has been no adjudication of the cause upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of a judgment of res adjudicata upon the facts. Upon reason there is nothing to justify such a rule [plea]; nothing has been litigated, and no principle of estoppel can be invoked. If plaintiff had proceeded with the trial until nonsuited upon the weakness of her evidence, such judgment of nonsuit would not have been a bar to the commencement of the present action. How much less reason to declare a bar under existing circumstances. We find no direct authorities in this state upon the question, but in the case of Laird v. Morris, 23 Nev. 34 [42 P. 11], the matter is directly presented under a similar statute, and after careful consideration it was held that such a judgment was not a bar."

See, also, Brown v. Shroeder, supra.

[31] The onus was on defendant to establish that the judgment of dismissal of the former action was a bar to or estoppel against the maintenance of the action at bar, and the record does not show that any proof was taken by the court which would infer, much less establish, that the judgment was on the merits; the record does not affirmatively show or infer that the judgment was given on the merits of the action, nor that it necessarily involved the merits, issues, or facts; no inference may be indulged in that the judgment was on the merits; the judgment does not certainly or uncertainly define any of the rights of the parties other than plaintiff should no longer maintain the action; the face of the record leaves to conjecture what was necessarily involved in and decided by the judgment; and no ground for the dismissal is shown.

[32] Defendant's contention that this court should read into the judgment some assumed state of facts which would make it a bar to the present action has no support in the decisions of the courts, nor can we find any support for such contention in the texts of the law writers. On the contrary, as held in Pyle v. Piercy, Oakland v. Oakland Water Front Co., Gray v. Dougherty, supra, Horton v. Goodenough, supra, and other decisions quot-

ed from in this opinion, this court may indulge in no such assumption.

[33] Neither can we agree with defendant in his claim that as the judgment of dismissal was not within the provisions of section 581 of the Code of Civil Procedure and that by reason of section 582 the judgment was on the merits.

If we should indulge in any assumption, it might well be that when the lower court sustained defendant's motion to strike the second amended complaint, plaintiff refused to further prosecute the action, and that thereupon the court gave its judgment dismissing the action for lack of prosecution.

The judgment was not entered upon any consideration of the facts involved in the action nor upon merits or issues shown by the pleadings therein, and therefore the judgment is not a bar to this action or an estoppel against its maintenance.

[34] Respondent contends that by the prior action plaintiff elected to rescind, thereby elected his remedy, and is precluded from maintaining this action in damages for fraud.

The original complaint in the prior action pleaded an attempt by plantiff to rescind. It was demurred to by defendant on the ground that it did not state a cause of action, the demurrer was sustained, plaintiff filed his amended complaint *in damages* for fraud, and defendant answered it. Therefore, so far as the parties are concerned, plaintiff's attempt to plead rescission was wholly abortive, and by the amended complaint and defendant's answer thereto the parties predicated the action in damages. Defendant did not plead in the prior action that by his complaint plaintiff elected to follow rescission as his remedy.

In opposition to defendant's contention, plaintiff calls particular attention to the recent case of Herdan v. Hanson, 182 Cal. 538, at 542, 189 P. 440, 442, in which Herdan recovered damages against Hanson for fraud in a trade of properties between them. Herdan had brought a prior action against Hanson based on alleged rescission, in which the court granted a nonsuit and dismissal of the action on the ground that Herdan failed to tender Hanson a deed of the property he obtained from Hanson. In the subsequent action for damages Hanson contended that, by the action for rescission, Herdan elected his remedy and was barred from maintaining the damage suit. In passing upon this contention the court said:

> "Where a party makes a mistake in election of remedies, he is not estopped by his abortive election from subsequently resorting to and pursuing a remedy to which he was really entitled. Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am. St. Rep. 84. * * * The effect of the judgment of nonsuit in the prior action was merely to leave the plaintiff and defendant in the same relative position as before the action was commenced, namely, with a subsisting contract through which plaintiff claims to have been defrauded. McGibbon v. Schmidt, 172 Cal. 70 [155 P. 460]. * * * 'The defendant is placed in no worse position by reason of the unsuccessful prosecution of that action. There is, consequently, no estoppel.'"

The Herdan Case has peculiar application here. This action is based on damage for false representations on substantially the same allegations of facts as contained in the amended complaint in the prior action.

[35] "Under the well-settled principles of the doctrine of estoppel, the disadvantage [which may be caused the other party by the change of remedy] * * * must be a real injury, such as would, in contemplation of law, amount to" an "estoppel. When it is of this character the doctrine of election of remedies will be applied by the courts. Buckmaster v. Bertram, 186 Cal. 673, 678 (200 P. 610)." Mansfield v. Pickwick Stages, 191 Cal. 129, at 131, 215 P. 389, 390, and Roullard v. Rosenberg Bros. & Co., 193 Cal. 360, 224 P. 449.

[36] In this action the defendant has not shown or claimed that he suffered any disadvantage by reason of the prior plea in rescission and the subsequent pursuit by plaintiff of the remedy of damages.

We hold that plaintiff did not elect his remedy by the prior action.

Respondent contends that the jury, in assessing the damages, was under the influence of passion and prejudice.

There was a conflict in the evidence upon the question whether defendant had the offer of $250 per acre for the land before he procured plaintiff's conveyance of his one-third interest. There was, however, substantial evidence supporting plaintiff's contention that defendant then had such offer. This evidence was sufficient to sustain the special finding of the jury that defendant had the offer before he bought plaintiff's interest.

The evidence showed without contradiction that defendant made an agreement to sell the land for $250 per acre on the day he bought plaintiff's interest in it upon the basis of $175 per acre.

Each party called two witnesses who testified as to the fair market value of the land in the month in which the transaction occurred, each of whom qualified as an expert. One of plaintiff's witnesses testified that the value was $300 per acre, and the other $250. One of defendant's witnesses testified that the value of the whole of the land was $175 per acre and that the value of an undivided one-third interest was on the basis of $130 per acre for the whole. Defendant's other witness testified that the value of the whole of the land was $180 per acre and that an undivided one-third interest was one-third of the value of the whole.

There was substantial support for the verdict of the jury, and there is nothing in the record which tends to show that the jury was actuated by passion or prejudice.

Inasmuch as the court's order does not say that the new trial was granted on account of the insufficiency of the evidence, we must presume in accordance with the mandate of section 657, Code of Civil Procedure, that the new trial was not granted on that ground but upon the questions hereinbefore discussed.

The order of the trial court granting a new trial is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

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89 Cal. App. 741

MURRAY v. SOUTHERN PAC. CO. ★
(Civ. 5119.)

District Court of Appeal, Second District, Division 1, California. March 6, 1928.

Hearing Denied by Supreme Court May 3, 1928.

1. Trial 🔑165—On motion for nonsuit, all evidence in favor of plaintiff, together with favorable inferences, must be considered as true.

On motions for nonsuit, all of the evidence in favor of plaintiff must be considered as true, together with every inference favorable to plaintiff and fairly deducible from the evidence received, and any evidence in conflict with that favorable to plaintiff may be disregarded.

2. Carriers 🔑228(1)—Evidence of failure to sand floors of cattle car and of violent jerking held sufficient to place burden on carrier of showing freedom from negligence.

In action by shipper for injury to live stock in transit, evidence of carrier's failure to sand floors of the cars and as to the violent jerking of car *held* sufficient to place burden on defendant of showing its freedom from negligence, rendering judgment of nonsuit erroneous.

3. Carriers 🔑230(1)—Contract of carriage not offered or admitted in evidence cannot be considered in passing on carrier's right to judgment of nonsuit.

In action for injury to livestock in transit, contract of carriage which was not offered or admitted in evidence cannot be considered in passing on defendant's right to judgment of nonsuit, notwithstanding during trial defendant amended its answer by attaching thereto a copy of bill of lading.

4. Carriers 🔑229(2)—Shipper held entitled to difference between value of live stock in condition they arrived and their value in good condition.

In action for injury to live stock in transit, evidence of plaintiff's witnesses as to market value of cattle as delivered and their reasonable value, if delivered in good condition, entitled plaintiff to judgment for difference between such values, and fact that, after their arrival, they were fattened and treated by a veterinarian, so that their value was enhanced, does not change the rule.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by Rex B. Murray against the Southern Pacific Company for damages for injury to live stock in transit. Judgment of nonsuit, and plaintiff appeals. Reversed.

Glensor, Clewe, Van Dine & Turcotte, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff delivered thirty-five cows to defendant, a common carrier, on February 20, 1923, at Gordon, Cal., for shipment to Hynes, Cal. He alleges that the stock was badly damaged by the negligence of the defendant, first, in not properly sanding the floor of the car containing the cows, and, second, in causing the car to be violently jerked, and seeks damages for the injuries sustained. The trial court granted defendant's motion for a nonsuit at the close of plaintiff's evidence, and the plaintiff appeals from the judgment rendered upon the granting of the motion.

Defendant contends that negligence on its part was not shown. Plaintiff was sworn as a witness, and testified that he accompanied the stock on the freight train over the Tehachapi pass and that he examined the floor of the car in which the cattle were shipped; that there was "practically no sand at all in the car. There wasn't a fraction of an inch in there. Two or three handfuls is all. You could see the boards through the sand." He further testified that he paid to defendant the customary charge for sanding. It was shown in evidence that defendant's published rules and regulations governing the transportation of livestock, filed with the Railroad Commission, required that the floor of the car "must be covered with sand, cinders, or other suitable material to a depth of not less than two and one-half inches." The regulations further provided that, "since the object of bedding cars is to furnish proper footing for the stock to avoid injury, agents must use great care to see that cars are properly bedded."

To establish his claim that the car was violently jerked, plaintiff testified that while he was asleep in a bunk in the caboose, the train was suddenly stopped with a "terrible crash" while traveling at 25 or 30 miles per hour. Plaintiff was thrown from his bunk to the floor. He said: "The train broke at that time. * * * It took about one hour, I should judge, to repair the train." A number of other jerks were described by the witness. He testified:

"Q. Describe the jerks that occurred. A. I would be sitting in the middle of the caboose, I mean halfway between one end and halfway between the other, and we were clattering along down there, and the train would come to such an abrupt stop it shot me clear into the end of

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★Hearing denied by Supreme Court.

the caboose against the door. * * * Q. How often did that occur during that part of the transportation? A. I didn't give it a chance to occur again. I got hold of something and hung onto it. * * * Q. Now describe to the court, if you will, the nature and character of the jerks which you have mentioned between the point of the first and second break. A. Well, the nature of them would be this: The train would be traveling along at a fair rate of speed, and all of a sudden the brakes were applied for some cause or other, I don't know. Q. And what would happen when the brakes were applied? A. The train would come to a stop or jerk."

When they were received by defendant the cows were in good condition. Upon their arrival in Los Angeles, they were shown to be in bad condition. A veterinary surgeon who examined the stock testified that all but one of the animals were injured. Four of them had broken ribs, and one had a five-inch rupture. Most of them were bruised and "skinned," and many walked "as if in great pain." They were physically unfit to complete the journey by rail, and plaintiff transported them from Los Angeles to Hynes by motor truck.

[1, 2] From the foregoing it is apparent that plaintiff has sustained the burden resting upon him of showing negligence on the part of defendant and that his stock was damaged. No rule of law is more firmly established than that upon motions for nonsuit all of the evidence in favor of plaintiff must be considered as true, together with every inference favorable to plaintiff and fairly deducible from the evidence received. Any evidence in conflict with that favorable to plaintiff may be disregarded. Davis v. Crump, 162 Cal. 513, 123 P. 294. By receiving compensation for so doing, defendant undertook to see that the car was properly sanded; by its own regulations it declared in effect that the sanding was necessary for the proper hauling of cattle and set forth the minimum of material to be used; and by the testimony of plaintiff it was shown that the sanding was not done properly or in the manner required by the regulations. In the matter of the violent jerking of the car, the doctrine of res ipsa loquitur applies. The testimony of plaintiff was sufficient to place upon defendant the burden of showing freedom from negligence in the operation of the train.

[3, 4] Defendant contends that, notwithstanding the injuries sustained by the cattle, it is established that plaintiff did not have a right to recover judgment against defendant, since he suffered no financial loss. Counsel rests this contention upon the fact that during the trial he amended his answer by attaching thereto a complete copy of the bill of lading, the contract of carriage between plaintiff and defendant, in which, according to defendant's argument, the limit of liability of defendant is set at $50 for each head of stock. Counsel further argues that the evidence shows that about two weeks after the arrival of the cows at their destination they were sold for a total sum amounting to more than $50 per head. Counsel states in his brief that the contract of carriage "was pleaded and offered in evidence." He does not claim that it was received in evidence. The record discloses that a document, presumably the contract of carriage, was shown to plaintiff while he was on the witness stand, and plaintiff was asked if his signature appeared thereon. A question followed concerning the document, which was objected to by plaintiff. Then ensued some discussion, followed by the noon adjournment. It does not appear from the record that the contract was offered or admitted in evidence. Therefore it cannot be considered in passing upon the right of defendant to a judgment of nonsuit. Moreover, plaintiff contends that under the terms of the contract of carriage defendant's liability was not limited to $50 for each animal.

Without passing upon the contentions of the respective parties in regard to the liability under the contract, it is sufficient to point out that plaintiff presented ample evidence to prove that many of the individual cows were worth less than $50 at the time of delivery at their destination, and that the herd, as a whole, was at that time worth less than the sum of $1,750. The witness Otting, after qualifying as an expert, testified that the reasonable market value of the animals was "about $22.50 a head." The witness Zangle, also an expert, testified that the market value of one of the cows was $10 and of four others $21 each. It was shown in evidence that the value of the cows would have been from $120 to $135 per head if they had arrived at Hynes in good condition. On the evidence introduced by plaintiff he was entitled to judgment for the difference between the value of the animals in the condition in which they arrived and their value in good condition at the same time and place. This rule would not be changed by a showing that after their arrival they were fattened and treated by a veterinarian so that their value was enhanced. This appears to be conceded by counsel for defendant, since he says in his brief:

> "Under the law, the market value of the cows at any other time than the time of the delivery would be immaterial."

In 10 Corpus Juris, 396, the rule is set forth:

> "Where goods intrusted to a carrier for shipment are injured through causes for which the carrier is responsible, the owner of the goods is entitled to recover the difference between the value of the goods at the time and place of delivery in an uninjured condition and their value in the depreciated condition in which they were delivered."

This rule was followed by Olcovich v. Grand Trunk Ry. Co., 179 Cal. 332, 176 P. 459, where it is said that the amount which will compensate the party aggrieved is the "value at the point of destination in case of total loss (Civ. Code, § 3316), and the depreciation in value at that point in case of partial loss, unless limited by contract."

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

89 Cal. App. 659

WILLIAMS v. McQUEEN. (Civ. 5401.)

District Court of Appeal, First District, Division 1, California. March 5, 1928.

1. Judgment 🔑143(1)—Statute permitting setting aside judgments for excusable neglect should be liberally construed.

Provision of Code permitting the setting aside of judgments taken against one where there has been excusable neglect should be liberally construed with a view to effect its object and promote justice, pursuant to general Code provision governing construction of Codes as a whole.

2. Judgment 🔑143(3)—Relief from default judgment should not be given to one willfully slumbering on rights nor on flimsy excuses or claims of ignorance of law.

Relief from default judgment should not be given to one who willfully slumbers on his rights and makes no effort to protect himself, and courts should not listen to flimsy excuses and to the claim of ignorance of the law.

3. Judgment 🔑139—Though motion to open default is addressed largely to court's discretion, doubts should be resolved in favor of application.

While a motion to open a default is addressed largely to the discretion of the court, all doubts should be resolved in favor of the application.

4. Judgment 🔑143(2)—Refusal to set aside default held abuse of discretion, where defendant engaged attorney who was not guilty of neglect in failing to appear and defendant's answer tendered meritorious defense.

Trial court's refusal to set aside default judgment *held* abuse of discretion, where defendant had procured services of an attorney to act for him in contemplated suit, and, when served with summons and complaint, he immediately caused same to be delivered to attorney, who failed to appear because he was not informed of existence of action due to negligence of his stenographer until after default was entered, and defendant's answer showed that he had a meritorious defense.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by R. F. Williams against H. S. McQueen. Default judgment for plaintiff, and, from court's refusal to set aside the judgment, defendant appeals. Reversed.

Ernest N. Clark, of San Diego, and George G. Graham, of Fresno, for appellant.

James W. Campbell, of Fresno, for respondent.

TYLER, P. J. This appeal is prosecuted on account of alleged error by the court in refusing to set aside a default judgment. The record shows that on May 6, 1925, plaintiff filed a verified complaint praying for damages against defendant on account of injury sustained in an automobile collision. Summons was served on defendant within the county on the 11th day of May, 1925. His default was entered May 25, 1925, and judgment was entered thereon on May 27th following. The next day defendant gave notice of motion to set aside and vacate the default judgment with permission to file an answer, and also certain affidavits which were to be used at the hearing of the motion. On the 19th day of June, 1925, the court denied the motion and refused to set aside the judgment. On the 6th day of July, 1925, defendant appealed from said action of the court. It is claimed that the court abused its discretion in denying the motion.

The affidavit of defendant in support thereof recited in substance, that prior to the filing of the complaint affiant consulted E. N. Clark, an attorney at law, with reference to the accident, and of his rights and duties in the event of a suit, and at that time he employed Clark to defend him in any action that might be brought, that thereafter affiant was served with a complaint and summons, and he immediately thereafter delivered the same to one Penn Cummings, an attorney at law, who was representing him in other matters, and requested and instructed Mr. Cummings to deliver the papers to E. N. Clark, the attorney he had employed to handle said matter for him, and further requested that Clark be instructed to do all things necessary and proper to protect the rights of affiant. Penn Cummings, in a similar affidavit, recited that he had received the process in the action from defendant as alleged by him, and that he visited the office of Clark, and in conformity with defendant's instructions delivered the papers to one Helen Johnston, a clerk and stenographer in Clark's office, Clark being absent, with instructions to deliver the same to her employer immediately upon his return. At the same time affiant indorsed on said papers a notation that the answer was due May 21, 1925. Helen Johnston made affidavit to the effect that she was a clerk and stenographer for Clark, and that she had received the complaint and summons from Cummings with instructions to deliver the same to Clark, that through inadvertence and mistake affiant neglected to deliver the paper to Clark until May 27, 1925, and that she likewise forgot to inform Clark that she had received the same or that an answer was due May 21, 1925, a fact she was familiar with by reason of the notation made on the papers by Cummings. The affidavit of Clark, attorney for defendant, showed that he had been employed by defendant in the event of suit, and that he had no knowledge of the action until the complaint was delivered to him on May 27, 1925, by Helen Johnston, who was at that time his stenographer and filing clerk; that immediately thereafter affiant called on plaintiff's attorney and asked for permission to file an answer, which request was refused on the ground that plaintiff had already filed his judgment; that affiant was prepared to answer, and would have done so in proper time had he known of the action before the judgment was entered. Defendant filed an answer denying the allegations of plaintiff's complaint, and alleged by way of cross-complaint that plaintiff had negligently operated his automobile to the damage of defendant in the sum of $84.99.

[1, 2] The answer shows that defendant had a meritorious defense, which is the equivalent to an affidavit of merits. The provision of the Code permitting the setting aside of judgments taken against one where there has been excusable neglect should be liberally construed with a view to effect its objects and promote justice pursuant to the general Code provision governing the construction of the Codes as a whole. It is remedial in character, and should be so applied as to dispose of cases upon their substantial merits and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. Courts therefore should be liberal in relieving parties of defaults caused by inadvertence and excusable neglect. This does not mean, however, that relief should be given to one who willfully slumbers on his rights and makes no effort to protect himself, and courts should not listen to flimsy excuses and the claim of ignorance of the law. Here, however, defendant did everything that was in his power in the premises. He anticipated that an action might be brought against him by reason of the accident, and he procured the services of an attorney to act for him in the event of such a suit. When served with summons and complaint he immediately caused the same to be delivered to his attorney. Nor can the attorney so employed be said to be directly guilty of any neglect. He was not informed of the existence of the action nor with the fact that the papers had been left in his office, until after the default was entered. The very next day after the entry of the judgment he took steps to be relieved therefrom.

[3, 4] While a motion to open a default is addressed largely to the discretion of the court, all doubts should be resolved in favor of the application; and where, as here, the circumstances show that a defendant has done everything in his power in the premises, and there has been no inexcusable neglect on his part or that of his attorney, the judgment should be vacated. No counter affidavits were filed by plaintiff, and it is not contended that the showing made by defendant did not present the true situation. Under all these circumstances we are of the opinion that the court abused its discretion in not relieving defendant from his default.

It follows that the order of the court refusing to set aside the default of defendant and to vacate the judgment rendered thereon should be, and it is hereby, set aside.

We concur: KNIGHT, J; PARKER, Justice pro tem.

89 Cal. App. 485

WALDECK v. HEDDEN et al. (Civ. 6129.)

District Court of Appeal, First District, Division 2, California. Feb. 27, 1928.

1. Specific performance ⇨10(1)—Specific performance as to undivided half interest owned by one agreeing to convey all will not be decreed.

Specific performance as to undivided one-half interest owned by one agreeing to convey all will not be decreed, since such decree amounts to making of new contract for parties.

2. Husband and wife ⇨262(1)—There is presumption that property acquired by husband is community property.

Where husband acquires property by ordinary grant deed at time when he is living with wife, presumption arises that property is community property.

3. Husband and wife ⇨264—Husband's statement that he could convey property acquired while living with wife held insufficient to overcome presumption that property was community property.

Husband's unexplained statement that he was in position to convey certain property which he had acquired by ordinary grant deed at time when he was living with his wife *held* insufficient to overcome presumption that such property was community property.

4. Husband and wife ⇨264—Evidence must be clear and convincing to overcome presumption that property acquired by husband is community property.

Evidence must be clear and convincing to overcome presumption that property acquired by husband by ordinary grant deed at time when he is living with wife is community property.

5. Husband and wife ⇨267(1)—Agreement by husband alone for exchange of community property is not enforceable (Civ. Code, § 172a, as added by St. 1917, p. 829).

Agreement to exchange community property acquired since enactment of Civ. Code, § 172a, in 1917 (St. 1917, p. 829), is not enforceable without wife joining in execution of agreement.

6. Husband and wife 🔑3(1)—Husband may select new domicile, and wife must follow him.

Husband has power to select new domicile, and it is wife's duty to follow him.

7. Husband and wife 🔑267(9)—Wife held not estopped from preventing exchange of community property by husband, though she followed husband in moving out (Civ. Code, § 172a, as added by St. 1917, p. 829).

Wife *held* not estopped, under Civ. Code, § 172a, as added by St. 1917, p. 829, from asserting rights to prevent exchange of community property by husband, where no deeds were executed and wife never promised to sign and disapproved of exchange, notwithstanding that she followed husband in moving out of property.

8. Limitation of actions 🔑62—Wife held not barred by limitation from preventing exchange of community property by husband where exchange contract was not recorded, notwithstanding filing of complaint and lis pendens (Civ. Code, § 172a, as added by St. 1917, p. 829).

Wife *held* not barred from preventing exchange of community property by husband by Civ. Code, § 172a, as added by St. 1917, p. 829, providing action to avoid instrument must be commenced within year from filing for record, where exchange contract was not recorded since filing of complaint, and lis pendens cannot be recognized as substitute for recording of contract as beginning point of period of limitation.

9. Husband and wife 🔑267(1)—Wife's defense to suit for specific performance of husband's contract to exchange community property, pleaded by way of answer, relates back to time of filing of action (Civ. Code, § 172a, as added by St. 1917, p. 829).

Wife's defense against action for specific performance of husband's contract to exchange community property pleaded by way of answer and not by way of complaint relates back to time of filing action in determining whether wife's defense is barred by limitation in Civ. Code, § 172a.

10. Principal and agent 🔑177(6)—Plaintiff cannot claim validity of husband's contract to exchange community property on ground of ignorance of marriage, where plaintiff's agent knew of marriage (Civ. Code, § 2332, and § 172a, as added by St. 1917, p. 829).

Plaintiff seeking specific performance of husband's contract to exchange community property cannot claim validity of contract under Civ. Code, § 172a, as added by St. 1917, p. 829, on ground that he did not know of defendant's marriage, where plaintiff's agent called on defendants and knew of marriage; agent's knowledge being imputed to plaintiff under section 2332.

11. Husband and wife 🔑267(1)—Husband's contract to exchange community property, in which wife did not join, cannot be specifically performed (Civ. Code, § 172a, as added by St. 1917, p. 829).

Specific performance of contract for exchange of community property by husband cannot be decreed where wife did not join in agreement of exchange and is not estopped by Civ. Code, § 172a, as added by St. 1917, p. 829, nor by conduct, nor barred by statute, from asserting her rights.

12. Specific performance 🔑10(1)—Generally, where vendor cannot convey all he has agreed to convey, purchaser may have specific performance so far as possible and money compensation for balance.

General rule is that where vendor is unable to convey all that he has agreed to convey, purchaser at his option may have specific performance so far as possible and money compensation for portion as to which conveyance is impossible, such compensation usually being based on average or unit value as agreed on by parties.

13. Specific performance 🔑64—Contract for exchange of property may be specifically enforced.

General rule is that contract of exchange of property may be specifically enforced as well as contract to convey for money.

14. Specific performance 🔑13—Specific performance of contract to exchange property cannot be decreed by allowing money compensation, where defendant is wholly unable to convey.

Specific performance of contract to exchange property cannot be decreed by granting money compensation, where defendant is wholly unable to convey, since defendant cannot be compelled to buy for money at market value that which he agreed to take in exchange for various pieces of real estate.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action for the specific performance of an agreement for exchange of real property, brought by Fred A. Waldeck against Fred F. Hedden and others. Judgment for plaintiff, and defendants appeal. Reversed.

See, also, 265 P. 344; 265 P. 345.

W. W. Kaye, of Los Angeles, for appellants.

J. Marion Wright and George Beebe, both of Los Angeles, for respondent.

KOFORD, P. J. This was an action for the specific performance of an agreement of exchange by which the defendant Fred F. Hedden agreed to exchange several pieces of property or equities in the city of Los Angeles, together with $5,000, for plaintiff's stock ranch and personal property thereon, in the county of Tulare. Two other actions growing out of the same transaction were commenced by defendants against plaintiffs on the same day, and these were coincidently tried by the court upon the same evidence. One of these actions was an action by the Heddens against Waldeck for a rescission of the exchange agreement based upon allegations of fraudulent representations. The other action was for forcible entry and detainer by the Heddens against Waldeck and wife to recover possession of one parcel of the Los Angeles property which had been delivered into possession of the Waldecks, to wit, lot 106 and the north one-half of lot 105 on Branner avenue.

Substantially the same issues raised by the two actions filed by the Heddens were raised by their answer in the action for specific performance. Separate findings and judgments were made in each case. Hedden went into possession of the ranch, but when these actions were filed Waldeck and Hedden entered into a written agreement that Hedden's possession of the ranch should continue as that of caretaker and should not in any manner prejudice nor affect the rights of the parties.

The court found that the agreement of exchange was fair and equitable, was not subject to rescission on the grounds of alleged fraudulent representations and gave judgment to the plaintiff for partial specific performance. For various reasons differently affecting the several pieces of Los Angeles property, the defendants were unable to convey title to some of the property, and to that extent the court gave the plaintiff a money judgment equal to the value, as determined by the court, of such parcels which the defendants agreed to convey but could not, as follows:

First. The defendants were unable to deliver title to the property referred to as the Alexandria street property because they held only an option on the same and the option had expired. For this reason the court gave the plaintiffs judgment for its value as fixed by the court.

Second. Lot No. 106, Branner avenue, was found to be the community property of Hedden and wife. Mrs. Hedden had not signed the exchange agreement. The court, nevertheless, decreed a specific performance and conveyance of this lot apparently upon the ground that she had not commenced an action to void the agreement within a year and that she was estopped from asserting her interest on account of having yielded possession to the plaintiffs in pursuance of the agreement.

Third. Three lots in Highland Park tract were found to be the separate property of Fred F. Hedden, and specific performance as to them was decreed. Appellants attack this finding claiming that there is no evidence in the record to overcome the presumption that his property was community. It had been conveyed to Hedden in 1920, at which time Hedden and his wife were living together as husband and wife and had been living together as such for many years last past.

Fourth. The north one-half of lot 105 on Branner avenue (which adjoined lot 106 and formed with it a part of one inclosure) was found to belong to Hedden and wife as joint tenants as separate property. The judgment decreed a specific performance as to Fred F. Hedden's undivided interest and gave plaintiff a money judgment for the market value of his wife's remaining undivided one-half interest.

Fifth. The Parkman Terrace property could not be conveyed by the defendants because it had been conveyed to a third party by Mr. Hoganson, in whose name the property stood. Because of defendants' inability to convey this property the court gave judgment for the value thereof.

Summarizing this judgment, a specific performance was ordered of lot No. 106, the community property of the parties; an undivided one-half interest in the north one-half of lot 105 held in joint tenancy by the defendants; and the lots in Highland Park tract claimed by appellant also to be community property. The money judgment aggregates $24,250 principal. The value of the plaintiff's ranch and improvements together with personal property thereon was fixed by the court at $42,000, and on the other hand the value of the properties which the defendants agreed to exchange for the ranch together with $5,000 cash was found to aggregate $44,600. The court found that the exchange agreement was not inequitable and that the consideration was not inadequate.

In addition to attacking the sufficiency of the evidence to support the findings, appellants' points on appeal are that the court erred in decreeing a specific performance of an undivided joint interest in one piece of property, and, second, in decreeing a specific performance of community property when the wife had not joined in signing the agreement of exchange, and, third, that an agreement to exchange real property cannot be specifically enforced as to part with abatement or money compensation for that part which cannot be conveyed, at least where the shortage in quality and quantity is as great as shown by the judgment in this case.

[1] The decree is erroneous in compelling the defendant Hedden to convey his undivided one-half interest in the north one-half of lot 105 on Branner avenue. The exchange agreement called for all the north one-half of that lot. Under the authorities specific performance of the undivided one-half interest owned by one agreeing to convey all will not be decreed. It is said that such a decree amounts to the making of a new contract for the parties. Linehan v. Devincense, 170 Cal. 311, 149 P. 584 [overruling earlier cases]; Olson v. Lovell, 91 Cal. 506, 27 P. 765; Jackson v. Torrence, 83 Cal. 521, 23 P. 695.

[2-5] The finding of the court that the Highland Park tract lots were the separate property of defendant Hedden is not sustained by the evidence. These lots were acquired by Hedden in 1920 by an ordinary grant deed received in evidence. At that time he was, and had been for a long time, married to and living with his wife, his codefendant Ida Ellen Hedden. The presumption arose from this that the property was community property. Respondent has tried but failed

to point out any evidence to overcome this presumption except defendant Hedden's unexplained statement that he was in a position to convey it. This is not sufficient. Evidence to overcome this presumption must be clear and convincing. Davis v. Green, 122 Cal. 366, 367, 55 P. 9. This property should have been found to be community property in consonance with the presumption because of the lack of evidence to overcome the presumption. Being thus community property acquired since Civil Code, § 172a, was enacted in 1917 (St. 1917, p. 829), the agreement of exchange was not enforceable without the wife joining in the execution of the agreement.

Lot 106, Branner avenue, was found by the court to be community property, but nevertheless it was decreed to be conveyed. Respondent defends this part of the judgment by finding XXIV, which reads:

> "* * * She took no steps at any time to avoid or set aside said instrument; that she, with her husband, gave the plaintiff possession of the property described as the north half of lot 105 and lot 106 of the Short Line Villa tract about four weeks after June 5, 1922, with full knowledge of the terms of said contract; that the plaintiff was a purchaser under said contract in good faith and for value, without knowledge at the time of the execution of said contract of the marriage relation between Fred F. Hedden and Ida Ella Hedden."

The last clause of this finding would bring the matter under the first proviso of Civil Code section 172a, which reads, "Provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid"; and the first part of the finding, it is claimed, brings the matter under the second proviso or last clause of said section which reads, "But no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate"; while the middle part of the finding is said to amount to a finding of estoppel.

[6, 7] Where all the necessary elements of an estoppel exist under proper pleadings, it may be invoked against the wife from asserting her claims under Civil Code, § 172a. Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56. But the finding here is insufficient as a finding of estoppel. It does not embrace all the necessary elements. The circumstances of the wife's yielding possession with her husband do not appear. The husband had the power to select a new domicile, and in that case it would be her duty to follow him. There is no finding that plaintiff was in any way prejudiced or misled to his injury by her conduct. The exchange agreement had already been signed, no deeds were ever executed, and both defendants refused to go on with the exchange. Mrs. Hedden never promised to sign. She generally disapproved of the exchange. She gained no advantage and caused no injury by moving out.

[8, 9] The wife is not barred by the last clause of Civil Code, § 172a, because the exchange contract was not recorded. The filing of the complaint and lis pendens cannot be recognized as a substitute for the recording of the contract mentioned in Civil Code, § 172a, as the beginning point of the period of limitation. The Code provision is plain and specific. It does not admit of such a substitute. The wife's defense pleaded by way of answer and not by way of complaint would relate back to the time of filing of the action. Although she pleaded that it was joint property instead of community, the court found it was community property.

[10] Plaintiff was not ignorant of the marriage and is therefore not protected by the first proviso of Civil Code section 172a. The plaintiff made his investigations of defendants' property through his daughter, Mrs. Wright, who acted as his agent. The evidence shows that she called upon both the Heddens in their home and knew of the marriage. Her knowledge is imputed to her father as an agent's knowledge is imputed to his principal. Civ. Code, § 2332.

[11] We conclude, therefore, that specific performance of the conveyance of lot 106, the community property of the Heddens, cannot be decreed because Mrs. Hedden did not join in the agreement of exchange and is not estopped by the Code section nor estopped by conduct nor barred by the section from asserting her rights.

None of the property which the defendant Hedden agreed to convey therefore can be ordered conveyed by a court of equity.

[12] It is true that in general where a vendor is unable to convey all he has agreed to convey, the vendee at his option may have specific performance so far as possible and money compensation for that portion which is impossible. This compensation has been usually based upon the average or unit value as agreed upon by the parties.

[13] It is true that in general a contract of exchange may be specifically enforced as well as a contract to convey for money. Cases are cited, however, which hold that partial specific performance with money compensation for shortage will not be decreed against one who had agreed to convey in exchange for other specific property. These decisions are based both upon the point that the parties have not agreed upon a price which the court can apply to the shortage and also upon the point that in agreements of exchange each party often gives inflated valuations of his property in the belief that the other party to the exchange has overvalued his property, so that the court, in compelling partial specific performance with money compensation

for shortage based either upon the market value or the exchange value, would in effect be making a new contract for the parties. Williams v. Pearman (Tex. Civ. App.) 164 S. W. 44, and cases cited; Ryan v. Evans, 195 Ind. 570, 145 N. E. 6. Olson v. Lovell, supra, and Jackson v. Torrence, supra, have some points of similarity to these cases and hold that the court will not make a new contract for the parties. Appellants have cited these cases in connection with their argument that the decree as given was erroneous in granting partial specific performance and abatement or compensation in money based upon value fixed by the court. The total values and money compensation for shortages compared together show that more than one-half could not be conveyed.

[14] If we are right in our conclusion that these parcels and title interests which the court decreed should be conveyed by the defendants cannot be ordered conveyed, then the question is not whether an agreement for the exchange of lands without an agreed price per unit can be partially specifically enforced with abatement in money compensation fixed by the court as to the parts which cannot be conveyed. It becomes a case where none can be conveyed. The case is, therefore, governed by the well-established general rule that specific performance cannot be decreed where the defendant is wholly unable to convey. It would be a most drastic application of the court's equity power to compel the defendant to buy for money at the market value that which he agreed to take in exchange for various pieces of real estate. Such would indeed be making a new contract for the parties.

Inasmuch as the judgment must be reversed, it is not necessary for us to consider the question of the sufficiency of the evidence to support the court's findings of value of the several pieces of property involved. These findings were made in response to the issue of the adequacy of consideration and fairness of the contract as a part of the decision on specific performance. The point will not arise again on a new trial in the same way.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

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89 Cal. App. 494

HEDDEN et al. v. WALDECK et al.★

(Civ. 6130.)

District Court of Appeal, First District, Division 2, California. Feb. 27, 1928.

Hearing Denied by Supreme Court April 26, 1928.

1. Forcible entry and detainer 🔑6(2)—Judgment that defendants were not guilty of forcible entry or detainer does not determine right of possession or title.

Judgment that defendants were not guilty of forcible entry or detainer does not determine right of possession or title and does not preclude plaintiffs from afterward asserting such right of title or possession.

2. Ejectment 🔑17—In ejectment, plaintiffs held entitled to possession of property, where defendants took peaceable possession under executory contract of exchange not capable of specific performance.

In action of ejectment, plaintiffs *held* entitled to possession of premises notwithstanding that defendants were not guilty of forcible entry or detainer but took peaceable possession, where executory contract of exchange under which defendants took possession was not capable of specific performance because it was contract by husband alone for exchange of community property.

3. Ejectment 🔑26(5)—Unenforceable contract for exchange of property under which defendants took peaceable possession held not defense to ejectment action.

Where contract for exchange of property under which defendants took peaceable possession was not capable of specific performance, such contract was not defense to ejectment or quiet title action, since right of possession is part of title.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action in ejectment by Ida Ella Hedden and another against Fred A. Waldeck and another. Judgment for defendants, and plaintiffs appeal. Affirmed in part, and reversed in part.

W. W. Kaye, of Los Angeles, for appellants.

J. Marion Wright and George Beebe, both of Los Angeles, for respondents.

KOFORD, P. J. The plaintiffs, husband and wife, brought this action for possession. It was labeled an action for forcible entry and detainer, but is referred to in the briefs as ejectment. It was tried by stipulation at the same time and upon the same evidence as case No. 6129, Waldeck v. Hedden et al. (Cal. App.) 265 P. 340, a specific performance case between the same parties. Separate findings and judgment for the defendant were made and entered.

No separate briefs are filed for this case. It is submitted upon the briefs in case No. 6129, supra. The briefs in that case make scant reference to this one. The only evidence printed is that printed by appellant in case No. 6129. The pleadings of this case are not printed in the briefs, although the record is brought here under the alternative method of appeal provided by Code of Civil Procedure, § 953a. The briefs in referring to this case call it an action in ejectment. The typewritten clerk's transcript shows that the complaint in the first cause of action alleges that on July 27, 1922, while plaintiffs were in the peaceable possession, the north one-

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★Hearing denied by Supreme Court.

half of lot 105 and all of lot 106, Shoreline Villa tract on Branner avenue, "the defendants, by means of fraudulent pretenses, deceit and misrepresentation hereinafter mentioned and by force also, entered the premises and that they have ever since unlawfully and forcibly against the will and consent of these plaintiffs held and kept possession. * * *" Then follow allegations of fraudulent representations inducing plaintiff Hedden to make the agreement of exchange. This agreement and these alleged fraudulent representations are the same as were pleaded in the specific performance case. The complaint alleges service of notice to surrender and quit possession and prays for restitution of the premises, damages, and costs.

No evidence is indicated or printed to show that the defendants did not obtain possession peaceably. The theory of the first cause of action seems to be that the alleged fraudulent representations constituted the alleged force in gaining possession of the property. The court found that the agreement of exchange was not procured by fraud and that defendants obtained possession peaceably. The finding against fraud, as we point out in case No. 6131, Hedden v. Waldeck (Cal. App.) 265 P. 345, must be sustained.

[1] So far as the judgment in this case determines only the issues of the first cause of action of the complaint it merely determines that defendants were not guilty of forcible entry or detainer. This much of the judgment is not in conflict with our conclusions in case No. 6129, supra, because it does not determine the right of possession nor title. 12 Cal. Jur. 597, § 4, "Forcible Entry and Detainer." Neither would this part of the judgment mean that the plaintiff herein, Ida Ella Hedden, might not hereafter assert such right of title or possession as she may have in the property by reason of its community character or by reason of the agreement of exchange not having been signed by her, or by reason of the exchange agreement not being subject to specific performance.

The second cause of action in the complaint, however, alleges: (1) Plaintiffs' peaceable possession. (2) Defendants' alleged unlawful entry against the will and consent of plaintiffs. (3) Plaintiffs' written demand on defendants for possession; the defendants' refusal for more than five days to surrender possession. (4) That on August 28, 1922 (more than five days after the demand), plaintiffs were and still are entitled to the possession of the premises. This cause of action does not allege force nor other essential requirements of subdivisions 1 and 2 of the Code of Civil Procedure, §§ 1159 and 1160.

The court included in its decision the finding that at no time since defendants took possession were the plaintiffs entitled to the possession of the premises. The judgment declared that plaintiffs were not entitled to any judgment against defendants whatever.

[2] This part of the judgment is erroneous. Although the defendants are held to have taken peaceable possession under an executory contract of exchange of lands which is held not subject to rescission for fraud, nevertheless that contract is not capable of specific performance, and the plaintiff Hedden, who agreed to convey this particular parcel of land, is unable to convey title thereto.

[3] Waldeck, of course, cannot remain in possession of the land and retain the consideration for it just because the vendor is unable to convey the title. Garvey v. Lashells, 151 Cal. 526, 531, 91 P. 498. The contract, not being capable of specific performance, is for that reason not a defense to an action to quiet title brought by the owner. Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544; Valentine v. Streeton, 9 Cal. App. 641, 99 P. 1107; Crane v. Roach, 29 Cal. App. 584, 156 P. 375; Archer v. Miller, 73 Cal. App. 678, 239 P. 92.

The right of possession is a part of the title, and the same rule applies to ejectment as well as to quiet title. Bruck v. Tucker, 42 Cal. 346; Flint v. Conner, 53 Cal. App. 279, 200 P. 37; Blum v. Robertson, 24 Cal. 127; Wallace v. Maples, 79 Cal. 433, 436, 21 P. 860.

It is therefore ordered that the judgment appealed from is affirmed in so far as it relates to the issues of forcible entry and detainer; but in so far as it determines that defendants and not plaintiffs are entitled to the possession of the premises it is reversed, each party to this appeal to pay his own costs.

We concur: STURTEVANT, J.; NOURSE, J.

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89 Cal. App. 497

HEDDEN et al. v. WALDECK. (Civ. 6131.)

District Court of Appeal, First District, Division 2, California. Feb. 27, 1928.

Exchange of property ⚷8(4)—Evidence held insufficient to justify rescission of contract for exchange of realty for fraud, where plaintiff inspected land.

Evidence *held* insufficient to justify rescission of agreement for exchange of real property on ground of fraud, in that defendant made false statements as to value of his land, where such statements were expressions of opinion, and plaintiff, who had been salesman in district where land was situated, inspected land himself and relied on his own judgment to great extent.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Suit to rescind an agreement for exchange of real property for fraud, brought by Fred F. Hedden and another against Fred A. Waldeck. Judgment for defendant, and named plaintiff appeals. Affirmed.

W. W. Kaye, of Los Angeles, for appellant.
J. Marion Wright and George Beebe, both of Los Angeles, for respondent.

KOFORD, C. J. This action was filed August 30, 1922, to rescind for fraud the same agreement of exchange of real estate involved in Waldeck v. Hedden, case No. 6129 (Cal. App.) 265 P. 340. Both actions were filed on the same day. By stipulation these two actions with a third one, No. 6130, Hedden et al. v. Waldeck et al. (Cal. App.) 265 P. 344, were tried at the same time upon the same evidence. Separate findings and judgments were given in each case. The court decided that the exchange should not be rescinded for fraud and gave judgment for defendant Waldeck. Plaintiff Hedden appeals.

Hedden agreed to exchange various lots and equities in Los Angeles for Waldeck's stock ranch in Tulare county, June 5, 1922. The fraudulent representations were alleged to have been made by Waldeck and his daughter, who was acting as his agent and mentor in the deal. These representations relate to the character and features of the ranch and to its value. The evidence printed fails to substantiate the necessary elements of actionable false representations concerning the features and character of the ranch. Most, if not all, of this part of the alleged representations concerned things which were plainly visible to Hedden from an inspection of the ranch which he made. The findings in favor of defendant upon this issue must be sustained. Appellant's argument in attacking the judgment is centered upon the representations of value. The testimony of appellant shows that his error in entering into the agreement of exchange was caused by his misconception of the value of the ranch. The court found in effect that Hedden relied upon his own judgment and estimate of the value of the ranch and upon his general knowledge of values of surrounding lands; that Waldeck's statements and his daughter's statements upon value so far as made were expressions of opinion. The evidence warrants the conclusion that these statements are fairly classified as the ordinary puff talk usually indulged in by parties entering into an exchange deal in real estate.

Appellant relies on Crandall v. Parks, 152 Cal. 772, 93 P. 1018. That case holds that representations of value made under special circumstances and in a positive manner may amount to a representation of fact instead of opinion and may be relied upon; that if relied upon they may support a rescission for fraud. In that case, however, the land was outside of the state, the plaintiff never visited it and never made any investigation of it nor of its value. Here, however, the plaintiff Hedden had some knowledge of the values of land in the vicinity. He had frequently traveled through this district as a ladder salesman and often had inquired about land values. He relied upon his own judgment to a great extent. His testimony is to the effect that he neglected to distinguish between the value of the valley land, concerning which his previous inquiries were made, and hill land, which was the general character of defendant Waldeck's ranch. Equity does not hold out relief for every mistake of judgment. In this case the evidence does not show that Waldeck was fraudulently taking advantage of the ignorance of one whom he knew to be relying upon his statements of value. Waldeck's statement was briefly to the effect that his ranch was worth $100,000, but that, owing to the illness of his wife, he would sacrifice it in exchange for Hedden's properties at a valuation of $47,500; that he had another purchaser in view who would pay more, and if Hedden acted quickly he could turn about and make $10,000 by selling to that prospect. Absolute reliance upon these statements by plaintiff, who had been a salesman, is not established by the evidence.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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89 Cal. App. 620

HUDSON v. SLONAKER. (Civ. 4886.)

District Court of Appeal, Second District, Division 2, California. March 2, 1928.

1. Escrows 🔑5—Separately executed escrow instructions as part of same transaction are to be construed together.

Separately executed escrow instructions, signed on same day and as part of same transaction, are to be considered and construed together, and not as unrelated and individual instructions.

2. Vendor and purchaser 🔑21—Separate escrow instructions, signed on same day as part of same transaction, held to constitute contract for sale of real property.

Separate escrow instructions, signed on the same day and as part of same transactions authorizing payment of money on delivery of deed, *held*, when considered together, to constitute a contract in writing for the sale of real property, and complaint so alleging, and alleging breach thereof by defendant, stated cause of action.

3. Escrows 🔑1—Mutual stipulations of parties to escrow instructions constitute sufficient "consideration" (Civ. Code, §§ 1565, 1580).

Mutual stipulation of the parties to escrow instructions actual conveyance in escrow by one, and promise by other to pay a price, constitute a sufficient "consideration" within Civ. Code, §§ 1565, 1580, relative to mutuality.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consideration.]

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by F. R. Hudson against C. E. Slonaker. Judgment for defendant, and plaintiff appeals. Reversed.

Charles D. Wallace and Carl E. Cameron, both of Long Beach, for appellant.

P. E. Keeler, of Los Angeles, for respondent.

VALENTINE, Justice pro tem. Plaintiff brought this action to recover damages which he claimed to have suffered through the failure of defendant to comply with a certain agreement in writing, a copy of which was attached to the complaint, and which it is claimed constitutes a contract for the sale of real property by defendant to plaintiff, for the sum of $2,500; it being alleged that the property was worth $5,000, and thereby plaintiff was damaged to the extent of $2,500. The court sustained defendant's general demurrer to the complaint, and, upon plaintiff's refusal to amend, judgment was entered for defendant, and plaintiff brings this appeal.

Appellant states that the sole question raised is whether escrow instructions set forth in the pleadings constitute a contract upon the breach of which an action for damages can be maintained.

We deprecate long quotations, but it here seems necessary to set forth the escrow instructions. The essential portions of appellant's instructions are as follows:

"Escrow Instructions.
"Order No. 697302.
"Escrow No. 205637.

"Title Insurance & Trust Company:
"Los Angeles, Cal., Sept. 6, 1923.

"I will hand you $2,500.00 and my charges all of which you are authorized to use in connection with your order No. 697302 when you can issue, in your usual form, your continuation for Title Guarantee & Trust Company (with your liability thereunder not to exceed $2,500.00) on lot 13 and 14, block 26 of the Alamitos Heights tract as recorded in book 5, page 124 of maps, records of Los Angeles county, which will show record title to said property vested in F. R. Hudson and Laura N. Hudson, wife, as joint tenants, free from incumbrances except all taxes for the fiscal year 1923 and 1924 not examined.

"Summary.

"When you can certify the title as called for above pay for deed $2,500.00.

"Instruct the recorder to mail:

"Deed to me, address below.

"The guarantee when completed to be delivered to me.

"If you are unable to comply with the instructions by Oct. 6, 1923, said money and instruments shall thereafter be returned to me on my written demand, but in the absence of such demand you will proceed to comply with these instructions as soon as possible thereafter. And time is declared to be of the essence of these instructions. * * *

"All disbursements may be made by check of Title Insurance & Trust Company.

"Begin search of title.

"I agree to pay the following charges before the close of this escrow.

"For guarantee vesting title in me on property I acquire, $5.00.

"For recorder's fees as follows (estimated), deed, $1.20.

"Phone 317183. Signature F. R. Hudson.

"Address 216 Newport St., Long Beach."

There follows the acknowledgment by F. R. Hudson and the certificate of recording on September 2, 1923. Respondent's instructions are as follows:

"Title Insurance & Trust Company, Title Insurance Building.
"Order No. 697302.
"Escrow No. 205637.
"Escrow Instructions.
"Los Angeles, Cal., Sept. 6, 1923.

"Title Insurance & Trust Company;

"I will hand you deed executed by C. E. Slonaker, single man, to F. R. Hudson and Laura N. Hudson, wife, as joint tenants of lot 13 and 14, block 26, of the Alamitos Heights tract as recorded in book 5, page 124, of maps, records of Los Angeles county, which you are authorized to deliver to grantees or their representatives, upon payment to you by Oct. 6, 1923, for account of parties executing the instrument the sum of $2,500.00 (payable by check of Title Insurance & Trust Company), from which you may deduct $5.00 for your escrow charges, and for your usual form cont. guarantee limiting liability to $2,500.00 as chgd. and from which you may also pay all incumbrances on said property.

"Subject to all taxes 1923–24, not examined.

"Draw deed for which I pay.

"Affix and cancel internal revenue stamps on deed $2.50.

"Time is declared to be of the essence of these instructions.

"If you are unable to comply with these instructions within the time specified, said instructions shall be returned to me on my written demand; but in the absence of such demand you will proceed to comply with these instructions as soon as possible thereafter. Begin search of title at once, charges for which I will pay. Signature: C. E. Slonaker.

"Address: 248 So. Olive St. L. A."

Respondent contends that in appellant's instructions no reference is made to respondent, only to the property. That there is no instruction to purchase or obtain title from respondent, only to use the $2,500 when the escrow holder can issue its certificate to the title to lots 13 and 14, non constat but what this title might have passed from respondent and changed hands several times, so that, if the title had finally been certified to appellant, the respondent might never have appeared in the transaction, except as his name was reported in the chain of title.

Respondent then proceeds in a logical manner to argue that there was no mutuality, no meeting of minds of appellant and respondent, and no acceptance, and cites numerous authorities, including to the same effect Lambert v. Gerner, 142 Cal. 400, 76 P. 53, in which case, at page 403 (76 P. 54), the court says:

> "But appellant fails to make it clear as to where this acceptance is to be found. His argument seems to be 'That all the papers are to be taken together' to show this acceptance. An acceptance, in order to make the contract complete, must be unconditional; there must be an acceptance of the offer as made,"

—and that, even assuming that plaintiff's instructions may be construed as an offer, nevertheless these instructions and the defendant's instructions are unrelated individual instructions conferring authority upon the title company to proceed in the particular manner indicated, but without conferring upon it any other or additional agency or authority. Conceding, for the sake of the argument, that respondent's position and the decision of the trial court in sustaining the demurrer on these grounds was justified by the authorities cited by respondent at that time, the Supreme Court has held in Tuso v. Green, 194 Cal. 574, 229 P. 327:

> "In construing such a contract the separately executed instruments are to be considered * * * together as one contract. * * * In such situation the mutual stipulations of the parties, the actual conveyance in escrow by one and the promise by the other to pay the price, both being valid, constituted a sufficient consideration and created a valid escrow."

[1] The facts in the above case were similar to those in the case at bar, and this authority, together with the later cases of Neher v. Kauffman, 197 Cal. 674, 242 P. 713, and Thoroman v. David, 199 Cal. 386, 249 P. 513, establishes the contrary principle to that contended for by respondent, viz., the principle that the separately executed escrow instructions are to be considered and construed together, and not as "unrelated, individual instructions."

In Neher v. Kauffman, supra, the court says:

> "These instructions having been signed on the same day and as a part of the same transaction are to be read and considered together. When so read and considered, if they contain all of the necessary constituent elements to make a contract they are to be regarded as a contract in writing between the parties," citing Tuso v. Green, supra.

In the case at bar the instructions were signed on the same day, and were part of the same transaction.

Respondent contends that the consent of the parties was not mutual because they did not agree upon the same thing in the same sense (Civ. Code, §§ 1565, 1580), and in support of this contention argues that plaintiff could have withdrawn his money before the performance of the conditions set forth in his (plaintiff's) instructions to the title company.

[2, 3] Again, conceding that the authorities cited by respondent and presumably relied upon by the trial court may have seemed to them to justify this argument at the time, the same is entirely negatived by the cases last cited above. As an incident to this argument as to lack of mutuality, respondent contends that no consideration passed to him from the title company compelling him to continue the agency for any length of time, but in Tuso v. Green, supra, the court held that:

> "The mutual stipulations of the parties, the actual conveyance in escrow by one and the promise by the other to pay the price, both being valid, constituted a sufficient consideration."

Applying the above principles to the escrow instructions in the case at bar, it is apparent that there was a contract in writing, and, the complaint so alleging and alleging a breach thereof by defendant, it stated a cause of action, and the demurrer should have been overruled.

Judgment reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

89 Cal. App. 615

PEOPLE v. RIDGEWAY. (Cr. 1564.) ★

District Court of Appeal, Second District, Division 2, California. March 2, 1928.

Hearing Denied by Supreme Court April 30, 1928.

1. Criminal law ⚷1186(4)—Giving instruction on circumstantial evidence without such evidence before jury held not prejudicial, where evidence justified verdict (Const. art. 6, § 4½).

In prosecution for sale of liquor, giving instruction on circumstantial evidence without any such evidence before the jury *held* not prejudicial, under Const. art. 6, § 4½, in view of fact that evidence was amply sufficient to justify verdict.

2. Criminal law ⚷786(2)—Instruction that defendant's testimony was to be measured according to same standards as others witnesses held not erroneous.

In prosecution for sale of intoxicating liquor, instruction to effect that testimony of defendant was to be measured according to same standards as that of other witnesses *held* not erroneous as intimating that court viewed defendant's testimony with distrust.

3. Criminal law ⚷776(2)—Instruction as to evidence of good "character," being relevant, held not erroneous as destroying effect of "reputation" evidence.

In prosecution for sale of liquor, instruction that evidence of good character is evidence relevant to the question of guilty or not guilty *held* not erroneous as destroying force of defendant's reputation evidence, though word "character" signifies "what a person is," and "reputation" means "what he is supposed to be," since purpose of testimony concerning good reputation of defendant was to convince jury that he was possessed of a good character.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Character; Reputation.]

4. Criminal law ⚷719(1)—Prosecuting attorney's remarks outside record as to matters of common knowledge relative to sale of liquor to high school girls and boys held not error.

Remarks of prosecuting attorney to jury trying defendant on charge of sale of liquor, to effect that whisky was being sold indiscriminately to high school boys and girls, *held* not to constitute error, since it is permissible to go outside the record and assume certain conditions where matters are of common knowledge.

5. Criminal law ⚷723(1)—District attorney's remarks to effect that if he lost case he would not prosecute any others held prejudicially erroneous.

In prosecution for sale of liquor, remarks of district attorney asserting that he would not prosecute any other cases if this case was lost, although ill-considered and improper, *held* not prejudicial, particularly since court directed jury to disregard remarks on objection thereto.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

Kirk Ridgeway was convicted of illegal sale of intoxicating liquor, and he appeals. Affirmed.

E. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J. We have here an appeal from a judgment pronounced upon a jury's verdict of guilty of the crime of illegal sale of intoxicating liquor.

[1] The sufficiency of the evidence is not in dispute. The record shows a square conflict in the testimony upon the question of the identity of the party who sold the liquor at the time and place named by the witnesses for the prosecution. However, two witnesses testified positively that it was the defendant who committed the criminal acts charged in the information. Surely, this evidence is not to be held less creditable because the witnesses were officers, and from the entire record we are satisfied that the evidence amply justifies the verdict. Hence errors which have not affected the substantial rights of the defendant do not warrant a reversal of the judgment. Section 4½, art. 6, Const. This clearly applies to the following assignment of error. Appellant complains that an instruction concerning circumstantial evidence should not have been given because, it is claimed, there was no circumstantial evidence before the jury. If this be conceded to be a fact, it is not pointed out how the defendant could have been prejudiced, and we can perceive no way in which such a result might have occurred.

[2] We conclude that, while the court might have refused to give the instruction to the effect that the testimony of the defendant was to be measured according to the same standards as that of other witnesses, it is not conceivable that the defendant's case could have been prejudiced thereby. This instruction differs materially from that concerning which the Supreme Court in People v. Maughs, 149 Cal. 253, 86 P. 187, said:

> "And after all this admonition, after all these cautions, the conclusion is forced upon us that when a trial judge does give this instruction to a jury, it can be with no other purpose than to throw his judicial weight into the scales against the defendant on trial before his court."

That instruction was the one copied from People v. Cronin, 34 Cal. 195, warning the jury:

> "Where the defendant offers himself as a witness in determining his credibility, it is proper to take into consideration the consequences, inducements, and temptations which would ordinarily influence a person in his situation."

★Hearing denied by Supreme Court.

The instruction here under consideration states the law correctly and gives no intimation that the court viewed the testimony of the defendant with distrust as is done by those condemned in the Maughs Case and certain others to which reference is made in the briefs.

[3] In another instruction the jury were informed that:

> "Evidence of good character is evidence relevant to the question of guilty or not quilty, and is to be considered by you in connection with the other facts and circumstances in the case. One object in laying it before the jury is to induce the jury to believe from the improbability that a person of good character should have conducted himself as alleged, and that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and in this connection, you must take it into consideration."

The well-recognized distinction between reputation and character is pointed out by appellant, and he insists that, in the absence of an instruction making this difference in meaning clear, the force of defendant's reputation evidence was destroyed. We think this line of reasoning goes beyond the breaking point. Regardless of the fact that, without consideration of the context, the word "character" signifies "what a person is," and "reputation" means "what he is supposed to be," we deem the instruction here in question to have been properly given. It is apparent that the purpose of the testimony concerning the good reputation of the defendant was to convince the jury that he was possessed of a good character. Hence counsel's contention that there was no testimony before the jury concerning character but only as to the reputation of the defendant, is incorrect. That the instruction given is a proper one has been held in People v. Shepardson, 49 Cal. 629, and other decisions of our Supreme Court.

Finally, certain statements of the district attorney, made during his argument to the jury, are said to be improper and prejudicial to the defendant's rights. He said:

> "You know, and I know, there is whisky being sold indiscriminately all over town, not only to men, not only to women, but to high school boys and girls. I tell you, if you want to continue, you throw down your sheriff's office and the district attorney's office, you vote to acquit, don't give any consideration to the testimony of the men they employ to go out and convict those who are bootlegging. I do not say the mere taking of one drink of whisky amounts to moral turpitude. A man may drink one drink of whisky and it may not make him a criminal, but when you pour your liquor, poison, the type of that stuff in that bottle, down the throats of innocent high school boys and girls, you are going to have something you don't want. That is what is going to happen in this case if you acquit this man, ladies and gentlemen of the jury."

And, again:

> "If he sold liquor to those fellows in this case before, you saw them on the stand. Dillon is only little more than a boy; if he sold it to him, he would sell it to a high school boy, wouldn't he? Do you suppose a man of that character has any choice? All he wants is his $2 or $2.50. It does not make any difference to me in this case. I would much rather not prosecute bootlegging cases, and won't prosecute them if we can't get convictions. I didn't want to do it before, but if you turn down the evidence in this case, positive identification, do you think there is any use of prosecuting any other liquor cases in the future? Why, no; and we don't do it. If you want to turn this man loose and you want every bootlegger in town to ply his trade indiscriminately, turn him loose."

[4] Appellant claims that by these statements counsel charged that the defendant had sold liquor to school boys and girls. We do not think this language is subject to being so construed. The most serious criticism that can be made in that behalf is that the speaker went outside the record in assuming certain conditions to exist in the community. This is permissible where the matters are of common knowledge, as they appear to have been in this instance.

In People v. Hail, 25 Cal. App. 342, 143 P. 803, cited by appellant the objectionable statement of the district attorney was, should the jury acquit the defendant, "you would be afraid to go out on the street and meet your fellow men." This was held to be "a direct declaration to the jury that if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney, and whether they could bravely meet their fellow citizens and face them with clear consciences was made by that official to depend upon whether they found the defendant guilty."

[5] Here, the district attorney merely made the puerile but irrelevant and unconvincing assertion that he would not try again if he lost this case. We agree that such a statement was ill-considered and improper, but we do not regard it as prejudicial. As an authority the Hail Case is further distinguishable, for there it was made clear that, although the language used was reprehensible, the holding that it was prejudicial was limited to the facts of that case, and in them there was "a manifest paucity of evidence tending to establish the guilt of the defendant." In the instant case, as we have said, the evidence is ample. Further under the circumstances here presented, the direction of the court that the jury disregard the remarks of the district attorney to which defendant's

counsel objected must be held to have removed any wrong impression which the statements may have made on the minds of the jurors. People v. Burke, 18 Cal. App. 72, 122 P. 435, and cases there cited.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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90 Cal. App. 36

BURGE v. DETWEILER et al. (Civ. 5040.)

District Court of Appeal, Second District, Division 2, California. March 9, 1928.

1. Mines and minerals 🔑117—Wife of lessee of ground where oil well was drilled held not liable for workmen's wages.

In action for wages of men working on oil development, nonsuit should have been granted as to defendant, wife of lessee, in lease covering ground on which well was being drilled, in absence of any other evidence connecting her with transaction.

2. Mines and minerals 🔑112(2)—Lessee of ground where oil well was drilled, not hiring workmen, held not liable for wages earned before he suggested that workmen continue to work.

In action for wages of men working on oil development, defendant, who was lessee under lease covering ground on which well was being drilled but who had nothing to do with hiring of workmen, *held* entitled to nonsuit as to wages due before he suggested that workmen continue working and that wages would be paid.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by William M. Burge against J. P. Detweiler and others. Judgment for plaintiff, and defendants L. L. Wills and another appeal. Reversed.

Spicer, Meacham & Mason, of Long Beach, for appellants.

Charles D. Swanner and Roland Thompson, both of Santa Ana, for respondent.

STEPHENS, Justice pro tem. A number of men working on an oil development were not paid their wages, and assigned their claims to plaintiff, who brought suit alleging that the labor was performed at defendants' special instance and request. The action was dismissed as to all defendants except L. L. Wills, Beulah M. Wills, and Orange Dome Petroleum Corporation, and judgment was ordered as prayed for against these three defendants, but was entered as against L. L. Wills and Beulah M. Wills only. At the conclusion of the testimony on behalf of plaintiff a motion for nonsuit was made upon the ground that there was no evidence that either of the last-named defendants had employed plaintiff's assignors or any of them.

[1, 2] We have carefully read the transcript (the appeal having been taken under the alternative method), and are unable to find any testimony supporting plaintiff's allegation that the men were employed by or for the defendants Wills. Some of the men, if not all of them, worked a few days after L. L. Wills had suggested that they continue working, that their wages would be paid, that he was selling or trying to sell the lease, and that, if he did, the money would be forthcoming with which to pay them. Possibly this would be a sufficient basis upon which to deny a nonsuit as to L. L. Wills, but there is no evidence connecting Beulah M. Wills with the transaction, except that she was the wife of the lessee in a lease covering the ground upon which the well was being drilled. This, however, did not connect her with the hiring in any way, and the present action is not one to foreclose a lien. The nonsuit should therefore have been granted as to her. There being no evidence whatever to connect L. L. Wills with the hiring or promising to pay, except that already referred to and that he was the lessee of the property mentioned, we are unable to find any evidence upon which a judgment could be premised other than that of work done after the conversation related, and as to that we are not herein deciding. The judgment, therefore, is unsupported, and must be reversed.

Judgment reversed.

We concur: CRAIG, acting P. J.; THOMPSON, J.

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89 Cal. App. 764

BROWN v. WILSON. (Civ. 5123.)

District Court of Appeal, Second District, Division 1, California. March 7, 1928.

1. Escrows 🔑9—Grantee, failing to comply with escrow conditions, did not acquire any title, nor become entitled to deed.

Where a deed is placed in the hands of a third person as an escrow, with agreement between grantor and grantee that it shall not be delivered to grantee until he has complied with certain conditions, grantee does not acquire any title, nor is he entitled to delivery of deed until he has strictly complied with conditions.

2. Quieting title 🔑7(2)—Grantor was entitled to removal of cloud on title caused by recording quitclaim deed in violation of escrow instruction.

Where quitclaim deed was erroneously recorded in violation of escrow instructions, in that grantee had failed to comply with conditions of escrow, grantor was entitled to removal of resulting cloud on title.

3. Frauds, statute of ⚷74(1)—Vendor and purchaser ⚷15—Purchaser on cancellation of escrow instructions is not entitled to enforce alleged new agreement not in writing or supported by consideration (Civ. Code, § 1624).

Where, on grantor's failure to secure title pursuant to requirements of escrow instructions, parties mutually agree to cancel instructions and release deposit thereunder, purchaser is not entitled to enforce alleged subsequent agreement for transfer of interest as secured without such agreement being in writing pursuant to Civ. Code, § 1624, or payment of consideration.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by H. C. Brown against Harry M. Wilson. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Barstow and W. J. Variel, both of Los Angeles, for appellant.

McCaughan & McCaughan and Frank H. Jaques, all of Long Beach, for respondent.

WOOD, Justice pro tem. This is an appeal by defendant from a judgment quieting plaintiff's title to an undivided interest in two parcels of land. On January 18, 1921, the parties to the action left written escrow instructions with the Exchange National Bank of Long Beach, containing these provisions:

> "The undersigned hereby instruct you to carry out the conditions of the following agreement entered into on the above mentioned date wherein H. C. Brown, Agt., address 243 East Ocean avenue, agrees to sell and Harry Wilson, address Naples, California, agrees to purchase the following described property: Lots 14 and 15, block 33, tract No. 500, Naples, California, in the county of Los Angeles, state of California, for the sum of $400.00, payable as follows: Escrow deposit herein $50.00, additional cash $350.00 on or before 90 days or when certificate of title and municipal certificate are in your bank. * * * In case seller is not able to give good title within ninety days the deposit herewith shall be returned on demand. * * *"

Thereafter plaintiff experienced difficulty in securing deeds for delivery into escrow, for the reason that the property was owned by several individuals, some of whom had died. He did, however, obtain deeds for a five twenty-sixths interest in the lots, and on July 5, 1921, executed a quitclaim deed covering the premises to the defendant. The trial court found:

> "That the aforesaid deed was placed in an escrow in a bank at Long Beach, California, then known as Exchange National Bank, of Long Beach, California. The court finds that contrary to the terms of said escrow that on the 6th day of July, 1921, the deed hereinabove mentioned was recorded in Book 276, page 262, of Official Records."

Upon recordation, the deed was returned to the bank. Defendant did not pay into escrow, or otherwise, any sum other than the original deposit of $50, and plaintiff did not place in escrow deeds conveying anything more than the five twenty-sixths interest. Shortly prior to March 9, 1922, the escrow officer of the bank requested plaintiff to dispose of the escrow, and about the same time defendant told plaintiff that he wished to withdraw his deposit. Accordingly, plaintiff and defendant, on March 9, 1922, signed and left with the bank the following:

> "We mutually agree to cancel our instructions in this escrow and release the $50.00 deposit. Please give Mr. Jaques deeds now held in Brown-Wilson escrow No. 11306."

Defendant thereupon received the $50, and Mr. Jaques (plaintiff's attorney) received the deeds.

[1, 2] The necessity for this litigation arises from the fact that the quitclaim deed was erroneously recorded. The finding of the trial court that the deed was recorded "contrary to the terms of the escrow" is fully sustained by the evidence. It has been held that, "where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions." Los Angeles City High School District v. Quinn, 195 Cal. 377, 234 P. 313. Since the defendant had not complied with the conditions of the escrow, having paid into escrow only the sum of $50, he had not acquired title to the land or a right to the deed. The recordation having resulted in a cloud upon his title, plaintiff had a right to the judgment of the court removing it.

[3] It is the contention of appellant that "judgment could have been entered in plaintiff's favor at the trial for $76.90 the pro rata of purchase price offered by defendant who had the corresponding right to be judicially declared upon payment, the owner of the five twenty-sixths interest." The parties cancelled their escrow instructions by clear and concise language on March 9, 1922, at which time the buyer withdrew his deposit, and the seller received back his deeds. Defendant also promised to go to the office of plaintiff's attorney and execute a reconveyance of the interest he had received. Clearly it was their intention to close the transaction at that time. No instrument was signed by them at any time other than the document which they referred to as their "escrow instructions." Defendant points out that, referring to the occasion of the withdrawal of his deposit, he testified as follows:

"Mr. Brown told me then that he would deed the units to me as fast as he got them. Q. Anything said about the payment of the entire amount * * * as set out in the agreement? A. I told him any time that he got them I would pay him as I got them."

This testimony, he claims, "is controverted by inference only." If this conversation did in fact take place, it formed, if any, a new agreement, since the first one had been canceled. To be enforceable as a new agreement it would have to be in writing. Section 1624, Civ. Code. Since it was not in writing, it was not enforceable. Moreover, it was not supported by a sufficient consideration. The record discloses that defendant has paid nothing whatever to plaintiff, and is not bound to him in any way by contract. He voluntarily withdrew his deposit of $50, and now proposes to pay to plaintiff the sum of $76.90 and retain the fractional interest in the property which was improperly placed in his name through the erroneous recordation of an instrument used in the canceled escrow. This he cannot do.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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89 Cal. App. 746

GITTELSON v. GANDOLFO. (Civ. 5121.)

District Court of Appeal, Second District, Division 1, California. March 6, 1928.

Brokers ⚷82(1)—Action for commissions on sale of real estate is not maintainable without alleging plaintiff had proper license (Real Estate Broker's Act, § 20).

Action to recover commissions for sale of real estate cannot be maintained without allegation that plaintiff had a proper license required under Real Estate Broker's Act, § 20 (St. 1919, p. 1259).

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by Max Gittelson against Josephine E. Gandolfo. From an order denying a motion to vacate a judgment theretofore entered, defendant appeals. Reversed, with directions.

See, also, 259 P. 340.

H. A. Massey and Peyton H. Moore, both of Los Angeles, for appellant.

Shapiro & Shapiro, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff filed this action to recover fees claimed to have been earned in the negotiation of the sale of defendant's real estate. He alleges in his complaint:

"That the defendant employed the plaintiff herein as her agent to negotiate a sale or secure a purchaser for the premises * * * described as lot 8, block 52," etc.

Then follow the allegations customary in actions of this kind prior to the enactment of the Real Estate Broker's Act of 1919. In the answer defendant denies these allegations, and in addition thereto sets forth that she was induced to sign the contract with plaintiff by duress. There is no allegation in the complaint that plaintiff was "a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose," nor is there any reference to this matter in the answer. The trial court found in favor of plaintiff on all the issues set up in the pleadings, and the findings, like the pleadings, are silent on the question of plaintiff's license. Judgment having been rendered in favor of plaintiff, the defendant presented a motion to vacate the judgment, to amend the conclusions of law so as to provide that defendant is entitled to judgment, and to enter judgment in favor of defendant. This motion was denied, and defendant appeals from the order of denial.

The Legislature in 1919 enacted the Real Estate Broker's Act (St. 1919, p. 1252), of which section 20 is as follows:

> "No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

Section 2 contains this provision:

> "One act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or negotiating a loan on or leasing or renting or placing for rent real estate, or collecting rent therefrom shall constitute the person, copartnership or corporation making such offer, sale or purchase, exchange or lease, or negotiating said loan, or so renting or placing for rent or collecting said rent a real estate broker within the meaning of this act."

It is disclosed by the complaint and the findings that the cause of action arose in January, 1923, long after the passage of the law just mentioned. The act has been held constitutional by the Supreme Court. Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418; Haas v. Greenwald, 196 Cal. 236, 245, 237 P. 38. The language of section 20 is clear and does not require interpretation. Plaintiff cannot "bring or maintain" the action without alleging he had the proper license. Since the record discloses that he did not

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

make this necessary allegation, judgment should be for the defendant. Beebe v. Kistler, 52 Cal. App. 494, 199 P. 537.

The order appealed from is reversed, with instructions to the lower court to grant defendant's motion.

We concur: CONREY, P. J.; HOUSER, J.

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89 Cal. App. 663

GROVE v. HODGE TRANSP. SYSTEM et al.★
(Civ. 6150.)

District Court of Appeal, First District, Division 2, California. March 5, 1928.

Hearing Denied by Supreme Court May 3, 1928.

Municipal corporations ⟹706(6, 7)—Where evidence respecting plaintiff motorcyclist's negligence at intersection was conflicting and showed negligence in operating colliding truck, nonsuit held improperly granted (Motor Vehicle Act, § 129).

In action for damages sustained when plaintiff's motorcycle collided with defendants' truck and trailer at street intersection, in which evidence showed defendants' negligence in operating truck by making left turn without first passing center of intersection as required by Motor Vehicle Act, § 129 (St. 1923, p. 558), and evidence as to plaintiff's negligence was conflicting, motion for nonsuit should not have been granted, but jury should have been allowed to pass on weight and sufficiency of evidence.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by William I. Grove against the Hodge Transportation System and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

Bertrand J. Wellman, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to obtain a judgment for damages alleged to have been suffered in a collision between his motorcycle and one of the trucks of the defendants. The action was tried in the trial court before the court sitting with a jury. At the end of the plaintiff's case the defendants made a motion for a nonsuit. The motion was granted, and from the judgment entered thereon the plaintiff has appealed under section 953a of the Code of Civil Procedure.

The collision occurred on the night of April 29, 1924, some time after dark. It occurred in a sparsely settled district at a point designated as the intersection of Main street and One Hundred-First street, in Los Angeles. The plaintiff was proceeding south on Main street. At that time the middle 20 feet of that street was paved with concrete, and on each side of the concrete there was a depression or ditch in which were mud and water. One Hundred-First street was wholly unpaved. As the plaintiff came from the north and when he was as yet about 200 feet north of the north line of One Hundred-First street, looking across the corner of the block he observed the defendants' truck traveling east and in a direction which would cross the path of the plaintiff. At that time the plaintiff commenced to slow down, but continued ahead. As he approached nearer the intersection he observed the slowness with which the defendants' truck was moving, and he testified that he assumed that the slowness was an invitation for him to approach and cross the defendants' path in front of the truck. At about that time he also noticed that the truck was drawing a trailer. As he came nearer he observed that he could not pass in front of the truck and turned to his right to pass to the rear. As he did so he observed that he could not execute that movement as the rear of the trailer was still in the ditch containing mud and water, and the rest of the defendants' vehicles, the truck and trailer, extended entirely across the concrete pavement. Thereupon the plaintiff swerved his machine and attempted to turn back. As he did so the rear end of his motorcycle was hit by the rear end of the trailer, and the plaintiff and his wife were thrown to the pavement. As defendants' vehicles approached the intersection they turned to the left to go north on Main street. In making that left turn they should have passed the center of the intersection and then made the turn. Motor Vehicle Act, § 129 (St. 1923, p. 558). However, they did not do so, but according to the testimony, they cut the northwest corner and pulled up on to the concrete pavement. It was the claim of the plaintiff in introducing his case that before he saw the truck and trailer he was traveling not to exceed 35 miles an hour; that he reduced his speed from time to time; and that at the time of the collision he was traveling not more than 15 or 20 miles per hour. In corroboration of his testimony he introduced evidence to the effect that there were skid marks back on Main street showing that he had had on his brakes and had reduced his speed 75 feet north from the point of collision. It may be conceded that there was other evidence to the effect that he was going 30 or 35 miles an hour at the time of the collision. The defendants call our attention to the statements made by the several witnesses regarding the speed of the plaintiff. In the trial court the defendants did the same thing, and thereafter the trial court granted the motion for a nonsuit under the belief that the evidence showed that the plaintiff was

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★Hearing denied by Supreme Court.

guilty of contributory negligence as a matter of law. In granting the motion we think the trial court fell into error.

As shown above, it appeared from the evidence at the time the motion was granted that the defendants were guilty of negligently operating their vehicles. Conceding that there was evidence to the effect that the plaintiff was negligent, there was other evidence to the effect that he was not negligent. Under this condition of the record a motion for a nonsuit should not have been granted, but the jury should have been allowed to pass on the weight and sufficiency of the evidence. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 599, 112 P. 53.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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89 Cal. App. 545

PEOPLE v. RINALDI. (Cr. 1453.)

District Court of Appeal, First District, Division 2, California. Feb. 29, 1928.

1. Criminal law 🔑1169(11)—Admitting evidence of other misconduct preceding proof of particular act relied on as showing lewd and lascivious conduct held not prejudicial (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, for lewd and lascivious acts on body of a girl not 12 years of age, on or about January 14, 1927, where after a few preliminary questions prosecutrix was asked when was last time defendant had done anything to her and her answers disclosed acts committed by defendant in December, 1926, and that other things happened after that time, overruling defendant's objection that by offering evidence of acts in December there was election to rely thereon *held* not prejudicial, where immediately on objection being made district attorney stated he relied on acts happening on or about January 14, and court directed that evidence be confined to acts relied on before receiving testimony of similar acts.

2. Criminal law 🔑814(7)—Prosecution definitely electing act relied on, use of word "acts" in instruction held not objectionable as authorizing conviction of different crimes (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, for lewd and lascivious acts on body of girl not yet 12 years of age, in view of definite specification by the district attorney of the offense relied on occurring on or about named date, use of word "acts" in instruction instead of "act" *held* not objectionable as informing jury that prosecution relied on different crimes committed at other times, especially where other instruction used the singular form of the word "act."

3. Criminal law 🔑829(8)—Refusal of defendant's instruction on good character as defense held not error where given instruction more accurately defined elements thereof.

In prosecution for lewd and lascivious acts on the body of a female child, refusal of defendant's inaccurate instructions that good character may generate reasonable doubt as to guilt, and if it creates reasonable doubt to acquit, was not error where court gave instruction more accurately, including elements of defensive effect of evidence of good character.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Francisco Rinaldi was convicted of lewd and lascivious acts on the body of a female child, and he appeals. Affirmed.

John J. Taaffe, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KOFORD, P. J. [1] Appellant was convicted of lewd and lascivious acts upon the body of a girl, Anna, who at that time was just under 12 years of age. The information charged the offense as occurring on or about January 14, 1927. No opening statement was made. The child was called to the stand as the first witness, and after a few preliminary questions she was asked when was the last time that defendant had done anything to her. She first answered in the basement in January, 1927, and upon further questioning said that defendant had done nothing at that time. This testimony evidently referred to a time when her mother came into the basement and called her away, January 21, 1927. Then, after considerable questioning, her further answers disclosed that in December, 1926, in the basement of their house, defendant had committed acts which, at most, amounted to indecent exposure. She was then asked if anything happened after that time. She answered yes, in the house in the bedroom. When asked what happened in the bedroom, appellant's counsel objected upon the ground that, by offering the evidence which had already been admitted, the district attorney had elected or at least the law had elected for him to rely upon the offense testified to as occurring in the basement in December. Thereupon the court asked the district attorney what act he elected, and the district attorney replied that he was relying on an act that happened in the bedroom some time after Christmas, on or about January 14, 1927. The court then overruled the objection directing that the evidence be confined to the act elected until established before offering testimony of similar acts.

It is claimed that it was error for the court to allow the district attorney to elect a different offense than the one concerning which testimony was first offered because it is said that by the first evidence offered an election was made. Authorities are cited by appellant in support of the necessity of making an early election and in support of the contention that in the absence of a timely election the first offense proved is deemed to have been elected, but it is only by specious argument that these principles are made to appear applicable to the facts of this case. Here the election was promptly made upon the first objection and almost at the beginning of the direct testimony of the first witness, so that appellant was in no way misled. It amounted to no more than a variation in the order of proof. The evidence was ultimately admissible. This first evidence of defendant's misconduct came in as a result of the difficulty of getting the child's mind directed to the particular time and place of the crime relied upon without asking leading questions. We see no merit in this point, and it is especially true that the defendant was not prejudiced by the ruling nor by the fact that evidence of this misconduct preceded the proof of the particular crime relied upon for conviction.

[2] It is contended that instruction No. 5 by the use of the word *acts* instead of *act* in some places had the effect of informing the jury that the prosecution had elected to rely upon several different crimes committed at different times and places all on or about January 14, 1927. This instruction reads as follows:

> "The prosecution has selected acts testified to by the witnesses as having been committed on or about the 14th day of January, 1927, and has elected to rely on proof of such acts for conviction in this case. Testimony has been introduced by the prosecution tending to prove other acts of lewd and lascivious conduct of the defendant prior to the act relied upon for conviction. This evidence is introduced for the purpose of proving the lewd and lascivious disposition and tendency of the defendant to commit lewd and lascivious acts. This evidence is not introduced to prove distinct offenses, but corroborative evidence tending to support the one specific offense for which the defendant is being tried."

The general substance of this instruction has been approved in People v. Troutman, 187 Cal. 313, 201 P. 928, and People v. Wilhite, 49 Cal. App. 246, 193 P. 151. Considered as a whole and in connection with instruction No. 4, which used the singular form of the word *act*, and in connection with the evidence and the definite specification by the district attorney of the offense elected, the jury would not be warranted in understanding this instruction to mean that several different crimes occurring at different times and places had been elected, on any of which they were at liberty to convict the defendant. The election specified the place as the bedroom. Although many different similar crimes were testified to, Anna testified to only two occurrences amounting to the crime denounced in Penal Code, § 288, as having occurred in the bedroom. One of these was fixed as having occurred before Christmas and the other on January 14, 1927.

[3] The court rejected the following requested instructions:

> "Good character itself may, in connection with the evidence, generate a reasonable doubt and entitle the defendant to a verdict of not guilty, even though no such doubt would have existed but for such good character."
>
> "If the character testimony introduced in behalf of defendant creates in your mind a reasonable doubt, you must vote for a verdict of not guilty."

The court, however, did give instructions which substantially and more accurately include all elements attempted to be put forward by those rejected. They are:

> "The good character of a person accused of crime when proved is itself a fact in the case. It is a circumstance tending in a greater or lesser degree to establish his innocence. It must be considered in connection with all the other facts and circumstances of the case. But if after a full consideration of all the evidence adduced, the jury believes the defendant to be guilty of any crime, they should so find, notwithstanding proof of good character.
>
> "If upon an entire comparison and consideration of the whole evidence, there remains in your minds a reasonable doubt as to the guilt of the defendant, you must acquit him."

These instructions given are not claimed to be erroneous. The same good character instruction was expressly approved in People v. Smith, 59 Cal. 601, 607. The rejected instructions, on the other hand, contain inaccuracies. Reasonable doubt should be reasonable doubt as to defendant's guilt and that doubt should come from all the evidence at the end of the case; for doubt from one or more parts of the evidence may arise at one time during the trial and be removed later by other competent evidence.

In People v. Bell, 49 Cal. 485, relied on by appellant, the instruction given in place of the rejected one did no more than tell the jury that good character was a circumstance for their consideration and this was said to add nothing to the mere fact of admitting the testimony.

In People v. Harris (Cal. App.) 251 P. 823, relied on by appellant, the substituted instruction also omitted an important element of the rejected one. The court there said that:

> "If the court * * * had even gone so far as to instruct the jury that testimony of good character was to be considered as any other testimony for the purpose of determining whether or not the defendant was guilty, then the instruction would not have been erroneous."

Here, however, the given instructions informed the jury that good character proved is a fact in the case, that it tends to establish innocence, that it must be considered with all the other facts, that if considering all the evidence the jury believes the defendant guilty they may so find notwithstanding proof of good character and also if from the whole evidence there remains a reasonable doubt as to guilt they must acquit. There was no error in refusing the instructions requested.

The sufficiency of the evidence is attacked on account of contradictory statements made by Anna which are made to appear by a comparison of her statement to the police, her testimony at the preliminary examination, and at the trial. These contradictions concern matters which could be all stricken out without leaving the remaining evidence insufficient nor unconvincing. Considering Anna's immature mind and the conditions and circumstances under which her statements were made, the designated contradictions might reasonably have been ascribed by the jury to poor understanding, and not to any tendency to falsify. Her testimony seems to us to be convincing, and we cannot say the jury was not well warranted in believing it. There was nothing inherently improbable about her story in its vital particulars. Her mother's testimony especially, and her sister's testimony also, furnish corroboration. Appellant's conduct upon being accused by Anna's mother constituted some evidence of his guilt.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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89 Cal. App. 653

DOTSON v. INTERNATIONAL LIFE INS. CO. (Civ. 6120.)

District Court of Appeal, First District, Division 2, California. March 3, 1928.

1. Appeal and error 🔑1064(1)—Instruction relative to proof of falsity and materiality of answers in insured's application, though ambiguous, held not to involve prejudicial error.

In action on life policy, in which defense was misrepresentations, instruction which required defendant to prove falsity of answers in application, and that misrepresentation was such that contract would not otherwise have been entered into, though objectionable as ambiguous, *held* not ground for reversal as constituting prejudicial error.

2. Insurance 🔑668(7)—Issue as to materiality of insured's false statement in application that he had never consulted physician held for jury under conflicting evidence.

In action on life policy, issue as to whether insured's false statement in application that he had never consulted physician constituted material misrepresentation, voiding policy, was erroneously withdrawn from jury, notwithstanding another statement in application showed insured had had operation, where testimony was conflicting as to insured's treatment on other occasions.

3. Contracts 🔑99(1)—Party pleading fraud must prove reliance thereon.

Generally, burden rests on party pleading fraud to prove that he relied on the alleged false representation.

4. Insurance 🔑646(3)—Insurance company, defending suit on life policy on ground of insured's misrepresentations, had burden to prove insured's fraud induced policy.

In suit on life policy, in which insurance company set up defense of misrepresentations, company had burden to prove that it relied thereon in issuing policy.

5. Trial 🔑253(5)—Requested instructions which omitted to recite insurance company's reliance on alleged misrepresentations held properly refused in action on policy.

In action on life policy, in which defense was misrepresentations by insured, instructions which omitted to recite that defendant believed the alleged misrepresentation, and acted thereon, *held* properly refused.

6. Trial 🔑143—Instruction requiring jury to find for defendant, if they believed evidence, held properly refused, where testimony was conflicting.

Requested instruction that, if jury believed all the evidence, they should find for the defendant, *held* properly refused, where plaintiff introduced testimony, and there was a substantial conflict as to defenses shown.

7. Trial 🔑121(1)—Attorney may state to jury his belief as to facts of case.

Attorney is not guilty of misconduct in stating to jury what he believes the fact of the case to be.

8. Appeal and error 🔑1058(2)—Excluding witness' testimony is not prejudicial, where witness is subsequently permitted to testify fully on subject.

Alleged error in sustaining objection to question is not prejudicial, where same question was later asked, and same witness allowed to testify fully on the subject.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Dollie Gorman Dotson against the International Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Peyton H. Moore, of Los Angeles, for appellant.

Frank D. McClure, of Los Angeles, for respondent.

STURTEVANT, J. As beneficiary thereunder, the plaintiff commenced an action against the defendant to recover on an insurance policy taken out by her deceased husband and written in favor of the plaintiff. The action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff and the defendant appealed.

In her complaint the plaintiff pleaded: (1) The application for insurance; (2) the policy; (3) the nonpayment, and thereupon she asked judgment for the amount due on the face of the policy. The defendant interposed an answer which contained certain denials, and then it specifically quoted certain questions propounded to the plaintiff's husband and his answers thereto. Thereupon such additional allegations were made in the answer as would constitute a defense for false representations on the part of the insured. Later the defendant filed an amendment to its answer, in which it set forth additional questions and answers, and thus extended its defense. It is of importance to note at this time that neither party in its written pleadings or the replication afforded by the statute (Code Civ. Proc. § 462) attempted to prove an estoppel. As a part of her replication, it was the theory of the plaintiff that, so far as the alleged false answers are concerned: (1) The answers claimed by the defendant were never made; (2) that the answers which were made were true and were not false; and (3) that the answers which her deceased husband made did not deceive, and were not made to deceive, the defendant.

[1] The trial court, among others, gave the following instruction:

> "You are instructed that, in order for the defendant company to succeed in this action, it is necessary for it to prove that some one or more of the questions in the application were untruly answered by the insured, with knowledge of such untruth and with intent to deceive, and that the defendant company was misled and deceived by and relied on such answers in entering into the contract of insurance; in other words, that the misrepresentation was, in your opinion, of such nature, weight, and force that you can say that without such misrepresentation the contract would not have been entered into."

The defendant contends that the instruction, as given, had the effect of submitting to the jury the question as to the materiality of each of the alleged false representations, and thereupon it asserts that prejudicial error was committed, and it cites and relies on McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 697, 139 P. 242. In defense of the instruction, the plaintiff quotes parts of the contract, and contends that the instruction but told the jury that it should weigh the fraud, if any. Something, perhaps, may be said in favor of each contention. Nevertheless, the instruction was far from being a model. Because of ambiguity alone it should not have been given. However, we may not with certainty say that the giving of the instruction was prejudicial error.

The application for insurance was made on the 12th day of September, 1923. Among others, it contained the following questions and answers:

> "Have you undergone any surgical operation or ever had disease of bone or joints, spinal curvature, or any bodily malformation? Ans. Tonsillectomy, August, 1921. When did you last consult a physician and for what? Ans. Never."

[2] Acting upon the request of the plaintiff, the trial court instructed the jury as follows:

> "You are instructed that the statement of the insured that he never had consulted a physician cannot be considered a material misrepresentation, in the face of the further statement of the insured that he underwent an operation for tonsillectomy in 1921, which clearly implied and brought to the attention of the defendant company the fact that he consulted a surgeon or physician about the time of such operation."

The instruction has the vice of assuming as a fact that the statement of the applicant for insurance to the effect that he had never consulted a physician is as completely qualified by his other answer that he had undergone tonsillectomy in August, 1921, as the evidence in the case would require, in order to make these two statements, taken as a whole, truthful. The evidence, however, showed that the deceased had consulted other physicians, and for physical ailments other than that suggested by the tonsillectomy. Dr. Dow testified that after the tonsillectomy Dotson came to his office and requested him to give his medical history to another physician, who he stated would call for it, but who did not. He also testified:

> "Well, I had referred him to Dr. Byington, and I know other physicians had taken care of him, but I do not remember their names at this time, none that I can recall. * * * He also called upon me at the time he was injured in a street car accident in 1921 or 1922, at which time I referred him to Dr. Byington."

Dr. Byington testified that he treated Dotson for injuries received in the street car accident, and that he had seen him professionally on at least one other occasion. Dr. Meredith testified that he treated Dotson professionally in the fall of 1923, or in December of that year. Upon objection made, his testimony was limited to such matters as would indicate Dotson's state of health at the time he applied for insurance in September, 1923. He said he observed diseased conditions which appeared to be of a chronic nature and to have existed for more than three or four months. It was a dropping of the lower jaw, a sort of paralysis, which prevented him from masticating his food, and required him to live mostly on soups. The doctor also testified that he treated him for asthma; that the asthma was chronic, and that Dotson had had other physicians doctoring him previously; that Dotson mentioned two or three other physicians who had treated him. This doctor testified that he did not attribute the paralysis to the tonsillectomy, and that it was beyond the reach of medicine, and was due to some nervous condition of the cerebrospinal system or the nervous system of the brain.

Further testimony indicated that, after the application for insurance, the condition of health of the insured gradually became worse, until he died on March 9, 1924, six months after the insurance policy was issued. The cause of death was given as "cerebral hemorrhage and central nervous system lues. Cause unknown. Sick about one-half year. Inability to swallow, choking, and inability to get breath. Duration about one-half year."

It may be conceded that there was testimony of other witnesses who gave testimony opposed to this, such as the wife of the insured, who stated that he enjoyed good health, and the testimony of Dr. Guyton, who testified that a Wasserman blood test was negative in 1924. This testimony, however, merely formed a conflict, and it was a conflict of evidence which should be determined by the jury. The instruction given and complained of, which we are now considering, had the effect of withdrawing from the jury a consideration of the evidence outlined, which, if believed, would fully justify the jury in concluding that the insured's representation that he had never consulted a physician was false and fraudulent, even as qualified by his other answer that he had undergone an operation for tonsillectomy in 1921. We think the giving of this instruction was a prejudicial error for which the judgment must be reversed.

[3, 4] Defendant also attacks an instruction worded as follows:

> "You are instructed that it is provided in the policy of insurance that all statements of the insured are, in the absence of fraud, to be deemed representations and not warranties, and therefore an untrue statement in the application would not avoid the policy unless you consider that the defendant company has proved to your satisfaction by a preponderance of evidence that it would not have taken the risk if that untrue statement had not been made."

The defendant complains that the instruction placed the burden on the defendant to prove "that it would not have taken the risk if the alleged untrue statement had not been made." In these cases, in general, the burden rests on the party pleading fraud to prove that it relied on the alleged false representation and acted thereon. 12 Cal. Jur. 750, § 29. Defendant does not cite any authority showing that a different rule applies to insurance policies.

[5] The defendant asked, and the trial court refused to give, four different instructions. Each one stated certain facts as constituting a defense, but each one wholly omitted to recite that the defendant believed the alleged misrepresentation and acted thereon. The trial court did not err. Spinks v. Clark, 147 Cal. 439, 444, 82 P. 45; Hutchason v. Spinks, 3 Cal. App. 291, 292, 85 P. 132; 12 Cal. Jur. 750.

[6] The defendant asked the court to instruct: "If the jury believe all of the evidence in this case, you will find for the defendant." That instruction assumed that the plaintiff had offered no testimony, or that the defendant had produced complete proof of one or more defenses to the plaintiff's complaint, and that there was no substantial conflict in the evidence thereon. Neither theory is supported by the record. The instructions were properly refused. Estate of Sharon, 179 Cal. 447, 459, 177 P. 283; Spaulding v. Mutual Life Ins. Co., 94 Vt. 42, 109 A. 22, 28.

[7] The defendant claims that the attorney for the plaintiff was guilty of misconduct in stating to the jury what "he believed" the facts to be. The record discloses no error.

It also claims that the trial court made improper statements of fact in the presence of the jury. The record does not support the claim; to the contrary, it shows that the action was most carefully tried.

[8] Finally, it is claimed that an objection was sustained to a question propounded by defendant's counsel. Conceding such to be the fact, it also is a fact that the same question was later propounded to the same witness by the same party, and the witness was allowed to testify fully on the subject.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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89 Cal. App. 600

MULLIGAN v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, et. al. (Civ. 6345.)

District Court of Appeal, First District, Division 2, California. March 1, 1928.

Appeal and error ⟹381—Appeal bond held invalid where surety on new bond executed without notice to opposite party did not justify (Code Civ. Proc. § 978a).

Where, on exception to sufficiency of sureties on appeal bond, sureties failed to appear and justify, whereupon defendants filed new bond without giving notice of filing thereof as required by Code Civ. Proc. § 978a, and sureties on such new bond did not justify and judge refused to approve bond, *held*, that appeal stands unsupported by a valid and approved appeal bond and should be dismissed.

Application by Ben D. Mulligan for a writ of mandamus, prayed to be directed to the Superior Court, City and County of San Francisco, Thomas F. Graham, Judge, to compel the dismissal of an appeal from the justice's court. Writ granted.

Henry Jacobsen, Jr., of San Francisco, for petitoner.

Sawyer & Sawyer, of San Francisco, for respondents.

KOFORD P. J. This is an original application for a writ of mandamus to compel the superior court to dismiss an appeal from the justice's court. It is based upon the failure of the appealing defendants to justify their sureties upon their appeal bond in the manner prescribed by law.

Petitioner, as plaintiff in the justice's court, obtained a judgment against Alfred Voyce, Jr., and Louise Hoggans for $134.78, together with interest and costs. Said defendants appealed to the superior court by serving and filing a notice of appeal and a notice of filing of undertaking on appeal October 11, 1927. The appeal bond was filed on the same day and was conditioned both for the appeal and a stay. It was signed by Charles Merkle and Annie Merkle as sureties. The sureties by notice duly served October 13, 1927, were by plaintiff duly required to justify. Defendants gave plaintiff notice on October 14 that they would justify their sureties October 17. On that day the sureties appeared and were examined in a department of the justice's court before a judge sitting there temporarily in the absence of the judge regularly assigned to that department. The hearing was not completed, and no order was made except to continue the hearing one day to be heard by the regular judge of that department. On the following day, October 18, the sureties failed to appear at the morning session, and on request of defendants the hearing was continued until the afternoon session. At that time the sureties again failed to appear and did not justify, but defendants filed a new bond executed by a surety company. The said new bond was objected to by plaintiffs on the ground that no notice of the filing thereof had been given him.

Under the provisions of Code of Civil Procedure, § 978a, formerly contained in Code of Civil Procedure, § 978, it has been frequently held that the filing of a new undertaking is not a sufficient justification without notice thereof to the adverse party. Wood v. Superior Court, 67 Cal. 115, 7 P. 50; Golden West Credit, etc., Co. v. Superior Court, 71 Cal. App. 532, 235 P. 738; Keefe v. Superior Court, 23 Cal. App. 750, 139 P. 899; M. W. Council No. 2 v. Superior Court, 29 Cal. App. 45, 154 P. 298; Herting v. Superior Court, 10 P. 514.[1] Although it is disputed in the pleadings whether or not the court called for justification upon the new surety company bond, and also whether the defendants were then and there ready and able to justify the bond, it is not disputed that they did not justify nor that the judge did not approve the bond, but refused to approve it. Consequently we have a situation where, although exception to the sufficiency of the sureties was taken, neither they nor others in their place have actually justified, and the appeal stands unsupported by a valid and approved appeal bond.

It is therefore ordered that the writ issue as prayed.

We concur: NOURSE, J.; STURTEVANT, J.

89 Cal. App. 687

GILLIS v. SUPERIOR COURT WITHIN AND FOR COUNTY OF ORANGE et al. (two cases). (Civ. 5979, 5980.)

District Court of Appeal, Second District, Division 2, California. March 5, 1928.

1. Indictment and information ⚷42—District attorney's failure to file informations within 15 days after defendant's commitment by justice held not to result in loss of jurisdiction (Pen. Code, § 809, as amended by St. 1927, p. 1045, and § 1382, subd. 1).

District attorney's failure to comply with Pen. Code, § 809, as amended by St. 1927, p. 1045, relative to filing informations within 15 days after examination and commitment of a defendant by a justice of the peace, *held* not, because of section 1382, subd. 1, allowing 30 days for filing, to result in loss of jurisdiction to continue the prosecution; the 15-day Provision of section 809 being directory.

2. Indictment and information ⚷42—District attorney's failure to file information within 15-day period prescribed is neglect of official duty unless good cause exists for delay (Pen. Code § 809, as amended by St. 1927, p. 1045).

District attorney's failure to comply with the provision of Pen. Code, § 809, as amended by St. 1927, p. 1045, relative to filing informations within 15 days after a defendant has been examined and committed by a justice of the peace, is a clear neglect of official duty, though the statute be but directory.

Application by Charles Gillis for a writ of prohibition, prayed to be directed to the Superior Court of the State of California within and for the County of Orange and H. G. Ames, Judge. Writ denied.

D. G. Wettlin and O. A. Jacobs, both of Santa Ana, for petitioner.

Z. B. West, Jr., Dist. Atty., and S. B. Kaufman, Deputy Dist. Atty., both of Santa Ana, for respondents.

CRAIG, J. On November 16, 1927, the petitioner herein was held by a justice of the peace of Santa Ana township, in the county of Orange, to answer before the superior court of said county upon two separate

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Reported in full in the Pacific Reporter; not reported in full in 69 Cal. xv.

charges of high misdemeanor, to wit, the selling of intoxicating liquor after prior conviction of a similar offense. Informations were not filed in the superior court until December 7, 1927. On the date of arraignment in each case, which was December 16th, demurrers to the respective informations and motions to dismiss the actions were filed, based upon the ground that, since the informations were not filed within 15 days after the defendant was examined and committed by the justice of the peace, as required by section 809 of the Penal Code (as amended by St. 1927, p. 1045), the superior court was without jurisdiction to hear or entertain any proceedings, in either case, except the motions for dismissal. The trial court overruled petitioner's demurrers and denied both motions, setting December 23, 1927, as the date to plead, and upon which latter date the petitioner appeared in person and with his counsel pleaded guilty to the charge of prior conviction, and not guilty to the offenses constituting the bases of the informations. January 10, 1928, was set as the date of trial, and this is an original proceeding in prohibition, founded upon the same ground as that assigned upon the motions below for dismissal, praying that the superior court be restrained from trying the defendant for the alleged misdemeanors.

Section 809 of the Penal Code reads as follows:

> "When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within fifteen days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offenses. * * *"

The petitioner relies entirely upon the foregoing section, and subdivision 1 of section 1382 of the Penal Code, which reads as follows: "When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within 30 days thereafter" the court, unless good cause to the contrary is shown, must order the prosecution dismissed. He cites Ex parte Fowler, 5 Cal. App. 549, 555, 90 P. 958, which refers to In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, and in which former case it was stated that the superior court acquired no jurisdiction by the filing of an information more than 30 days after examination and commitment.

Although the language in Ex parte Fowler is not free from ambiguity, the net result of what is said is that subdivision 1 of section 1382 of the Penal Code is mandatory, and this holding is based upon the opinion in Re Begerow, where it is held that subdivision 2 of section 1382 is mandatory. Neither case passes upon the question here involved, that is, whether section 809 is to be regarded as mandatory. The latter section was amended in 1927, prior to which time the district attorney was required to file an information within 30 days after the defendant had been committed. Now reading section 809 and subdivision 1 of section 1382 of the Penal Code together, we have this provision: That it is "the duty of the district attorney" to file an information within 15 days after the defendant has been committed, and that if such information is not filed within 30 days after such commitment, unless good cause to the contrary is shown, the court must order the prosecution dismissed. As the law thus reads, it can hardly be doubted that the part contained in section 809 is directory; otherwise, section 1382 would also have been amended so as to provide for dismissal within 15 days after commitment if the information should not be filed within that time. It may be that but for an oversight the Legislature would have amended section 1382 so as to make it conform in this particular to section 809, but as to that matter we have no such evidence as would justify the court in digressing from the application of the usual rules of statutory interpretation. The principal reason to surmise that such an error might have occurred is that a clear intention is shown in a number of amendments to the Penal Code enacted concurrently with the amendment of 1927 to section 809 of the Penal Code, to compel more speed in the functioning of criminal procedure. However, it might also well be reasoned that the difference in the provisions of these two sections may have resulted from a deliberate purpose, for the Legislature may have been willing to aid in speeding up trials by making it the duty of the district attorney to file informations within a shorter time after commitment than before, and yet not have believed it wise to go so far in that regard as to compel the dismissal of a prosecution, and thus perhaps release a criminal, because the district attorney might have not proceeded as promptly as directed by section 809 of the Penal Code. However, it is certain that the mandate of the provisions of the Penal Code now under consideration is to be found in section 1382. The teeth of this law have been written into it, and by it 30 days are still permitted for filing an information after commitment and before the courts are commanded to dismiss the prosecution.

[1, 2] Although we conclude that a failure on the part of the district attorney to comply with section 809 does not result in a loss of jurisdiction to continue the prosecution, nevertheless the terms of this section are unmistakable. Its purpose is to hasten the disposition of criminal cases, and thus to procure more exact administration of justice and greater public protection; and unless good cause exists for delay in the filing of an information, to fail to do so within the 15-

day period prescribed is in any case a clear neglect of the official duty. As to whether or not such cause for delay is present in this instance, we are not called upon or in a position to determine, but in view of the evident purpose of the Legislature in the recent amendment of section 809, and other provisions of the Penal Code, the definiteness of the official duty therein announced and the importance of its performance cannot be too forcibly stressed.

Respondents urge other grounds upon which they contend that the petition should be denied, but we think it unnecessary to discuss or express an opinion upon them.

For the reasons stated, the alternative writ is discharged and the application for a peremptory writ of prohibition is denied.

We concur: WORKS, P. J.; THOMPSON, J.

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89 Cal. App. 736

LOS ANGELES COUNTY et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 5932.)★

District Court of Appeal, Second District, Division 1, California. March 6, 1928.

Hearing Denied by Supreme Court May 3, 1928.

1. Master and servant ⇨364—Woman appointed by county to serve as inspector at election held "employee," within statute (Workmen's Compensation Act).

Woman regularly appointed as inspector at election by board of supervisors of county *held* an "employee," within meaning of Workmen's Compensation Act (St. 1917, p. 831).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

2. Master and servant ⇨371—Injury sustained by employee performing act necessary to comfort, safety, or welfare while at work arises "out of and in course of employment" (Workmen's Compensation Act).

Acts necessary to comfort, convenience, safety, or welfare of an employee while at work being incidental to his employment, injury sustained in performance of such acts "arises out of and in course of employment," within meaning of Workmen's Compensation Act (St. 1917, p. 831).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. Master and servant ⇨375(1)—Woman acting as election inspector who, while procuring water for member of board, fell into service pit of oil station sustained injury arising "out of and in course of employment" (Workmen's Compensation Act).

Where woman serving as election inspector left small real estate office used for balloting to procure water to aid in resuscitation of another member of board, who had fainted, fell into service pit on premises of adjoining oil station, and was injured, *held*, that injury "arose out of and in course of employment," within meaning of Workmen's Compensation Act (St. 1917, p. 831).

4. Master and servant ⇨364—County engaging woman to act as inspector at election held engaged in "business," within statute (Workmen's Compensation Act, § 8 [a] [c]).

County employing woman to act as election inspector to aid in taking care of balloting at election *held* engaged in business as required by Workmen's Compensation Act, § 8 (c) (St. 1917, p. 835), in view of section 69 providing act shall be liberally construed, notwithstanding section 8 (a) excluding employment which is both casual and not in course of "business" of employer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

Proceeding under the Workmen's Compensation Act by Caroline Wolhaupter for compensation, opposed by the County of Los Angeles and the Los Angeles County Flood Control District, employers. To review an order of the Industrial Accident Commission, awarding compensation, employer applies for certiorari. Order affirmed.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

PER CURIAM. An award was made by the Industrial Accident Commission against the petitioners and in favor of Caroline Wolhaupter for injuries sustained by her while serving as inspector at the election held in November, 1926. Mrs. Wolhaupter had been regularly appointed as such inspector by the board of supervisors of Los Angeles county to serve at the polling place in precinct No. 44, in the city of Santa Monica. A small real estate office was used as the polling place. In due time the work of counting the ballots commenced and continued all night until about 4:30 o'clock the next morning, when one of the lady members of the election board fainted. No water had been provided on the premises. In order to restore the lady who had fainted to consciousness, Mrs. Wolhaupter went to the lot of an adjoining oil station to get water from a faucet, a practice which had been followed during the day. In the darkness she walked into a service pit on this lot and suffered a broken collar bone and other injuries. Petitioners now seek to annul the award made for these injuries.

Petitioners first contend that Mrs. Wolhaupter was not an employee of the county of Los Angeles, within the meaning of the

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★Hearing denied by Supreme Court.

Workmen's Compensation Insurance and Safety Act, and therefore not entitled to the award made in her behalf. They cite the case of City of Los Angeles v. Industrial Acc. Com., 35 Cal. App. 31, 169 P. 260, as authority for this contention. In that case an election officer was injured while carrying the returns to the city hall. The court held that as such officer he was not an employee within the terms of the act. The injuries of the election officer were received on June 6, 1916, and the decision was made October 17, 1917. The case was governed by the law in force at the time of the accident. A very important amendment to the act was passed in 1917 which clearly makes the decision cited inapplicable to the facts of the case now before us. Before the amendment of 1917, an "employee" was defined as follows:

> "Every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service." Stats. 1913, p. 284.

By the amendment of 1917 the term "employee" is defined as follows:

> "Every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, *and all elected and appointed paid public officers*, and all officers and members of boards of directors of quasi public or private corporations, while rendering actual service for such corporations for pay, but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in household domestic service, farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising and any person holding an appointment as deputy clerk, deputy sheriff or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy. * * *" Stats. and Amendments of 1917, p. 831.

[1-3] It will be noted that the words "and all elected and appointed paid public officers," appear in the amendment of 1917 and that they do not appear in the statute as in force at the time of the decision of City of Los Angeles v. Industrial Acc. Com., supra. Clearly, an inspector at a general election is an appointed paid public officer. The reason for the change in the law is explained in County of Monterey et al. v. Rader, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359, wherein it is pointed out that the Legislature had in mind the "legal and public controversies that grew out of the uncertain situation as to whether the sheriff [an elected officer] was entitled to compensation" under the statute as it existed before 1917. The sheriff of Mono county had been killed in the discharge of his duties in July, 1915. An award having been made by the Industrial Accident Commission, a writ of certiorari was issued by the Supreme Court in October, 1916. The opinion annulling the award was filed August 27, 1917, but in the meantime the amendment had been passed. As said in the Rader Case:

> "The Legislature, with the purpose of saving such cases from the peril of annulment, extended the term 'employee' to include *elected heads* of public offices and inserted in the amendment of 1917 the italicized words '*all elected and appointed paid public officers*' words not in the acts of 1911 and 1913."

Petitioners next contend that Mrs. Wolhaupter was engaged when injured in an activity not growing out of nor incidental to her employment as election officer nor within the scope of her duties as such officer. We are of the opinion that the facts shown bring the case within the well-established rule that those acts of the employee necessary to his comfort, convenience, safety, or welfare while at work are acts incidental to the employment, and an injury sustained in the performance of such acts is an injury arising out of and in the course of that employment. In Whiting-Mead Co. v. Industrial Acc. Com., 178 Cal. 505, 173 P. 1105, 5 A. L. R. 1518, an award was made to a workman who had placed a bandage soaked with turpentine upon his hand which had been slightly injured. The workman temporarily ceased his labor and struck a match for the purpose of lighting a cigarette. The saturated bandage ignited and the hand was seriously injured. In affirming the award the court reviewed a number of cases in which the award had been upheld where workmen had left their labors to secure refreshments, two of them being cases in which the employees had left the performance of their work to procure drinking water. The court said, quoting from Archibald v. Ott, 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D, 1013:

> "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service. * * *"

It was the duty of Mrs. Wolhaupter and the other election officers to see that the ballots were counted. Manifestly this work could not properly or humanely proceed with one of the members of the board in a fainting condition. It was the duty of Mrs. Wolhaupter to endeavor to resuscitate the unconscious member so that the work of the board could be completed. If water had been provided in the room where the ballots were being counted, and if Mrs. Wolhaupter had secured such water and dashed it upon the face of the unconscious member, surely it could not be contended that such an act would not have been necessary to the life, comfort, or convenience of the stricken member. The rule is not altered by the fact that it was necessary to walk a short distance to procure water, or that the employee seeking compensation was ministering to a fellow employee rather than to herself.

[4] It is the final contention of petitioners that the employment of the applicant for compensation was casual in character and not within the business of petitioners. Respondent concedes that the employment was casual. Section 8 (a) of the act (1917) provides that, in order to exclude an employee from the benefit of the act, the employment must be "*both* casual and not in the course of the trade, business, * * * of his employer." Section 8 (c) provides that:

> "The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity. * * *"

And section 69 contains this provision:

> "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment. * * *"

The petitioners are political subdivisions of the state government. All their powers are derived from the law and their duties are those fixed by law. The "business" of petitioners includes the performance of the duties prescribed by law. Among these duties is that of conducting elections, providing for polling places, appointing election officials, etc. Elections are held at dates fixed by law. Certainly it cannot be said that they are not held "with some degree of regularity." In counting the ballots cast at the election the officers of the election board were employed in the course of the business of the petitioners.

The award is affirmed.

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89 Cal. App. 646

PEOPLE v. CAMPBELL. (Cr. 1015.)

District Court of Appeal, Third District, California. March 2, 1928.

Larceny ⚷28(4)—Indictment accusing defendant of felony, grand theft in unlawfully taking money of another, held to charge "grand theft" (Pen. Code, § 484).

Indictment accusing defendant of a felony, to wit, grand theft in unlawfully taking property of a corporation consisting of money of value of $687.50, *held* to charge the commission of felony of "grand theft," as defined by Pen. Code, § 484.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

William Campbell was convicted of grand theft, and he appeals. Affirmed.

Ray T. Coughlin, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was indicted on two charges of grand theft. He demurred to the indictment on the ground that it did not state facts sufficient to constitute a public offense. The demurrer was overruled, whereupon the defendant entered a plea of guilty of both charges, and judgment was entered against him accordingly. This appeal is from the judgment. Both counts of the indictment are in the same form. The first one is as follows:

> "The grand jury of the county of Sacramento hereby accuses William Campbell of a felony, to wit, grand theft, in that on or about the —— day of January, A. D. 1925, in the county of Sacramento, in the state of California, he, the said William Campbell, unlawfully took the property of the California Deciduous Fruit Companies, a corporation, consisting of lawful money of the United States, of the value of $687.50."

In appellant's brief it is said:

> "It requires no argument to sustain the proposition that every unlawful taking of the property of another is not theft."

This may be conceded, but the indictment charges more than an unlawful taking. It charges the commission of "a felony, to wit, grand theft," a crime fully defined by section 484 of the Penal Code. Webster defines theft as "the act of stealing." In State v. Fair, 35 Wash. 127, 76 P. 731, 102 Am. St. Rep. 897, it is said: "Larceny is only another name for stealing or theft." In People v. Donahue, 84 N. Y. 438, it is said:

> "It is at first questioned whether 'theft' is a crime either at common law or under the statutes. * * * The criticism is upon the word. It is claimed not to be the precise equivalent of 'larceny.' * * * We do not think either suggestion is well founded. Bouvier defines 'theft' as 'a popular term for larceny.' Blackstone uses the two words synonymously and as descriptive of one and the same offense."

In People v. Lopez, 90 Cal. 569, 572, 27 P. 427, it was contended that the information therein for larceny was insufficient because it failed "to charge that the offense was committed feloniously." The court said:

> "The defendant is accused, by the information herein, 'with the crime of felony,' which he is charged with having committed by 'stealing,

taking, and driving away' a horse, the personal property of the person therein named. * * * Larceny is defined by section 484 of the Penal Code to be 'the felonious stealing, taking, carrying, leading, or driving away the personal property of another.' * * * The word 'steal,' as here used, has, as will be hereafter shown, a fixed and well-defined meaning, and is, perhaps, in its common, everyday use and general acceptation, as well understood as any word in the English language. * * * To therefore contend that the defendant, who must be presumed to be a person of common understanding, did not know what was intended when he was charged by the information with stealing another man's horse, is simply preposterous."

That case was decided prior to the adoption of section 4½ of article 6 of the Constitution, which forbids the reversal of a case for mere technical errors which do not result in "a miscarriage of justice." The word "theft" is probably as well understood as the word "steal," and the reversal of a judgment on the ground that the defendant did not know the meaning thereof would be a long step backwards. Much of the time of courts has been consumed in the consideration of technical objections to pleadings in criminal cases; yet it is probable that few judges are able to recall a single case in which the defendant was actually in the slightest doubt as to the crime with which he was charged. Modern legislation is endeavoring to cut the inextricable Gordian knot by which the trial of criminal cases has been so long fettered, and the courts ought not to thwart that laudable effort by an adherence to mere technical precedents which regard form rather than substance.

It is unnecessary to repeat what is said in the opinions filed in this court January 24, 1928, and February 21, 1928, in the case of People v. Plum, 263 P. 862, and 265 P. 322, where the subject under discussion is more fully considered.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

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90 Cal. App. 94

PEOPLE v. POTTER. (Cr. 1448.)

District Court of Appeal, First District, Division 1, California. March 13, 1928.

False pretenses ⚷49(4)—Conviction of grand theft could not be sustained, where there was no evidence defendant did not have bank deposit in amount claimed.

Where information for grand theft alleged that defendant, by means of false and fraudulent pretenses, obtained wearing apparel by representing that she had a deposit of $6,000 to her account in a certain bank, conviction could not be sustained, where there was no evidence in record showing that defendant did not have on deposit in bank amount of money she claimed to have had.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Grace G. Potter was convicted of grand theft, and she appeals. Reversed.

Scott & Pioda, of Salinas, and Henry L. Corson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was accused by information of the crime of grand theft. It was alleged, in substance, that, on or about the 21st day of September, 1927, she, by means of false and fraudulent pretenses, obtained certain wearing apparel from one Lois Dibrell of the total value of $234.50. The false pretense alleged was that defendant had represented that she had a deposit of $6,000 to her account in a certain bank. She was tried and convicted. Motion for new trial was made and also a motion in arrest of judgment. Both motions were denied, and appellant was sentenced to an indeterminate term in San Quentin. Several points are relied on for a reversal of the judgment, but, as one of the points, in our opinion, is decisive of the case, it will only be necessary to consider that question. It is contended that there is no evidence in the record to show that appellant did not have on deposit in the bank the amount of money she claimed to have had, for which reason the judgment should be reversed. We have examined the record carefully and we fail to find any testimony whatsoever on the subject, and respondent admits there is none. This being so, we see no escape from appellant's contention. The only testimony regarding her possession of any funds was with reference to the amount of money she carried on her person on two or three occasions. This testimony is contained in an extrajudicial statement of the defendant, received in evidence, and on her cross-examination, but this evidence had no reference to the alleged false representations. The falsity of such representations made by a defendant is a material and essential element and portion of the corpus delicti. They form the gravamen or core of the charge, and make the defendant's conduct and acts a crime, when otherwise they would be entirely innocent and lawful. People v. Simonsen, 107 Cal. 346, 40 P. 440; People v. Bliss, 47 Cal. App. 503, 190 P. 1046.

There being no evidence in the record to show that the representations were false, nothing remains but to reverse the judgment of conviction. It is therefore ordered that the orders and judgment appealed from be and the same are hereby reversed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

90 Cal. App. 27

PEOPLE v. NELSON et al. (Cr. 1554.)

District Court of Appeal, Second District, Division 2, California. March 9, 1928.

1. Criminal law 🔑622(1), 1148—Question of separately trying defendant rests in trial court's discretion, which will not be disturbed, in absence of abuse.

Whether defendants in criminal case shall be separately tried rests in trial court's discretion, and exercise of discretion against defendant seeking a severance is controllable on appeal only when discretion is abused.

2. Criminal law 🔑340—Statement of physical facts is not inadmissible because their existence was ascertained in absence of accused.

A statement of physical facts by witness in a criminal case is not rendered inadmissible merely because their existence was ascertained in absence of the defendant on trial.

3. Criminal law 🔑388—Evidence, in prosecution for burning insured property, as to finding of wrench which fitted open valve controlling entry of gas, held admissible.

In prosecution for burning insured property, testimony of fire captain that he found in the house a wrench, the mouth of which was open, so that it fitted exactly a valve controlling gas jets, which valve was turned on, *held* admissible as against objection that defendant was absent when wrench was fitted on valve.

4. Criminal law 🔑671—Exclusion of jury was properly denied during investigation of question whether confessions of codefendants were freely and voluntarily made.

Where, on alleged confessions of codefendants being offered, trial court proceeded to investigate question of whether confessions were freely and voluntarily made, request for exclusion of jury was properly denied.

5. Criminal law 🔑543(2)—Due diligence in procuring attendance of state witness held shown, rendering his preliminary deposition admissible (Pen. Code, § 686).

Where state's witness was in attendance in court at time cause was originally called, but thereafter left not only state but the country, without district attorney knowing of his intention to depart, or his actual departure, *held* that there was sufficient showing of due diligence required by Pen. Code, § 686, to procure witness' personal attendance, so as to render his deposition admissible.

6. Criminal law 🔑858(3)—That jury took alleged confessions of codefendants never received in evidence on retirement, and returned them in a few minutes without reading them, held not prejudicial.

That jury, apparently through inadvertence, took alleged confessions of codefendants, which were never received in evidence into jury room, but returned them on discovery a few minutes after retirement, *held* not to have been prejudicial to defendant, when none of the confessions were read, except the first few lines for purpose of identifying them.

7. Criminal law 🔑372(11)—In prosecution for arson, admitting fireman's testimony that he had been at defendant's house at previous fire held error.

In prosecution for burning insured property, admission of testimony of officer of fire department that he was at house of defendant and her husband in response to a previous fire, without showing how earlier fire was started, or whether defendant ever knew it occurred, *held* error.

8. Witnesses 🔑373—Letters written by state's witness, offered to show witness' hostility toward defendant, held properly excluded, where not offered while witness was on stand nor exhibited to him.

Letters written by state's witness, offered for purpose of showing witness' hostility toward defendant, *held* properly excluded, where letters were not offered while witness was on stand, nor exhibited to him.

9. Arson 🔑28—In prosecution for burning insured property, testimony that insurance company was existent held properly admitted.

In prosecution for burning insured property, testimony of insurance agent who delivered policy on property that insurance company, which purported to issue policy, was an existent insurance company, licensed to do business in state, was properly admitted.

10. Criminal law 🔑1186(4)—On review required by Constitution, error in admitting evidence in prosecution for arson held not to have resulted in miscarriage of justice.

On an examination of entire cause, including evidence, as required by Constitution, *held* that error, in prosecution for burning insured property, in admitting testimony of fireman that he was at previous fire at defendant's house, did not result in a miscarriage of justice.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Bessie Nelson was convicted of burning insured property, and she appeals. Affirmed.

C. E. Heidingsfelder, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, P. J. The three defendants were charged in a single information with the crime of burning insured property. Under direction of the trial judge, Pritchard and Le Verne were acquitted. Bessie Nelson was convicted, and appeals from the judgment and from an order of the trial court denying her motion for a new trial.

It is insisted that the evidence was insufficient to support the verdict against appellant. We usually deem it necessary, when such a point is made in any case, to state so much of the evidence as is necessary to meet it. In the present instance, however, the chain of circumstances shown by the record justified so plainly an inference by the jury that appellant was guilty—if, indeed, it did not positively require the inference—that we think it unnecessary to state any of the evidence upon the question.

[1] At the hearing appellant moved for a separate trial, but the motion was denied, and she and Pritchard and Le Verne were tried together. The motion was made upon the ground that evidence would be introduced against appellant's codefendants which would be inadmissible as against her, and that the hearing of such evidence by the jury would necessarily be prejudicial to her interest. The question whether defendants in a criminal case shall be separately tried rests in the discretion of the trial court, and the exercise of discretion against a defendant asking a severance is controllable on appeal only when the discretion is abused. People v. Perry, 195 Cal. 623, 234 P. 890. In the case cited the Supreme Court said that "in almost every criminal trial in which two or more persons are jointly charged with the commission of an offense some fact, or facts, are developed against one of the defendants which cannot be regarded as evidence against the other," and remarked that it is not the rule "that the defendants are entitled to a separate trial for that reason alone."

[2, 3] The fire which, as shown by the evidence, occurred in the insured house of appellant and her husband, was extinguished before it had completely consumed the building. One of the persons who aided in extinguishing the blaze was a captain in the fire department. He testified that he found several gas jets in the house to be open, that the gas meter which controlled the flow of gas into the building was locked by a "standard padlock" used by a certain gas corporation, but that the meter had been "turned on" as far as the presence of the padlock would permit and that he found it in that condition. He also testified that he found in the house a wrench, the "mouth" of which was turned or opened to a certain width, and, over the objection of appellant, that he applied the wrench, as thus open, to the valve which controlled the entry of gas into the house at the meter, and found that it fitted exactly. It is contended that the trial court erred in permitting the witness to detail to the jury his experiment, conducted in the absence of appellant, in applying the wrench to the valve. We think the ruling was proper. A statement of physical facts by a witness in a criminal case is not rendered inadmissible merely because their existence was ascertained in the absence of the defendant on trial. The question here presented seems to be practically identical with that shown by a part of the facts recited in the latter half of the opinion in People v. Searcey, 121 Cal. 1, 53 P. 359, 41 L. R. A. 157.

[4] Certain alleged confessions of Pritchard and Le Verne being about to be offered, the trial court was proceeding to embark upon an investigation of the question whether the confessions were freely and voluntarily made, whereupon appellant, contending that this preliminary evidence would be damaging to her, asked for an exclusion of the jury, and the request was denied. The ruling was proper, as it was necessary for the jury to hear the preliminary evidence. "The judge must determine, first and as a matter of course, whether the confession was free and voluntary and whether, therefore, it is to be heard by the jury. * * * The judge may decide that the confession was freely and voluntarily made, and, if he does, will allow it to be received in evidence; but the jury may, upon the same evidence, determine that it was not so made and may refuse to consider it." People v. Black, 73 Cal. App. 13, 238 P. 374.

[5] The deposition of one Kennedy, taken at the preliminary examination of appellant, was read in evidence at the trial, and appellant contends that there was no preliminary showing by the prosecution of due diligence in an attempt to procure the personal attendance of the witness. According to the minutes of the trial court, of date March 28, 1927, the cause was set down for trial on June 1. In the meantime, the district attorney procured the issuance of a subpœna for a number of witnesses, including Kennedy, but the process was never served on him. However, when the cause was called on June 1, he was in attendance in court. The trial was not then commenced, a continuance to June 17 being ordered, and all witnesses being instructed to return at that time. The record fails to disclose whether Kennedy was present in court on June 17, but on that date a further continuance was ordered to August 17, and all witnesses were instructed to return on the date set. In the interim, and on or about July 1, Kennedy left the county of the jurisdiction, and went to Canada, where he remained until after the time when his deposition was read to the jury. Both his intention to depart and his actual departure were unknown to the district attorney. While it would have been better if the prosecutor had caused the subpœna to be served on Kennedy, we think, under all the circumstances of the case, that the failure to serve it does not show a lack of due diligence. Kennedy was in the employ of the public as an "arson investigator" under the county fire warden. It was evidently a part of his duty, or aided in the charge of his duty, to give testimony to facts ascertained by him as an investigator. He had testified at the preliminary examination of the charges against the defendants, and was present in court on the day first set for the trial in the superior court. We think the district attorney was justified in the belief that he would be present, as he was instructed by the court to be, whenever his testimony was needed. Under

all these circumstances the prosecution is not to be held responsible for his nonappearance at the final time, and for his departure from the jurisdiction without warning. We think there was a showing of due diligence, as required by section 686 of the Penal Code. It is especially to be noted that the record shows without dispute that Kennedy was out of the state—out of the country, in fact—at the time of the trial, a circumstance which has been allowed controlling weight in several late cases, notably in People v. Padilla (Cal. App.) 254 P. 585.

[6] The alleged confessions of Pritchard and Le Verne were never received in evidence, but were marked as exhibits for identification only. When the jury retired to consider the charge against appellant, these exhibits for identification, apparently through inadvertence, were handed to a member of the jury, together with other papers, and were then taken into the jury room. Members of the jury within a few minutes discovered that the alleged confessions were among the papers which had been taken into the room, whereupon the bailiff of the court was immediately called, and was made acquainted with the fact. That officer then reported the circumstance to the judge who had tried the case, with the result that the exhibits for identification were at once removed from the possession of the jury. Appellant, deeming that the alleged confessions contained matters which were highly prejudicial to her interest, sought, on her motion for a new trial, to take advantage of the circumstance that the papers had been in the possession of the jury during its retirement to consider a verdict. On the hearing of the motion, eleven of the jurors were sworn and examined, and we have read the transcript of their testimony thus given. We find it unnecessary to set down in detail what the testimony was. It is enough to say that each of the eleven testified that he read, or heard read, no part of the confessions, except that it was testified by a few of them that one of their number read aloud, in the hearing of two or three of the others, a few lines at the beginning of one of the papers. The confessions were in the form of question and answer, and the portions of the one which was read aloud consisted only of questions and answers relating to the occupation and address of the person whose alleged confession followed. The reading was merely for the purpose of identifying the paper. It is necessary briefly to refer to the twelfth juror, the one whose testimony was not taken on the hearing of the motion for a new trial. It was testified by several of the others that this juror neither saw the confessions nor read them nor heard them read. While, of course, these papers should never have gotten into the jury room, the only question of substance presented for our consideration is whether appellant was injured by the inadvertence. Remarks to this effect are to be found in the opinion in People v. Stokes, 103 Cal. 193, 37 P. 207, 42 Am. St. Rep. 102, although there it was held that what occurred in the jury room was damaging to the appellant, and a reversal of the judgment followed. We are satisfied that the rights of the appellant in the present instance were not prejudiced by the untoward circumstance shown by the record.

[7] An officer of the fire department was asked whether, on a certain date, he was at the house of appellant and her husband "in response to a previous fire." The trial court overruled an objection to the question, and the witness answered: "I was—I do not know as to the date, but I was there at a previous fire." The Attorney General would defend the ruling on the ground that the evidence "was competent as tending to show intent, design, and plan," but it did not tend even remotely to show either intent, design, or plan. There was nothing to show how the earlier fire was started or whether appellant even knew that it had occurred. The circumstance here disclosed is utterly different from those presented by People v. Shainwold, 51 Cal. 468, and People v. Lattimore, 86 Cal. 403, 24 P. 1091. The testimony was not admissible under the rules of the criminal law which permit evidence of other and similar offenses under certain circumstances, for the reason that no offense whatever was shown. The ruling was error.

[8] Appellant complains of rulings of the trial court which excluded two letters written by a witness for the prosecution—letters offered for the purpose of showing the hostility of the witness toward her. The letters were not offered while the witness was on the stand, nor were they exhibited to him. He was asked, however, if he had written letters containing certain matters, among which were statements that, if appellant "stuck" Pritchard and Le Verne, the witness "would send her to the penitentiary," and that the witness would "stick" appellant, and "would send her to the pen as sure as hell," and he said that he had not. It transpired later, when the letters were offered, that they contained no such assertions, nor anything remotely resembling them. It has been well said that, when the credibility of a witness is assailed on the ground that he has made declarations showing hostility toward the party against whom he is called, "it is required that the attention of the witness be called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstance as to afford him an opportunity to explain." 27 Cal. Jur. 129, § 105. Appellant did not comply with this rule, and the letters were properly excluded.

[9] Appellant contends that the trial court erred in admitting certain testimony of the

insurance agent who delivered to her the fire insurance policy upon her property. The testimony was to the effect that the insurance company which purported to issue the policy was an existent insurance corporation at the time the policy was issued, and that the company was licensed to do business in California. The testimony was proper under the rules laid down in People v. Hughes, 29 Cal. 258, and People v. Morley, 8 Cal. App. 372, 97 P. 84. The question involved here is one mainly of intent. It was said in the opinion in the first of the two cases cited, where the charge was the same as the one here under consideration:

> "It was not necessary for the prosecution to prove that the Hartford Insurance Company was legally incorporated, or that the policy was valid, and that the defendant could maintain an action thereon for loss or damage. His guilt or innocence of the offense charged in this indictment cannot be made to depend upon any such questions."

The evidence admitted in the second case cited, and which was there held to be sufficient, was practically the same as that admitted here.

Appellant states a number of other points, but they are either not argued, or they are disposed of by what we have said above as to other points, or they are plainly without merit. They do not, therefore, require a particular consideration.

[10] Because of the single error which we have found in the record, we have found it necessary to examine the entire cause, including the evidence, as required by the Constitution. From such examination we are convinced that the error has not resulted in a miscarriage of justice.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

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89 Cal. App. 542

BERG v. STANDARD LIGHT CO. OF CALIFORNIA et al. (Civ. 6188.)

District Court of Appeal, First District, Division 1, California. Feb. 29, 1928.

1. Pleading 🔑406(5)—Failure of assignee's complaint to allege consent of wives of assignors to assignment of claims for wages held waived (Civ. Code, § 955).

In action by assignee to recover for work and labor performed, failure of complaint to state that consent of wives of married assignors were attached to assignments of claims for wages as required by Civ. Code, § 955, *held* waived by defendants, who did not set up such failure in their answer nor object to complaint on that ground; the defect not being a jurisdictional element.

2. Assignments 🔑131—Assignee suing on assigned claims for wages is entitled to file amended complaint on defense that wives of assignors did not join (Civ. Code, § 955).

Where, in action for work and labor by assignee of claims, defense is set up that wives of married assignors had not joined in assignments as required by Civ. Code, § 955, plaintiff is entitled to file an amended complaint setting forth a proper assignment, as lack of assignment could in no manner deprive employees of their cause of action.

3. Abatement and revival 🔑22—Disability created by statute is personal and operates only to abate action.

A disability created by statute is of a personal character and operates only to abate the action.

4. Assignments 🔑138—Judgment denying recovery to assignee of claims for wages as to married assignors held erroneous, where wives joined in proper assignments prior to judgment (Civ. Code, § 955).

Where, in action by assignee of claims for wages, on objection that wives of married assignors did not join in assignment as required by Civ. Code, § 955, proper assignments were executed before judgment, judgment denying plaintiff recovery on claims of married assignors was erroneous; statute being remedial and for benefit and protection of wives.

Appeal from Superior Court, San Dieg County; W. P. Carey, Judge.

Action by Andy Berg against the Standard Light Company of California and another for work and labor performed. From the judgment, plaintiff appeals. Reversed.

Sweet, Stearns & Forward, of San Diego, and Edwin L. Eckert, of El Centro, for respondents.

W. J. Mossholder, of San Diego, for appellant.

TYLER, P. J. [1] Action to recover for work and labor performed. The complaint alleges in substance that defendants employed plaintiff, together with others named F. McNeil, Joseph Beechler, Wm. H. Brockett, and Wilfred Brockett, respectively, to work and labor for defendant Standard Light Company at certain agreed wages per week. The company was not in a prosperous condition and it was unable to pay said persons their wages in full at the close of each week. Partial payments were made, but the company kept getting further and further behind in the payment of the workmen until June, 1922, when the company was informed by its employees that they would have to sever their relations with it as they were not receiving enough to support their families. Subsequently the employees assigned their claims to plaintiff, who brought an action to recover the amounts due him and the other four employees. Judgment was recovered for the amounts due plaintiff and Wilfred Brockett, but the trial court found that the other three employees were not entitled to judgment for the reason that they were married persons and had not complied with the provisions of section 955 of the Civil Code, which provides that no order or assignment of wages made by a married person shall be valid unless the written consent of the husband or wife, as the case may be, is attached to such order or assignment.

[2-4] Defendants did not set up in their answer the fact that the complaint did not state that the consent of the wives of McNeil, Beechler, and Wm. H. Brockett were not attached to their husbands' assignments, nor was any objection made on that ground to the complaint either by demurrer or answer. Under these circumstances they must be deemed to have waived the same. Respondents have not favored us with a brief, but it seems clear to us that as a defense the section invoked by defendants is a mere matter that goes to the abatement of the action when specially pleaded, and not having been so pleaded it was waived. The case is similar in principle to a situation where a corporation has failed to allege the filing of its articles of incorporation, or a copartnership the certificate required by the Civil Code, a necessary requisite before either may maintain or defend an action, in which case it has been universally held that failure so to do subjects them only to the specific defense in the nature of a plea in abatement, the allegation not being essential to the cause of action. Cal. Sav. & L. Soc. v. Harris, 111 Cal. 136, 43 P. 525; Ward Land, etc., Co. v. Mapes, 147 Cal. 752, 82 P. 426. The defect is not a jurisdictional element. Then again, the record shows that when the objection was raised by defendants at the trial, the wives of the particular plaintiffs did make and execute proper assignments prior to the court's decision. The court held them to be ineffectual for the reason, no doubt, that they were not executed prior to the filing of the suit. Had defendants set up in their answer the special defense that the wives had not joined in the assignment, plaintiff would have been entitled to file an amended complaint, setting forth a proper assignment, as lack of the assignment could in no manner deprive the employees of their cause of action. First Nat. Bank v. Henderson, 101 Cal. 309, 35 P. 899; Phillips v. Goldtree, 74 Cal. 151, 13 P. 313, 15 P. 451. A disability created by statute is of a personal character and operates only to abate the action. Byers v. Bourret, 64 Cal. 73, 28 P. 61.

The provisions of section 955, Civil Code, are remedial in character and intended to be salutary and beneficial to wives whom it was designed to protect, and the judgment appealed from denies the wives the benefit of the act. Here, the objection to the assignment having been removed prior to the submission of the cause, that portion of the judgment of the court denying plaintiff judgment on the claims of McNeil, Joseph Beechler, and Wm. H. Brockett was erroneous for the reasons stated and should be reversed. Rudneck v. So. Cal. M. & R. Co., 184 Cal. 282, 193 P. 775.

It is so ordered.

We concur: KNIGHT, J.; PARKER, Justice pro. tem.

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90 Cal. App. 13

WAYBRIGHT v. MEEK et al. (Civ. 6272.)

District Court of Appeal, First District, Division 1, California. March 9, 1928.

1. Brokers 🔑86(1)—Evidence held to sustain finding that broker had fulfilled terms of contract for commission for securing loan.

In action to recover broker's commission for securing loan, evidence that loan was made, though not paid in lump sum, *held* to sustain finding that broker had fulfilled terms of contract.

2. Contracts 🔑171(2)—Agreement for commissions for securing loan held separate from agreement for additional compensation on sale of bonds.

Under agreement to pay commission for procurement of loan, together with agreement for additional compensation in case of sale of certain bonds, recovery could be had under agreement for commissions for securing loan without having performed other condition, since contract was not an entire but a severable one in that it provided for two separate and severable items of service.

3. Contracts 🔑171(1)—Whether contract is entire or separable depends on language and subject-matter.

Whether a contract is entire or separable depends upon its language and subject-matter, and this question is one of construction to be determined by court according to intention of parties.

4. Contracts 🔑171(1)—Covenants of contract apportioning money to several things to be done thereunder are ordinarily regarded as severable and independent; "severable covenants."

Where several things are to be done under a contract if the money consideration is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Severable Contract.]

5. Usury 🔑55—Contract for broker's commission of $5,000 for securing $50,000 loan held not void as violation of Usury Law.

Portion of Usury Law (St. 1919, p. lxxxiii) attempting to regulate amount of commission which may be charged by broker having been held unconstitutional and void, contract for commission of $5,000 for securing a loan of $50,000 is not invalid as violation of Usury Law.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by J. S. Waybright against Otto Meek and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James S. Bennett and Howard L. Grace, both of Los Angeles, for appellants.

Emmet H. Wilson and J. Edward Keating, both of Los Angeles, for respondent.

TYLER, P. J. Action to recover a broker's commission of $5,000 for securing a loan of $50,000. The complaint is in three counts. The first cause of action alleges an agreement to pay plaintiff and Elmer E. Cole $5,000 to negotiate the loan. The second alleges that plaintiff performed services as broker for defendants to the reasonable value of $5,000. The third, that plaintiff performed services as broker for defendants, and that they agreed to pay for said services the sum of $5,000. Prior to the filing of the action, Cole assigned his interest in the claim to plaintiff. Issues were joined on an answer which denied all of the allegations of the complaint and on a counterclaim of $103. Trial was had without a jury. The trial court found that about April 25, 1922, defendant Meek entered into an agreement with plaintiff and his associate Cole, whereby they were employed to negotiate a loan of $50,000, and that Meek agreed to pay the sum of $5,000 for their services. The court further found that about said day defendant Meek signed a written memorandum of agreement wherein he agreed to pay plaintiff and his associate the said sum for services performed by them for him on and prior to April 25, 1922, in procuring the loan. Judgment was accordingly rendered against Meek on all the allegations of the complaint and defendant Utah-Nevada Land & Live Stock Company was relieved from liability. Motion for a new trial was made and denied. A motion to vacate the judgment was also made, on the ground that the commission allowed plaintiff for securing the loan, for a shorter period than six months, it being one not secured by mortgage or pledge upon real property, was illegal and void under the state Usury Law (St. 1919, p. lxxxiii). This motion was likewise denied. Appellant here claims that the evidence is insufficient to support the judgment. He also claims that plaintiff's contract is void under the Usury Law. There is no merit in either contention. The contract upon which the action is based reads as follows:

> "Mr. Elmer E. Cole and Mr. J. S. Waybright: Referring to the transaction which I have agreed to make with the General Mortgage Company, and the Engineering Corporation, or their clients or assigns, by which they are to loan me $50,000 in cash now, and if they are satisfied, after investigation of my securities or bonds they are to take over or to purchase my 500,000 bonds, said bonds secured on the ranch known as the Utah Nevada Land and Live Stock Company's ranch, located in White Pine county, Nev., and Millard county, Utah, at a price of 85 cents on the dollar, payable $65,000 in deming New Mexico lands and lots as per schedule and prices shown to me by you and the balance in cash at stated intervals.
>
> "Now, as payment for your services in bringing about the introduction to the said people and for your aid in bringing about such sale, I hereby agree to pay you the sum of $5,000 in cash, the same to be paid to you at the time I receive the $50,000 loan above described, which shall be your full compensation providing the investigation of my securities is unsatisfactory and the deal goes no further. But in the event such investigation is satisfactory and the bonds are purchased by the parties named above, or through said parties, then in that event I agree to deed to you as your further compensation $15,000 of the Seming property I get according to above-described agreement, the same to be given to you at the time the property is deeded to me and at the prices at which I take it, free and clear of incumbrances. Property to be selected by Otto Meek at a price to be an average of even value to the whole property.
>
> "Dated this 25th day of April, 1922.
>
> "Otto Meek.
>
> "September 6, 1922."

[1-5] In support of the claim of insufficiency of the evidence, it is appellants' contention that it shows that respondent never complied with the terms of the contract. In this connection it is argued that as the contract provided that appellant should receive the $50,000 at one time, in one sum, and immediately after the signing of the written contract, he is not bound thereby to pay a commission to plaintiff, as the evidence shows that the sum was received in installments. The objection is frivolous. As the contract indicates and the evidence and findings show, the loan had been negotiated and the transaction had been agreed upon by defendant before the signing of the contract. The document signed by Meek was merely to confirm in writing an oral agreement previously made by Meek with plaintiff and his associate. The document itself so indicates, as it recites:

> "The transaction which I have agreed to make * * * by which they are to loan me $50,000," etc.

And further on, in providing for payment for the services, it is provided:

> "Now, as payment for your services in bringing about the introduction to the said people * * * I hereby agree to pay you the sum of $5,000 in cash, the same to be paid to you at the time I receive the $50,000 loan," etc.

The use of the word "now" merely refers to the concluded agreement with reference to the loan as distinguished from the sale of the bonds referred to in the contract which might or might not be sold, and for the accomplishment of which sale respondent was to receive the further commission therein provided for. Respondent procured the loan to be made, and the fact that it was not paid in a lump sum was of no consequence, the contract not requiring it. Having received and accepted the full amount, defendant was bound by his agreement to pay the stipulated commission. The court found that plaintiff and his associate in all respects fulfilled the terms of the contract on their part to be performed, and no other finding could be made under the evidence. The further claim is made that as the contract covered two subjects, first, an agreement on the part of appellant to pay $5,000 for the procurement of the loan, and second, the payment of further and additional compensation if bonds amounting to $500,000 should be sold, that no recovery could be had until both conditions were performed. This contention is equally without merit. The contract was not an entire, but a severable one. It provided for two separate and severable items of service, viz., (1) the negotiation of a loan for which appellant agreed to pay $5,000, and (2) the sale of bonds belonging to appellant. Each covenant was separate and distinct, and the contract plainly so indicates. In express terms it provides that payment of the sum for services in procuring the loan shall be paid "at the time I receive the $50,000 loan." No reference to the sale of any bonds is here mentioned, nor is the promise in any other manner limited or qualified except that it was provided that said payment "shall be your full compensation, provided the sale of my securities is unsatisfactory and the deal goes no further," which clearly shows that the services to be performed were of a separate and distinct character. Language could not be more plain. Whether a contract is entire or separable depends upon its language and subject-matter, and this question is one of construction to be determined by the court according to the intention of the parties. Where several things are to be done under a contract, if the money consideration is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent. Pacific Wharf, etc., Co. v. Dredging Co., 184 Cal. 21, 192 P. 847. Here the consideration is apportioned to each of the items of services. Neither item is a part of the other, nor are they in any manner dependent upon each other. The first one was fully performed by respondent and his assignor, and they are entitled to the compensation which the agreement provided for. And finally as to the claim that the contract is a violation of the Usury Law, for the reason that the commission agreed upon between the parties is greater than the amount allowed thereunder. This question has been determined contrary to appellants' contention in the late case of Wallace v. Zinman (Cal. Sup.) 254 P. 946, wherein it is held that the portion of the Usury Law attempting to regulate the amount of commission that may be charged by a broker is unconstitutional and void.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

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90 Cal. App. 22

FIDELITY CREDIT ASSUR. CO. OF CALIFORNIA v. COSBY. (Civ. 5129.)

District Court of Appeal, Second District, Division 1, California. March 9, 1928.

1. Contracts ⚷137(4)—Contract for conditional sale of filling station equipment held not rendered unenforceable by invalid severable provision requiring buyer to buy gasoline and oil from seller (Civ. Code, § 1673).

Under Civ. Code, § 1673, contract for conditional sale of filling station equipment to be paid for by installments *held* not rendered entirely void and unenforceable as in restraint of trade by provision therein that, during period covered by installments, buyer should purchase entire requirements of gasoline and oil from seller; such invalid provision being severable.

2. Contracts ⚷137(4)—If portion of contract restraining trade can be severed, part not so tainted can be enforced (Civ. Code, § 1673).

If portion of contract objectionable under Civ. Code, § 1673, as being in restraint of trade can be severed from remainder of contract, part which is not so tainted can be enforced.

3. Contracts ⚷153—Law encourages making contracts on proper considerations.

It is policy of law to encourage making of contracts on proper considerations.

4. Contracts ⚷153—Contract may not be held void as restraining trade unless its provisions plainly violate sound public policy (Civ. Code, § 1673).

Contract may not be *held* void under Civ. Code, § 1673, forbidding contracts in restraint of trade unless its provisions are plainly violative of sound public policy.

5. Contracts ⚷147(3)—Contract is construed as a whole to determine intention.

Filling station equipment contract must be considered in its entirety and various paragraphs in their relation to each other, to determine intention of parties.

6. Contracts ⚷116(2)—Contract for conditional sale of filling station equipment to be used only at certain place held but protection to seller (Civ. Code, § 1673).

Where contract for conditional sale of filling station equipment indicated that conditions therein should be effective only during life of contract, provision therein that such equipment should be used only at specified address afforded but reasonable protection to seller, and did not make contract void as being in restraint of trade, contrary to Civ. Code, § 1673.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Fidelity Credit Assurance Company of California against W. O. Cosby. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Ray Miller, of Los Angeles, for appellant.
Jesse R. Shafer, of Los Angeles, for respondent.

WOOD, Justice pro tem. Defendant's demurrer to the complaint was sustained without leave to amend, and plaintiff appeals from the judgment entered in defendant's favor. The action was commenced to recover the sum of $561.76, alleged to be the balance due on a conditional sale contract by which plaintiff's assignor, the Mutual Refining Company, sold to defendant a pump and certain other gasoline service station equipment. Defendant paid the sum of $15 upon the execution of the contract and agreed to pay the balance of the purchase price at the rate of $15 per month. The contract contained the provisions which are usually found in conditional sales contracts. Most of the provisions are contained in twelve enumerated paragraphs. For the purposes of this decision it will not be necessary to set forth more than the first seven, which are as follows:

> "It is further mutually promised and agreed as follows:
>
> "(1) That the title to all of said property shall remain in seller until the complete performance by the purchaser of all of the purchaser obligations under this agreement.
>
> "(2) Time is of the essence of this contract with respect to the performance of the obligations herein assumed by or imposed upon the purchaser and acceptance of the seller of any delinquent payments shall not constitute a waiver by the same of this provision, nor shall it entitle the purchaser to a notice or demand before the forfeiture by the seller for or on account of a subsequent delinquency, and should the purchaser be in default in the performance of any of the terms or conditions hereof on his part to be performed, then and in such case the seller shall have the right to declare immediately due and payable the entire amount of principal and interest then remaining unpaid.
>
> "(3) Said purchaser agrees to save the seller harmless from any and all liability, including all costs and attorney's fees, for all injury or damage to persons or property caused in any manner by the use of said property. Said purchaser shall have no right to and shall not attempt to sell, assign, pledge, mortgage, or otherwise dispose of this contract or of said personal property, or any part thereof, during the existence of this agreement, without the written consent of the seller.
>
> "(4) The purchaser shall be entitled to the possession of said personal property while not in default hereunder, but the loss or destruction or theft of or damage to said property from any cause shall be wholly borne by said purchaser and shall not relieve the purchaser from the obligation to make all or any of their payments hereunder.
>
> "(5) Said property shall be used only at the address above given, to wit: 3724 American avenue, Long Beach, Cal., and not elsewhere.
>
> "(6) Said property shall never become a part of the realty upon or in which the same is placed.
>
> "(7) It is hereby understood and agreed between the parties hereto that in consideration of the purchase of the above-mentioned equipment on monthly installments without interest, to proposed purchaser, that the latter shall, during the period covered by the above-mentioned installments, purchase his entire requirements of gasoline, and as much lubrication oil as possible, exclusively from the Mutual Refining Company, of Huntington Beach, Cal."

[1] In sustaining the demurrer the trial court was doubtless of the opinion that the contract was in restraint of trade and therefore unenforceable. After discussing the case of Coombs v. Burk, 40 Cal. App. 8, 180 P. 59, in which a similar provision was held to be unforceable when inserted in a contract by a public service corporation, appellant states in his brief:

> "Appellant concedes, for the purpose of this appeal, that a portion of paragraph 7 of the agreement in this action may tend to a partial restraint of trade, but submits that that portion of the agreement can and properly should be severed from the remainder of the agreement."

In this contention he must be upheld. Section 1673, Civil Code, provides:

> "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

[2] It will be noted that the section does not make every contract void which contains some provision in restraint of trade. If the contract carries a provision in restraint of trade it is "to that extent" void. If the objectionable provision can be severed from the remainder of the contract, the part which is not so tainted can be enforced. McVicker v. McKenzie, 136 Cal. 656, 69 P. 495; United States Cons. S. R. Co. v. Griffin & Skelley Co. (C. C. A.) 126 F. 364; 6 Cal. Jur. § 95. In the case before us the seventh paragraph is easily severable from the other provisions of the contract, which will be enforceable unless a provision in restraint of trade is found in the fifth paragraph.

The contract provides in its fifth paragraph as follows:

> "Said property shall be used only at the address above given, to wit: 3724 American avenue, Long Beach, Cal., and not elsewhere."

[3, 4] Defendant argues that this paragraph is also in restraint of trade. If he is right in this contention, the complaint must

necessarily fall. It is the policy of the law to encourage the making of contracts upon proper considerations, and contracts may not be held to be void under the section of the Code above referred to unless they contain provisions which are plainly violative of sound public policy. Stephens v. So. P. Co., 109 Cal. 86, 41 P. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17. In Smith v. S. F. & N. P. Co., 115 Cal. 584, 47 P. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119, it is said:

> " 'Public policy' is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law."

[5, 6] The contract set forth in the complaint must be considered in its entirety, and the various paragraphs in their relation to each other, in order to determine what was in the minds of the parties to the agreement. It is provided in the first paragraph that title to the personal property which is the subject of the complaint "shall remain in the seller until the complete performance by the purchaser." All of the other provisions of the contract indicate that it was the intention of the parties that the conditions therein contained are effective only during the life of the contract. The fifth paragraph does not provide that the property should *never* be used elsewhere than at 3724 American avenue. It is entirely reasonable to hold that the parties intended that the equipment should remain at the place indicated while it was not paid for. Strength is given to this interpretation when we consider that the eighth paragraph, which is set forth at length in the transcript, contains provisions for the retaking of the property in case of default on the part of the purchaser in making payments. The provision requiring that the equipment sold be kept at a definite location during the life of the contract affords but a reasonable protection to the seller. In City Carpet, etc., Works v. Jones, 102 Cal. 513, 36 P. 843, the court says:

> "It is quite clear that a covenant in restraint of trade is good if it does not go further than is necessary to give reasonable protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantee."

In Grogan v. Chaffee, 156 Cal. 611, 105 P. 745, 27 L. R. A. (N. S.) 395, it was held that a manufacturer of olive oil in a quantity relatively small in comparison with the total output may, without encountering the nullifying effect of section 1673 of the Civil Code, sell his product on the condition that the buyer shall not resell it at less than a certain minimum price. The court gave approval to the following:

> "The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract by which one is restrained from 'exercising a lawful profession, trade, or business,' except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy. * * *"

The judgment is reversed, with directions to the superior court to overrule the demurrer, granting leave to the defendant to answer.

I concur: HOUSER, J., Acting P. J.

I concur in the judgment: YORK, J.

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89 Cal. App. 602

MILLER v. COOKSON et ux. (Civ. 4898.)

District Court of Appeal, Second District, Division 2, California. March 1, 1928.

1. Trial ⚷165—Motion for nonsuit admits truth of plaintiff's evidence and every inference that can be legitimately drawn therefrom.

Motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn from it, and the evidence should be interpreted most strongly against defendant.

2. Negligence ⚷136(5)—Nonsuit should be denied in personal injury action if any evidence tends to sustain action.

If there is any evidence tending to sustain action for personal injuries, nonsuit should be denied without passing on sufficiency of evidence, though, if only inference that can be drawn from evidence by reasonable men is that plaintiff was guilty of negligence contributing directly to injuries, nonsuit should be granted.

3. Master and servant ⚷149(1)—Employee, to recover for personal injuries, need not show directions by employer were of formally imperative character.

In order that employee may recover against employer for personal injuries alleged to have been received in course of employment it is not necessary that he show that directions given by employer were of a formally imperative character; all that is necessary being that he proceeded in compliance with manner usually used by employer in directing work of employees.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Master and servant 🔑88(1)—Servant of one person loaned to another may become servant of such other by submitting himself solely to his direction and control.

When the service of a general servant of one person is loaned to another, he may become the servant of the other by submitting himself solely to direction and control of such other with respect to particular piece of work.

5. Master and servant 🔑284(2)—Evidence held to require conclusion, on motion for nonsuit, that injured employee at time of injury was acting under employer's instructions.

In employee's action for personal injuries alleged to have been received in course of employment, evidence *held* such as to require conclusion, on motion for nonsuit, that plaintiff while proceeding in work resulting in injury was acting directly under instructions from employer.

6. Explosives 🔑3—Electrical exploder to discharge dynamite held "explosive" and "detonator," within law relating to care and storage of explosives (Act March 21, 1911, § 2, as amended, Deering's Gen. Laws, Act 2432).

Electrical exploder filled with fulminate of mercury and designed to be exploded by means of a current of electricity and thereby to discharge dynamite *held* an "explosive" and "detonator" as defined in Act March 21, 1911, § 2, as amended, Deering's Gen. Laws, Act 2432, relative to care and storage of explosives.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Explosive.]

7. Master and servant 🔑286(4)—Evidence in employee's action for personal injuries resulting from explosion of electrical exploder held for jury.

In action by employee for personal injuries resulting from explosion of an electrical exploder, evidence as to employer's negligence contributing proximately to injuries *held* sufficient to require submission of case to jury.

8. Master and servant 🔑288(4), 289(19)—Whether employee is chargeable with knowledge of special danger, negligence, and assumption of risks is fact question for jury.

Questions which arise under evidence whether employee is chargeable with knowledge of special danger which might be encountered in pursuing his work as a servant or in doing an act he has a right to perform, whether he should be charged with negligence, and whether he assumed risks resulting, are questions of fact for jury.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Wallace C. Miller against Walter M. Cookson and wife. Judgment of nonsuit, and plaintiff appeals. Reversed.

Chas. D. Swanner and Roland Thompson, both of Santa Ana, for appellant.

W. F. Menton, of Santa Ana, for respondents.

HAZLETT, Justice pro tem. Plaintiff sued for $10,275 in damages on account of personal injuries suffered by him, resulting from the explosion of an electrical exploder. He alleges that his injuries occurred in the course of his employment by defendant Mrs. Virginia L. Cookson, as a ranch hand on her ranch. At the close of plaintiff's case in chief, defendants moved for a nonsuit, contending that plaintiff had failed to make out a prima facie case, and that no neglect was shown which would attach any liability to either defendant. The court made its order granting the motion on the ground that the evidence was not sufficient to permit the case to go to the jury, and discharging the jury. Plaintiff appeals from the order, asserting that he had made a prima facie case of negligence.

The evidence produced by plaintiff showed substantially the following facts:

On June 14, 1922, and for a time prior thereto plaintiff was employed by defendant Mrs. Virginia L. Cookson on her ranch to do general ranch work, for a monthly wage and his room and board. On that date, while plaintiff was engaged in pumping water on the ranch, one Collins, a radio salesman, was installing a radio upon the ranch for demonstration purposes and without obligation on the part of defendants. Collins asked Mrs. Cookson for help in making the installation. Thereupon, as testified by Mrs. Cookson who was called on behalf of plaintiff for cross-examination:

> "Mr. Miller [the plaintiff] came by where we were standing, and I introduced him to Mr. Collins and told him * * * he desired some help, and I asked Wallace [the plaintiff] if his work was in such shape he would be able to leave it for a while, and he said as soon as he went and turned the water off * * * he would be ready to help; and he went away and he was gone probably 10 minutes and came back. * * *
>
> "Q. As a matter of fact, Mrs. Cookson, wasn't that your usual way in directing your help to do anything, asking them if they had their work in shape to do certain work for you? A. I always try to work with my help; I never give orders, I sometimes instruct them, but I never give orders.
>
> "Q. You usually put it that way, then, similar to the way you spoke to Mr. Miller? A. Yes; I believe they are entitled to some consideration."

This testimony by Mrs. Cookson was received without objection. After plaintiff came to assist, Collins asked for a piece of brass to use as a wave plug in the installation. Mrs Cookson produced her clock keys which were tried, but did not fit, and while she was still present, plaintiff said:

> "I think there is something in the garage that will fit."

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Plaintiff then went to a wooden drawer in Mrs. Cookson's garage on her premises where she kept her automobile, which drawer contained automobile light bulbs and accessories, screws, nuts, etc., and took from the drawer a device about two inches long, composed partly of brass, with some wire wrapped around it. He had seen this device in the drawer as testified by him for "probably months and months," but he did not know and had not been warned by either of the defendants or by any one else as to its nature, for what it was designed, or its composition, other than as shown by its exterior. This device was tried by Collins and was found to be too large, whereupon plaintiff said he would file it down. He then commenced to use a file upon it when it exploded in his hand, causing him personal injuries, including a very serious injury to his left eye. The injury to his eye caused it to permanently lose the most of its power of sight, and to be a menace to his other eye. The injuries prevented him from working for ten weeks and caused him pain and suffering and to incur doctor's and medicine bills. The device was known as an "electrical exploder," and was designed to be exploded by means of a current of electricity, and thereby to discharge dynamite. It was filled with fulminate of mercury and was very treacherous and liable to be exploded if filed or dropped or struck with a hammer. Dynamite had been used by plaintiff on the ranch in the course of his employment, and he had used dynamite prior thereto for about a month, in the mines, but he had never used such an exploder. The ranch was not wired for electricity, but the electrical exploder could have been discharged by a current from an ordinary automobile storage battery. The assistance plaintiff gave Collins was during his regular working hours, for which Mrs. Cookson paid him. In fact, she paid his wages for six days thereafter.

The rules governing the review of an order on motion for a nonsuit have been well settled.

[1, 2] The motion admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn from it, and the evidence should be interpreted most strongly against the defendant. Elder v. Rose, 63 Cal. App. 545, 550, 219 P. 74. If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court. Southern Pacific Land Co. v. Dickerson, 188 Cal. 113, 204 P. 576; Bush v. Weed Lumber Co., 55 Cal. App. 588, 590, 204 P. 24, and cases cited. If there is any evidence tending to sustain the action, the nonsuit should be denied without passing on the sufficiency of the evidence whether the court believed it to be true or not, and, where a conflict appears, some of which tends to support plaintiff's case, and the conceded facts are such that reasonable minds might differ as to whether or not one was negligent, the question is one of fact for the jury. In re Estate of Daly, 15 Cal. App. 329, 331, 114 P. 787; Seller v. Market-Street Ry. Co., 139 Cal. 268, 271, 72 P. 1006; Davis v. Crump, 162 Cal. 513, 515, 123 P. 294; Oles v. Kahn Bros. (Cal. App.) 253 P. 158. But if the only inference that could be drawn from the evidence by reasonable men is that plaintiff was guilty of negligence contributing directly to his injuries, a nonsuit should be granted. Vinson v. Los Angeles Pacific R. R. Co., 147 Cal. 479, 489, 82 P. 53; Payne v. Oakland Traction Co., 15 Cal. App. 127, 137, 113 P. 1074.

Respondents contend that the evidence shows that at the time plaintiff's injuries occurred the relation of master and servant did not exist between plaintiff and defendants, and that plaintiff was guilty of negligence which contributed proximately to his injuries, and therefore that the nonsuit was properly granted.

[3] The evidence received in this case does not raise the presumption of negligence on the part of plaintiff.

Plaintiff did not assist Collins of his own volition, but proceeded in compliance with Mrs. Cookson's request made by her in the manner she usually used in directing the work of her employees. It was not necessary for him to show that the directions given by her were of a formally imperative character. See Stephens v. Hannibal & St. J. R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336. "An order need not be in set words, but may be inferred from any words or acts, one or both, which reasonably justify an inference of such order." Republic Iron & Steel Co. v. Williams, 168 Ala. 612, 626, 53 So. 76, 80. See also, Cumberland Tel. & Tel. Co. v. Graves' Adm'x, 104 S. W. 356, 31 Ky. Law Rep. 972. When one person is employed by another, he undertakes to obey all lawful orders, and the servant is not to be imputed any blame by yielding obedience. Chicago & Northwestern Ry. Co. v. Bayfield, 37 Mich. 205, 209, 210, Cooley, C. J.

It appears that plaintiff proceeded to assist Collins as directed by Mrs. Cookson; that what he did was done on her time and upon her ranch; that both Mrs. Cookson and plaintiff endeavored to find a piece of brass which Collins might use as a wave plug; and that Mrs. Cookson was present when plaintiff said he knew of something in her garage which might fit, and when he went to get it. It does not appear that the assistance given by plaintiff to Collins was beyond the scope of his employment or duty as the servant of Mrs. Cookson. The court should have assumed that he was still acting for Mrs. Cookson.

As plaintiff's services were loaned to Collins if plaintiff procured the electrical exploder solely pursuant to Collins' request, and was in no manner under the directions or control of Mrs. Cookson, the general rule announced in Hardy v. Shedden Co. (C. C. A.) 78 F. 610, 47 U. S. App. 362, 37 L. R. A. 33, and note, and 39 Cor. Jur. 36, might apply in this case, to wit:

[4] When the service of a general servant of one person is loaned to another, he may become the servant of the other by submitting himself solely to the direction and control of the other with respect to a particular piece of work.

[5] However, under the circumstances disclosed in this case, that rule does not apply here. The evidence was such that, in ruling upon the motion for a nonsuit, the court could and should have legitimately inferred and concluded that plaintiff was acting directly under instructions from Mrs. Cookson when he endeavored to find the desired piece of brass and to make it fit. In the light of the foregoing, the question of intervening cause is not involved in this case.

Respondents also contend that the trial court was justified in concluding from the evidence that neither of them was responsible for the presence of the electrical exploder.

Dynamite had been used on the ranch and the exploder was found by plaintiff exposed in a drawer in Mrs. Cookson's garage on her premises which contained miscellaneous small metal articles; it was not inclosed in any container; and it had been seen there by plaintiff during some months before the explosion occurred.

The statute of this state relating to the care and storage of explosives is very definite.

Section 2 of "An act relating to explosives," etc., adopted March 21, 1911, page 391, as amended, Act 2432, Deering's General Laws, provides that:

> "Except only at an explosive manufacturing plant, no person shall have, keep or store, * * * any explosives, unless such explosives are completely inclosed and encased in tight metal, wooden or fiber containers, * * * and, shall be kept and stored in a magazine. * * *"

Section 3 of the same act provides, in effect, that blasting caps or other detonating or fulminating caps or detonators or electric fuzees shall be kept and stored in a magazine separate and apart from other explosives and at least one hundred feet from any other structure, and shall have conspicuously posted thereon the words "magazine," "explosive," "dangerous," in letters not less than six inches high.

[6] The electrical exploder certainly was such an "explosive" and "detonator" as defined in that act, and, if defendants were responsible for its presence, they violated the act in keeping it where it was found and were guilty of a misdemeanor.

Our courts have held that:

> "When a thing which caused the injury without fault of the injured person is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." Koskela v. Albion Lumber Co., 25 Cal. App. 12, 20, 142 P. 851, 855, and cases cited.

Where a party was injured by the explosion of a dynamite cap, and it was clearly established that defendant used dynamite, and the dynamite cap was found on the premises by the injured party who was there by permission of the defendant, the presumption arose that the defendant was guilty of actionable negligence, and a nonsuit is not proper, although the possibility of an accident might arise on the evidence. The injured party "is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. * * * Ordinary care requires that such dangerous instrumentalities * * * should be cared for with the utmost caution." Southwest Cotton Co. v. Clements, 25 Ariz. 124, 132, 134, 213 P. 1005, 1008, 1009. See, also, Elder v. Rose, supra; Boin v. Spreckles Sugar Co., 155 Cal. 612, 617, et seq., 102 P. 937.

"If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence" (Fisher v. Western Fuse etc., Co., 12 Cal. App. 739, 747, 108 P. 659, 663); and the presumption of negligence arises by reason of the explosion (Judson v. Giant Powder Co., 107 Cal. 549, 560–562, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146).

When explosives are kept in a manner in violation of a city ordinance and an explosion occurs, a case of prima facie negligence is made which must be rebutted by the defendant. Rathbun v. White, 157 Cal. 248, 255, 107 P. 309. A landowner is liable to a licensee going on his land if he recklessly exposes him to danger, and one using or handling dangerous articles does so at his peril and must respond in damages for injuries caused the licensee resulting from such exposure. Means v. Southern California Ry. Co., 144 Cal. 473, 480, 481, 77 P. 1001, 1 Ann. Cas. 206.

The servant may always require the master to respond for injuries resulting from the master's personal negligence. Cases of this sort arise (as in this case) where the master exposes the servant to risks of which he is ignorant. Chicago & Northwestern R. Co., v. Bayfield, supra.

The presumption that Mrs. Cookson was guilty of negligence which contributed proximately to plaintiff's injuries should have been resolved by the trial court in favor of plaintiff.

[7, 8] Questions which arise under the evidence whether the plaintiff is chargeable with knowledge of special danger which might be encountered in pursuing his work as a servant or in doing an act he has a right to perform, whether he should be charged with negligence and whether he assumed the risks resulting, are questions of fact and are for the jury (Boin v Spreckles Sugar Co., supra. p. 617 [102 P. 939]; Southwest Cotton Co. v. Clements, supra), unless plaintiff's evidence discloses that he could have avoided the accident by the exercise of reasonable care. (Payne v. Oakland Traction Co., supra). In this case the evidence does not show that plaintiff failed to use reasonable care.

The order granting a nonsuit is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

89 Cal. App. 628

ANTOGNINI v. GRANDI CO.★

FARRELL v. SAME.

(Civ. 3428.)

District Court of Appeal, Third District, California. March 2, 1928.

Rehearing Denied March 31, 1928. Hearing Denied by Supreme Court April 30, 1928.

1. Appeal and error 🔑994(3), 1012(1)—On appeal in trial to court neither preponderance of evidence nor credibility of witnesses, unless inherently improbable, can be considered.

On appeal in trial to court neither preponderance of testimony nor credibility of witnesses, unless inherently improbable, can be considered.

2. Appeal and error 🔑1010(1)—Findings of trial court, reasonably supported by testimony, are binding on reviewing court.

If there is testimony in record reasonably supporting trial court's findings, reviewing court is bound thereby.

3. Appeal and error 🔑1011(1)—Determination of facts was exclusively for trial court, where evidence was conflicting.

Where evidence on certain issue was conflicting, determination of facts was exclusively for trial court.

4. Corporations 🔑80(11)—Excluding evidence of reproduction cost of corporation's property as of year 1914 was proper, where plaintiffs purchased stock on statement from books for year 1920.

In action to recover purchase price of stock because of false representations by corporation's agents that it had a book value of $125 per share, whereas such value did not exceed $100 per share, excluding evidence as to reproduction cost of corporation's property as of year 1914 was not error, where plaintiffs purchased their stock in reliance on statement taken from corporation's book at close of year 1920.

5. Evidence 🔑18—It is common knowledge that business properties in small communities may depreciate greatly in value within 5 or 6 years.

It is common knowledge that lumber yard and other business properties situated in small communities may be of great cost value at one time, and, five or six years later, of a much less market value, or even actual value.

6. Appeal and error 🔑1050(1)—Admission in evidence of letter indicating corporation's belief as to value of stock held not prejudicial error, in action to recover price paid for misrepresentations as to value.

In stockholders' actions against corporation to recover purchase price of shares because of alleged misrepresentation that book value of stock was $125 per share, admission of letter written by representative of corporation wherein sale price of stock of corporation was being considered at $100 per share was not prejudicial error.

7. Corporations 🔑80(12)—Stock purchasers' salaries could not be considered excessive on issue whether they were injured by misrepresentations as to value of stock, where additional compensation was because of disparity with salaries of other employees.

In action by stockholders to recover amounts paid for stock in corporation because of misrepresentation of book value of its shares as $125 per share when in fact it was not worth to exceed $100, additional compensation paid to plaintiffs while in corporation's employ could not be considered as payment in excess of value of their services to show they were not injured, since it was paid them because of disparity in former salaries with salaries of other employees who were also stockowners at time plaintiffs purchased their shares.

8. Corporations 🔑80(12)—High return on stock paid out of principal funds of corporation held immaterial in purchasers' actions for price for misrepresentation.

Where plaintiffs paid $125 per share for stock in defendant corporation which was alleged to have value not to exceed $100 per share, defendant when sued for price because of misrepresentation could not claim that plaintiffs had received high rate of interest on their investment and so were not injured, where payments were made from principal of corporation's funds irrespective of its earnings.

9. Corporations 🔑80(1)—False statement of book value of stock, accompanied by alleged correct statement from books of corporation, held "actual fraud" within statute, and not opinion (Civ. Code, § 1572, subd. 1).

Statement by corporation's agents that book value of certificates of stock was $125 per share, accompanied by alleged correct statement taken from books showing such value, *held* statement of fact, which, being false, was "actual fraud"

★Rehearing denied. Hearing denied by Supreme Court.

within Civ. Code, § 1572, subd. 1, and not an expression of an opinion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

10. Appeal and error 🔑1011(1)—Whether agent's statement of book value of corporation stock was misrepresentation or expression of opinion held, under conflicting evidence, for trial court (Civ. Code, § 1572, subd. 1).

In action by stockholders to recover price paid for corporation's stock at $125 per share for stock alleged to be of book value of not more than $100 per share, whether statement of corporation's agents that book value of stock was $125 per share was misrepresentation of fact on expression of opinion, and therefore not actionable fraud within Civ. Code, § 1572, subd. 1, was under conflicting evidence, to be resolved by trial court.

Appeal from Superior Court, Marin County; Edward L. Butler, Judge.

Separate actions by Joseph Antognini and by Robert Farrell against the Grandi Company which were tried together. From the judgments for plaintiffs, defendant appeals. Affirmed.

Martinelli & Martinelli, of San Rafael, and A. J. Treat, of San Francisco, for appellant.

Roy C. Lewis and Thos. P. Boyd, both of San Rafael, and R. L. McWilliams, of San Francisco, for respondents.

PLUMMER, J. The plaintiffs above named, each having identical causes of action against the defendant, filed their separate complaints, to which the defendant filed answers, and upon the trial both actions were tried at the same time, upon the same testimony, and are submitted to us upon one record. The plaintiffs were awarded judgment in their respective actions, and the defendant appeals. The complaints are alike, except as to the amount sued for, the plaintiff Antognini praying for judgment in the sum of $15,000, and the plaintiff Farrell prosecuting his action for the recovery of a judgment in the sum of $20,000. Each complaint alleges that in the month of July, 1921, the defendant corporation represented to the plaintiff that its capital stock was reasonably worth, and that it had a book value of, $125 per share; that said representations were made to each plaintiff for the purpose of inducing the purchase by each plaintiff of the capital stock of the defendant corporation. Each complaint sets forth that the plaintiff named therein relied upon and believed the representations so made to him, and in reliance thereupon purchased stock in said defendant corporation, the plaintiff Antognini purchasing 120 shares of the capital stock of said corporation, and the plaintiff Farrell purchasing 160 shares of the capital stock of said corporation. The respective complaints further set forth that the representations so made were false, and were known to be false by the agents of the company representing the same, and that the stock did not have a book value of $125, and was not reasonably worth that sum, nor did it have a book value in excess of approximately $100 per share, and was not reasonably worth more than that sum per share. It is further set forth in the respective complaints that the plaintiff therein did not discover the falsity of said representations until on or about the 15th day of June, 1923. The complaints then set forth that the respective plantiffs therein thereupon tendered to the defendant the number of shares so purchased and demanded the return of the purchase money paid therefor. The plaintiff Antognini had judgment for the recovery of the sum of $12,658.65, and the defendant Farrell had judgment for the recovery of the sum of $16,718.64. The difference in the judgment awarded in the respective cases, from the amount respectively sued for, was arrived at by the trial court deducting from the $15,000 paid by the plaintiff Antognini to the defendant, of the sum of $2,341.65 paid by said company to said plaintiff Antognini in excess of the reasonable value of his services as an employee of said company, and of the sum of $3,281.36 paid by the defendant to the plaintiff Farrell in excess of the value of the services rendered by him as an employee of the company. In other words, from the purchase price of stock of $15,000 paid by the plaintiff Antognini to the defendant, there was deducted from the judgment awarded him the said sum of $2,341.65, and from the $20,000 paid by the plaintiff Farrell for the purchase price of said stock to the defendant, there was deducted the sum of $3,281.36.

The findings of the trial court are to the effect: That the duly authorized agents of the defendant represented to each plaintiff that the capital stock of the defendant, Grandi Company, was reasonably worth, and that it had a book value of, $125 a share. That said representations were made for the purpose of inducing the plaintiff in each case to purchase shares of the capital stock of said defendant company. That the plaintiff in each case relied upon such representations, and relying upon the same, purchased certificates or shares of stock of said company, as alleged in the complaint. That the representations made by the agents of the company were false, and known by the agents making the same to be false. That said stock, to the knowledge of said defendant and to its agents, was not reasonably worth, nor did it have a book value of, $125 per share or any sum in excess of $100 per share. That the plaintiffs did not discover the falsity of said representations until about the 15th day of June, 1923, and thereupon, and on or about the 25th day of June, 1923, said plaintiffs tendered and of-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fered to return to the defendant the certificates of stock purchased by them, respectively, and demanded the return of the purchase price paid for the same. It is further found that said plaintiffs were in the employ of the defendant for a number of months; that the reasonable value of their services was worth a certain named sum for each plaintiff; and that there was paid out of the funds of said company to each plaintiff the respective sums hereinbefore mentioned, in excess of the value of the services rendered to defendant by the respective plaintiffs. As two certain items constituting assets of the company will be hereinafter discussed, we will here state that the court found that at the time of making the representations herein referred to, and that at the time of the sale of the stock referred to, the reasonable value of the lands owned by the plaintiffs (so appearing in the transcript, but evidently a clerical error and meaning "defendant") was the sum of $17,875, and that the reasonable value of the improvements was the sum of $42,000.

Upon this appeal it is contended by the defendant that the findings of the trial court are not supported by the evidence, that whatever statements the agents of the defendant made were simply matters of opinion and not statements of an existing fact, and that the property and the shares of stock therein had an actual value and a book value of at least $125 per share, provided the books were corrected, to admit a showing therein of the increased value of the real property owned by the defendant and of the improvements placed thereon.

[1, 2] As we read the appellant's argument, based upon the lack of testimony to support the findings, it would appear that reliance is placed chiefly upon the testimony introduced by the defendant. The rule is definitely settled that upon appeal neither preponderance of testimony nor credibility of witnesses, unless inherently improbable, can be considered. If there is testimony in the record which reasonably supports the findings of the trial court, our inquiry can extend no further and we are bound thereby. With this in view, we will give a general summary of the testimony as disclosed by the record.

The plaintiff Antognini testified that about a year prior to his actual purchase of the stock he went to the place of business of the defendant company to pay a bill, and there had a conversation with Reno L. Grandi, the vice president and manager of the defendant company. In this conversation Antognini mentioned the fact that he was about to sell his business; that thereupon Mr. Grandi said to him:

> "If you do sell, come in with us and we will sell you some stock."

Nothing appears to have come of this conversation. A year later Antognini disposed of his business, and at that time Mr. Grandi repeated his request that the plaintiff purchase some stock in the defendant company. Mr. Grandi is quoted as saying:

> "We have a good going business, and we need a couple of good men that we know we can trust and help us along."

Mr. Antognini explained that before he went into any business he desired to make a trip to Switzerland. After making this trip, and upon Mr. Antognini's return, Mr. Grandi again on several occasions spoke to him about buying some stock, Mr. Antognini inquiring as to the value of the stock, to which Reno L. Grandi replied:

> "Well, $125 a share, but before you buy I will show you a statement of the books."

Shortly thereafter Mr. Grandi showed the plaintiff a certain pen and ink statement which he had in his possession, saying, "Here's a statement of the books." Antognini, from this statement, figured out that the shares of stock were worth approximately $125 each, and thereupon purchased 120 shares thereof, paying therefor the sum of $15,000 by way of a check for that amount. Upon the trial of the case a certain statement was introduced in evidence by the defendant as a pen and ink statement, and is marked in the transcript "Defendant's Exhibit No. 3." Both Mr. Antognini and Mr. Farrell testified that this exhibit differs somewhat from the pen and ink statement shown to them by Mr. Grandi. Mr. Antognini, after the purchase of stock by him, went into the employ of the company, and for some months received a monthly salary of $200 per month. Mr. Farrell, after the purchase of stock by him, entered the employ of the defendant at a salary of $150 per month. After becoming employees of the company, both plaintiffs discovered that other employees of the company were receiving much larger salaries, and thereupon the salary of Antognini was raised to $400 per month, and the salary of Mr. Farrell to $425 per month. Upon attending a stockholders' meeting in the month of February, 1923, Antognini inquired as to the value of the stock per share and was told that at that time it was only of the value of $105 or $106 per share; that the company had sustained a loss of between $20,000 and $30,000. The plaintiff Antognini not understanding how the loss could occur, and there being a financial statement presented at the meeting by Mr. Reno L. Grandi which did not show any loss as having occurred, the plaintiff asked for an explanation, to which Mr. Grandi said:

> "I didn't like to show any loss on the books, so I kind of swelled up the assets. I didn't like to show any loss on the books, but we had a loss of between $20,000 and $30,000."

Mr. Antognini inquired as to the department of the business in which the loss occurred, but so far as we read the record, no satisfactory explanation was made. Mr. Farrell's conversation with relation to the purchase of stock by him was had with one Muscio, an officer and employee of the defendant company. Thereafter Mr. Farrell had a conversation with Mr. Reno L. Grandi, in which the latter said that they wanted a couple of good men that they could depend upon; that he, Farrell, asked Mr. Grandi the value of the stock; that Mr. Grandi said:

> "The book value is $125, and I will go to the house and get the statement for you."

This statement Mr. Grandi obtained and handed to Mr. Farrell. The witness Farrell testified that he looked over the statement, took down the figures, and upon calculating ascertained that the statement presented to him by Mr. Grandi showed the value of the shares of stock to be the sum of $125 each. Mr. Grandi explained that he had taken the statement from the books kept by the company. The discovery as to what the value of the stock really was, as claimed by the plaintiff, and the book value thereof at the time of the purchase, was made after the annual meeting referred to herein and after the plaintiffs had had the books of the company inspected. The testimony relating to Mr. Farrell's purchase of the stock is well shown by his cross-examination, as follows:

> "Q. Then you say, Mr. Farrell, just as soon as you asked Reno Grandi what the stock was worth, that he immediately said the book value was $125? A. He did, and says, 'I will get the statement and show it to you.'
>
> "Q. But you asked what the value of the stock was? A. I says, 'What is the stock worth?' He says, 'The book value is $125. I will go and get the statement for you.' * * *
>
> "Q. Well, in your own mind did you question any item that was down on the pen and ink statement as to its correctness or as to whether it was a true representation of value? A. No, I did not.
>
> "Q. You didn't question that? A. No. I looked at the statement and took it for absolutely correct as to what Mr. Grandi said. I depended on him for that. I didn't think he was producing a false statement. * * *
>
> "Q. Now, what do you mean by 'book value?' A. That is from the statement which he showed me. He said it was off of the books. That was the only value I knew of.
>
> "Q. The only value you knew of was the book value? A. Yes, that was the paper value.
>
> "Q. The paper value? A. Yes, from the books.
>
> "Q. Well, didn't you also think and understand that by that statement the actual value of the stock was $125? A. Why, I thought that was the only value that was on it. I went entirely by the statement. I didn't know he had another value on it. * * *
>
> "The Court: You didn't make any distinction between book value and actual value? A. No, I didn't."

Mr. Grandi's testimony differed from the testimony of Mr. Farrell in some particulars. Mr. Grandi testified:

> "I had the pen and ink statement on which I based by valuation. I told Mr. Farrell that was not a book statement; that the book statement only showed $102 a share, but in my opinion, on account of extra values which we did not carry on the books, I believed the stock was worth $125."

The questions and answers in this particular are as follows:

> "Q. What did you say to him the value was in your opinion? A. $125 a share.
>
> "Q. What did you base that on? A. My opinion."

Mr. Grandi's attention was called to this testimony given by him at the making of his deposition, and he was asked:

> "You so testified, did you not? A. Yes.
>
> "Q. Said nothing whatsoever about the book value being $102, did you? A. No, not at that time.
>
> "Q. Why didn't you at that time when this question was asked you? A. I couldn't say."

Mr. Grandi further testified that Exhibit No. 3 was and is the pen and ink statement which he exhibited to the plaintiffs. Both plaintiffs denied this, and testified that the exhibit introduced as Defendant's Exhibit No. 3 was first seen by them at the time of the taking of Mr. Grandi's deposition. The testimony further shows that in the statement exhibited by Mr. Grandi to each one of the plaintiffs and also that accepted and admitted in evidence as Defendant's Exhibit No. 3 purporting to be taken from the books of the Grandi Company, the merchandise account set forth therein had been raised from the real value shown by the books of $17,700.11 to $38,606.83; that the surplus account had been likewise raised from $2,271.62 to $23,178.34. As to these changes, Mr. Grandi testified as follows:

> "Q. What did those extra values consist of? A. Extra values on real estate and improvements.
>
> "Q. Where did you get those extra valuations? A. From my own opinion."

The witness then stated that he added the valuation to the merchandise account on account of the increased value of the buildings and improvements, and then further testified:

> "Q. Did any of them say that it was a peculiar thing that the increased value of real estate should be placed under the heading of 'Merchandise'? A. No.
>
> "Q. Did any of them say that since you had a heading, 'Buildings and Improvements,' that that item of increased valuation should go under that heading? A. No.
>
> "Q. No comments were made whatsoever? A. No. I just told you it was a family account."

The witness testified he had no particular explanation for that any more than it was a family affair. The witness then further testified as follows:

> "Q. You say it was between your father and yourself that the statement was gotten up. I

assume that you got your father's advice in the matter, didn't you? A. Oh, we talked over it; yes.

"Q. And you agreed between you that the real estate should be put down at $25,000, did you? A. We didn't put it down at $25,000, but we figured it was reasonably worth that.

"Q. Well, when you came to make up this $20,000—the increase—you had to make it up by adding the different individual items, did you not? A. Yes.

"Q. One of those items was an increase in the value of the real estate, was it not? A. Yes.

"Q. And that item, you say, was $10,000 increase, do you not? A. Yes.

"Q. Now, how did you compute that $10,000? A. Oh, I don't recollect. We figured that our stock was reasonably worth $125 and we worked that in.

"Q. I see. In other words, you figured the stock was worth $125, and you calculated in such manner to bring it up to $125, did you? A. Yes.

"Q. Yes. And therefore, you figured that by increasing the value of your assets by $20,000 that that would bring your stock up to $125 a share, did you? A. Somewhere there, yes.

"Q. And therefore, in order to make the $20,000, you took so much from this source and so much from that source a sort of guesswork proposition, and added it together to make $20,000, didn't you? A. Yes. We took it from the improvements in the buildings. We figured it had those actual valuations.

"Q. And when you got through adding up these various figures that you had practically guessed at, that amounted to $20,000, didn't they? A. Well, I don't recall the exact amount that we got at the time, but $20,000 was what we added.

"Q. In other words, you had merchandise at that time at $17,000, and in this statement that you got out you had merchandise at $37,000, so what you did was added $20,000, didn't you? A. Yes.

"Q. Because what you were trying to get at was trying to show that your estimate of $125 per share was correct, wasn't that it? A. Yes.

"Q. And that was the reason you used $20,000, was it not? A. Yes."

Mr. Muscio testified that he knew nothing about the transaction of the sale of the stock; that it was conducted by Mr. Grandi. Other officers of the company likewise testified. Upon cross-examination of Mr. Muscio a letter was introduced, written by him to one Sweeney, wherein a contract was referred to indicating that a sale of the stock in the Grandi Company at $100 would be satisfactory. This occurred some time along in December, 1921, a few months after the sale of stock to plaintiffs. The plaintiffs further testified that they understood the statement presented to them by Mr. Grandi to represent the correct value of the stock; that it represented the value of the stock after deducting the liabilities; that if the assets of the corporation were sufficient, after deducting the liabilities, to show an actual value of $125.00 per share, they would have bought the stock. It further appears from the testimony that the plaintiffs bought under the belief that the actual value of the stock and the book value were identical. The contention of the defendant corporation was, as we have herein stated, that the actual value was $125 per share, and that the book value only showed $102 per share, and this statement was made up upon that theory. The testimony of the witness Grandi is to the effect that he used the words "my opinion," as is illustrated by the following:

"Q. What statement was made to him, if anything, about the value of the stock? We are speaking now of Mr. Antognini? A. I explained to him that in my opinion the stock was worth $125, and that the books did not show that. I told him that that statement was my opinion which made the stock worth $125, but the book value was $102."

[3] This testimony is contradicted by the plaintiffs, and under such circumstances the trial court was vested with the exclusive province of determining the facts and whether Mr. Grandi did state that the books showed a value of $125 per share, and that the actual value thereof was the same as the book value.

The property owned, controlled, and operated by the defendant, Grandi Company, during the times involved in this transaction was situate at Point Reyes, in Marin county, and consisted of a lumber yard, garage, a brick building in which was operated a merchandising store on the first floor, and a hotel in the floors above. The statement furnished by Reno L. Grandi to the plaintiffs listed the real estate as valued at the sum of $15,000, and the buildings and improvements thereon at the sum of $35,000. The trial court in its findings fixed the value of the real estate at the time the plaintiffs purchased stock in the defendant corporation at the sum of $17,875, and the value of the improvements thereon at that time at the sum of $42,000, and from which it is argued that the stock was actually worth more than shown by the statement, and that, even though the statement did contain a fictitious excess sum of $20,906.83 added to the merchandise account, it did not materially affect the truthfulness of the statement. It may here be added that the statement, as shown by the findings of the trial court, did not contain any mention of a certain liability in the sum of $10,400, which sum is a trifle more than the added value found by the trial court, of the real estate and improvements, over the value listed in the statement. Outside of the merchandising account, the surplus account, and the failure to mention the liability just referred to in the sum of $10,400, the court found the statement to be a correct listing of the assets and liabilities appearing on the books of the company. The record also contains considerable evidence as to the reproduction cost of the buildings, improvements, and other property owned by the defendant corporation in 1920, and the court found that the reproduction cost at that time would have been in the neighborhood of $91,000, but upon testimony which we think justified the conclusion of the court, the values of all the property owned by the defendant corporation at that time, less its liabilities, was only such as to give a valuation to the shares of stock of the sum of about $100. As we read the figures and calculate the same, the book value of each share of stock at the time of the sale thereof to the plaintiffs was a trifle below $100 per share. The finding of the expert accountant who examined the books of the company returns a value of the shares of stock during the period under consideration, at $102.41 each. The trial court found the value not to be in excess of $100 per share, which we accept as correct for the reason that we have no means of determining whether the typewritten figures in the transcript may not have been incorrectly copied, and thus show a trifling difference in the value per share. It may be here stated that the answer of the corporation alleged the value of the real estate and improvements to be the sum of $78,152.

[4] Upon the subject of value, the defendant sought to introduce evidence as to the production cost or reproduction cost of the property belonging to the corporation, as of the year 1914. This testimony was excluded by the trial court, and it is here urged as error. As just stated, the court permitted testimony as to the reproduction cost of the properties, as of the year 1920; also as to the value of the property at that period, and in its findings upon the testimony so introduced, determined the value of the property as of that date. It was upon the statement taken from the books of the corporation at the close of the year 1920 that the plaintiffs purchased their shares of stock, and we do not very well see how testimony as to the production cost of the property six years previously would have had any material bearing upon the issues tendered to the court for determination. While such testimony might, under the circumstances, have been admissible, which we do not decide, the real issue for the court to determine was the then value of the premises. The location of the premises, the business transacted by the corporation, and all the attendant circumstances connected with the year 1920, constituted a good foundation for the court determining the values as of that date.

[5] It is common knowledge that business and properties like that conducted and owned by the defendant in this case, situated in small communities, may be of great cost value at one period of time, and, five or six years later, of a much less market value, or even actual value. While there is nothing in the record showing either the growth or lack of progress of the place designated as Point Reyes, we know that its geographical location removes it somewhat from the growing centers of population, and that it would be subject to all the depreciation attendant upon small communities that start with growing prospects and realize more or less of discouragement. At least nothing has been presented which would justify us in interfering with the findings of the trial court as to values.

[6] It is also urged that the trial court erred in permitting the letter written by the witness Muscio and presented to him and identified by him during his cross-examination wherein the sale price of the stock of the Grandi Company was being considered at the figure of $100 per share. The letter itself is not in the record, and we cannot say that its admission was prejudicial. It certainly tended in some measure to contradict the testimony of the witness, and also to show that if the corporation was willing to sell to Sweeney $15,000 worth of stock at $100 per share it was at least realizing a very good profit when at practically the same period of time it was selling $15,000 worth of stock to Antognini at $125 a share, and $20,000 worth of stock to the plaintiff Farrell at $125 per share.

[7, 8] It is further argued that the plaintiffs were not injured by reason of the fact that during the time that they were in the employ of the defendant corporation they received the sums of money which we have hereinbefore stated in excess of the value of their services as employees. Without quoting the record, it is sufficient to say that it discloses that the additional compensation paid to each plaintiff was paid because of the large disparity in salaries theretofore paid to the plaintiffs and the other employees of the corporation who were owners of its stock at the time the plaintiffs purchased their shares. It is further argued that the plaintiffs received a high percentage or rate of interest upon their investment. This, however, is an apparent fallacy. It was a payment out of the principal funds of the corporation irrespective of its earnings, and the court practically so found in decreeing that, in return for the purchase price of the capital stock which had been paid by the respective plaintiffs, there should be deducted the excess sums hereinbefore referred to. A complete answer to the appellant's contention is in the case of Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011:

> "The plaintiff paid $22,500 for the stock and it is neither alleged nor found that the stock was actually worth less than that sum. It is urged in argument that, as there is no presumption that it was worth less, it must be presumed that it was and is worth at least that amount, that plaintiff is, therefore, as well off with stock of the cash value of $22,500 as he was with the money in his possession with which he bought the stock at that price and hence that he has suffered no detriment. If this proposition were correct, it would at once put an end to actions founded on injury from a purchase induced by fraudulent representations as to the character or quality of the property purchased, except in cases where the purchaser could show that he made a bad bargain independent of the false rep-

resentations. One who buys property is lawfully entitled to all the benefit of the purchase, that is, to the full value of the property he buys regardless of the price he paid. And it is a fundamental principle of the law of fraud that where one has, by false and fraudulent representations as to the quality of property, led another to believe it to be possessed of valuable qualities and thereby wrongfully induced the other to buy the property, presumably in order to obtain the benefit of property possessing those qualities, the seller will not be allowed to show as a defense to an action for such fraud, that the property, in its actual condition, was worth the price paid, or more. The real question in all such cases is whether or not the property, if it had been as represented, would have been of substantially greater value than its actual value in its real condition. The price actually paid is immaterial as an element in the cause of action, though it may be admissible evidence on the question of value" (citing a long list of cases).

[9] The final objection which we need to consider is the one most strenuously urged, that whatever was said by the agents of the defendant corporation was simply an expression of opinion. We have set forth the testimony as to the statement taken from the books of the corporation sufficiently to show that this contention is unsound. There might be some reasonable argument that the testimony in this case shows that whatever was said about the actual values of the different kinds of property owned by the defendant corporation were expressions of opinion and not direct statements of fact, but when it comes to a statement of the book value of the certificates of stock, and what the books of the corporation showed, accompanied by a statement alleged to have been taken from the books of the corporation and to have been a correct statement thereof, there is no rule for the theory that such language is only an expression of opinion. The entries on the books of the corporation were not matters of opinion. They were all statements of fact, and any transcript taken therefrom would partake of the same elements of exactness. If the statement said to have been taken from the books by Reno Grandi and exhibited to the plaintiffs had been a correct statement and not a fictitious statement as to some of its items, then, as to any error in calculation made by the plaintiffs as to the book value of the shares of stock, they alone would have been responsible, as there would have been no misrepresentation. The testimony shows that the books of the corporation exhibited the merchandise value of the corporation at only $17,700.11. This item was increased to read $38,606.83, as testified by Reno Grandi, in order to make the statement show a book value of $125 per share. A question propounded to Mr. Reno Grandi and his answer thereto may be properly here repeated:

"Q. And therefore you figured that by increasing the value of your assets by $20,000, that would bring your stock up to $125 a share, did you? A. Somewhere there, yes."

It only requires the statement to show that the very nature of the property precludes the possibility of any one looking thereat from determining its value. There is no pretense in the record that either one of the plaintiffs was accustomed to handling merchandise or knew anything about the values of property carried in a general merchandise store, and they could only arrive at such values by an examination of the books or examining a transcript thereof. It may be here again stated that the trial court found the increase in value of the real estate and improvements amounted to the sum of only about $9,000; that the statement also failed to show an existing liability of $10,400. Hence there was nothing upon which Reno Grandi was justified in basing his lifting of values, either of the real estate or of the merchandise schedule, in the sum of $20,906, or any other sum.

All of these facts, we think, bring this case squarely within the prohibitions contained in section 1572 of the Civil Code. Subdivision 1 of that section, defining actual fraud, reads:

"The suggestion, as a fact, of that which is not true, by one who does not believe it to be true."

Here we have the positive statement of something which is not true, by a person whose own testimony shows that he knew it not to be true. We do not need to quote the other subdivisions of the section, and content ourselves with simply saying that the record does not show anything warranting the increase made in the statement in order to show a book value of $125 per share of the shares in the defendant corporation.

In view of what we have just said, there appears no necessity for extending this opinion by considering and differentiating the cases cited by appellant, wherein it is held, under the circumstances of the particular cases, that representations as to value were matters of opinion. This question, like others, was primarily for the trial court to decide, as shown by the opinion in the case of Stockton v. Hind, 51 Cal. App. 131 (we quote from page 136) 196 P. 122, 124:

"It is conceded that the general rule is that an expression of opinion or belief, if nothing more, and if so understood and intended, is not a representation of fact, and although false, does not amount to actionable fraud. Ordinarily a person has no right to rely upon such statements, and if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury." 20 Cyc. 15; Spreckels v. Gorrill, 152 Cal. 395, 92 P. 1011; 14 Am. Eng. Enc. of Law, 36.

[10] The statement to which we have just referred furnished by Reno Grandi to the plaintiffs was no more an expression of opinion than would be a trial balance, but under the authorities just cited, if there was any doubt upon this question, it was for the trial court to resolve that doubt, and it has done so in favor of the plaintiffs.

This court, in the case of Lombardi v. Sinanides, 71 Cal. App. 272, 235 P. 455, had before it a case involving misrepresentation relating to a contract of sale of real estate. It was there held by this court, speaking through Mr. Presiding Justice Finch:

> "'In equity it is generally held that where a vendor of realty makes a false representation of a material fact, it is not a good defense to an action by the vendee seeking relief that such representation was innocently made. * * * This rule is most frequently applied in actions for the rescission of contracts, it being held that a false representation by a vendor of realty of a material fact constituting an inducement to the contract of purchase, and on which the purchaser had the right to rely, is a ground for the rescission of his contract by a court of equity, and that, too, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being not whether the vendor knew the representation to be false, but whether the vendee believed it to be true and was misled by it in entering into the contract.' A party will always be held to make good his statement in the form in which he makes it," etc.

This case goes beyond any holding necessary to support the judgment under consideration. Here the representations were made by a statement in writing and figures purporting to exhibit to the plaintiffs what the books of the corporation showed, and which statement the agent of the corporation, by his own testimony, shows was not true.

In the case of Stone v. McCarty, 64 Cal. App. 158, 220 P. 690, this court had before it the question of statements as to values relating to the productive qualities of a certain tract of land, and also as to the sale value of nursery stock. It was there held that such statements came directly under the provisions of subdivision 1 of section 1572 of the Civil Code, relating to the suggestion, as a fact, of that which is not true, by one who did not believe it to be true. It was also held in that case that representations of value often afford a solid basis for actionable fraud.

In the recent case of Palladine v. Imperial Valley Farm Lands Association, 65 Cal. App. 727, 225 P. 291, the District Court of Appeal of the Second District, in an opinion written by Presiding Justice Finlayson, considered similar questions with which we are here dealing, and set forth in extenso a great number of cases bearing upon the question of whether a statement of value is a statement of fact or a statement of opinion. While we need only refer to the Palladine Case as an authority supporting the judgment of the trial court, we will quote the following from the opinion in the Palladine Case:

> "We think the following rule is sustained by reason and the authorities: If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts."

In the case at bar Reno Grandi could not have honestly entertained the opinion that the books of the corporation exhibited a certain state of facts, because he had intentionally and purposely changed the figures so that the book value of the shares of stock in the corporation would appear to be such as concluded by the plaintiffs.

A similar case to the one with which we are dealing is that of Iler v. Jennings, 87 S. C. 87, 68 S. E. 1041. The question there involved was a misrepresentation as to the book value of stock. The record shows that when the plaintiff asked as to the value of the stock the defendant replied:

> "These stock books will show it is worth about $119, but so far as making a statement as to what the stock is worth, or anything about the condition of the business, I won't do it. I will refer you to * * * John Major who is bookkeeper, and he can give you more information about it than I can. He knows more about the business. He has been in here all the time as bookkeeper, and knows the hardware business better than I do," etc.

The bookkeeper gave the intending purchaser an incorrect statement purporting to be a correct statement of what was exhibited by the books as to the book value of the stock. It was there held, among other things, that:

> "Such use of a statement of the corporate business by a director negotiating a sale of his stock therein could not be regarded as other than a direct affirmation of its correctness, and, if it was delivered for the purpose of assuring the buyer of the truth of the facts therein stated and to induce him to purchase and the buyer purchases in reliance thereon, there is an express warranty," etc.

Other objections, such as that the proper tender of rescission was not made, and that the defendant did not offer to rescind promptly, have been considered, but do not appear to us to call for extended consideration. As to the tender it is sufficient to say that the record shows that no objection was made thereto. As to the question of promptness the record shows that within a very short time after the discovery of the misrepresentation these actions were begun.

The judgments of the trial court are affirmed.

We concur: FINCH, P. J.; HUGHES, Justice pro tem.

89 Cal. App. 665

FEDER et al. v. WREDEN PACKING & PROVISION CO., Inc. (Civ. 5023.)

District Court of Appeal, Second District, Division 1, California. March 5, 1928.

1. Landlord and tenant 🔑94(2)—Right to forfeiture under lease not providing therefor depends on strict compliance with statute prescribing notice to lessee (Code Civ. Proc. § 1161).

Where lease contains no provision for forfeiture by lessee in event of default in payment of rent or performance of any covenant, right to accomplish forfeiture depends on strict compliance with Code Civ. Proc. § 1161, prescribing contents of notice to tenant to quit and deliver up possession to landlord.

2. Landlord and tenant 🔑291(1)—Lessors' notice and demand for possession for lessee's failure to keep accurate books for determining rent on profit basis held insufficient to sustain unlawful detainer action (Code Civ. Proc. § 1161).

Lessors' notice and demand for immediate possession of premises for lessee's failure to keep accurate books under lease providing that rents should be 75 per cent. of lessee's net profits, to be determined on basis of actual cost prices to lessee of merchandise, but containing no allegation that because of such violations lessors were injured or did not receive full amount of rent under lease, was insufficient, under Code Civ. Proc. § 1161, and complaint in unlawful detainer action based on such notice failed to state cause of action.

3. Landlord and tenant 🔑291(1)—To sustain unlawful detainer action, notice must be given tenant stating rent due or covenant violated, and that lessor will regain possession if tenant fails to perform (Code Civ. Proc. § 1161).

To sustain an action for unlawful detainer notice must first be given, under Code Civ. Proc. § 1161, to delinquent tenant prescribing specifically the amount of rent due or covenant that has not been performed, and further notice that, in event of failure of tenant to make payment of delinquent rent or perform the defaulted covenant, lessor will exercise his right under the law to regain possession of the premises.

4. Landlord and tenant 🔑291(1)—Lessors' notice demanding possession for using incorrect invoices in determining rent did not imply profit was made or rent due (Code Civ. Proc. § 1161).

In action for unlawful detainer based on breach of covenant in lease for invoicing merchandise at cost as basis for determining lessee's net profits for purpose of fixing amount of rent, notice by landord demanding immediate possession and reciting that merchandise was invoiced at an amount in excess of cost did not justify implication that lessee made profit in business or that lessee had not paid every dollar which landlord was lawfully entitled to as rent, and notice was therefore insufficient, under Code Civ. Proc. § 1161.

5. Landlord and tenant 🔑291(1)—Landlord held not relieved of giving tenant alternative of delivering possession or performing covenant requiring correct showing of profits for determining rent, covenant not being performable after breach (Code Civ. Proc. § 1161, subd. 3).

In action for unlawful detainer based on breach of covenant in lease for invoicing merchandise as basis for determining net profits for purpose of fixing amount of rent, lessors were not relieved from requirement of Code Civ. Proc. § 1161, of including in notice demanding possession provision that, if covenant was not performed, possession would be regained on ground that covenant violated was one that could not thereafter be performed under subdivision 3, where from landlord's demand for possession no difficulty would be encountered in determining rent for delinquent months on basis of correct figures.

6. Landlord and tenant 🔑291(8)—Complaint in unlawful detainer, not alleging tenant owed rent, implied receipt of all rent due.

In action for unlawful detainer based on breach of covenant in lease for invoicing merchandise as basis for determining net profits and amount of rent payable, failure by lessors to claim that tenant was owing any sum that was due for rental under lease implied receipt of all rent due which landlord was legally entitled to.

7. Landlord and tenant 🔑291(8)—Complaint in unlawful detainer, not alleging rent due under lease or reasonable rent, furnished no basis for judgment for rent and damages.

In action for unlawful detainer based on breach of covenant in lease for invoicing merchandise as basis for determining net profits and amount of rent payable, complaint failing to allege amount of rental whether as determined by computations under lease or as to reasonable rental value of premises furnished no basis to support judgment for specific amount of rent for premises and trebling of such amount as damages.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Milton Feder and another, doing business under the fictitious name of the Federal System of Bakeries, against the Wreden Packing & Provision Company, Inc. Judgment for plaintiffs, and defendant appeals. Reversed.

Henry Schaefer, Jr., and Raymond V. Haun, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

HAHN, Justice pro tem. From a judgment for plaintiffs in an action of unlawful detainer defendant prosecutes this appeal.

By the terms of the lease which forms the basis of the action, the plaintiffs, as lessors, demised to the defendant, as lessee, certain floor space in plaintiffs' storeroom in Long Beach, which was to be occupied by the defendant in the maintenance of one of its branch stores for the sale of fish, poultry, and meat products. The lease, dated January 30, 1923, was for a period of 5 years and provided for the payment of rental on a basis of 75 per cent. of the net profits made by the defendant in this Long Beach store. The lease further provided that, in arriving at the profit for the basis of determining the amount of rent, all produce and merchandise put in stock in the Long Beach store was to be inventoried at the actual cost prices to the defendant. The defendant maintained a main store or warehouse in Los Angeles where produce and merchandise were purchased in large quantities and then distributed in smaller lots to the various branches. The lease provided that with shipments to the Long Beach store invoice bills were to be issued showing the cost prices of all provisions or merchandise, and these invoice bills were to be used in the monthly computations which were provided for to determine the profit and the amount of rent to be paid for each month. The defendant was also required to keep an accurate set of books which would correctly show all moneys paid out and all moneys received in the conduct of the Long Beach store.

Apparently, the rentals were determined and paid in a manner satisfactory to the plaintiffs until July 31, 1924, when plaintiffs served a written notice on the defendant, the important portion of which reads as follows:

> "You will please take notice: That you are hereby required to quit and deliver up to the undersigned the possession of the premises now held and occupied by you. [Here follows a detailed description of the premises.] This notice to quit and deliver up possession of said premises is given to you and based upon the fact that you have violated the following covenants in said indenture as follows, to wit: 'That all meat or other merchandise placed in said storeroom by the Wreden Packing & Provision Company, Inc., shall be done so at a net price f. o. b. Long Beach; in other words, the original prices and billings to the Wreden Packing & Provision Company, Inc., from the packers shall be the price paid by the Long Beach store. That in arriving at the net profits the invoice bill shall be used as a basis for said figuring.' And specific violations of said covenants are as follows, to wit: [Here follow certain itemized statements of fish, poultry, and meat products that the plaintiffs allege were purchased at certain prices and billed to the Long Beach branch at prices in excess of cost prices during the months of November and December, 1923, and January, 1924.]"

Upon the refusal of defendant to vacate the premises, plaintiffs brought this action in unlawful detainer, praying for judgment for restitution of the premises, and also "for damages for the holding over by said defendant of said premises, in treble the amount of rent paid by said defendant during the period of such holding over," and for costs, etc. The complaint alleges the execution of the lease, the alleged violations of its provisions as to invoicing merchandise, and the giving of the notice hereinbefore referred to, but contains no allegation as to the amount of monthly rental that had been paid for the premises or the reasonable monthly rental value of the demised premises.

Findings of fact and conclusions of law follow the complaint, and judgment was awarded to the plaintiffs, giving them possession of the premises, and in addition a judgment for the sum of $1,500 for each month the premises were held over after the receipt of the notice "as damages for unlawful detention of the premises, being treble the amount of the monthly rental for said premises." The portions of the findings which we will hereafter have occasion to refer to read as follows:

> "IV. The court finds that the defendant herein has violated the terms, conditions and covenants of said lease as set forth in paragraph III of plaintiffs' complaint, in that they have charged and caused to be charged to the Long Beach branch of their company a greater price than was actually paid for the same by the Wreden Packing & Provision Company, Inc., and a list of said violations is as follows: * * * [Here follows the identical items as set forth in the complaint.]
>
> "The court further finds that the violations of the terms and conditions and covenants of said lease as hereinbefore set forth were because the defendant herein failed to keep proper books, records, and accounts, and further finds that it is and was not possible for the violations of said terms, covenants, and conditions of said contract to be adjusted, because of the said failure of the defendant herein to keep proper books, records, and accounts.
>
> "The court further finds that, in violation of said terms and covenants, the defendants arbitrarily fixed prices upon which goods were to be charged to the Long Beach branch and that the charges made against said Long Beach branch were in excess of the price to be charged under and by virtue of the terms of said contract."
>
> "VIII. The court further finds that the rental value of said premises from and after said 4th day of August, 1924, and the time in which the defendant herein unlawfully detained the premises from said plaintiffs, is the sum of $500 per month; and further finds that the period of unlawful detainer by the defendant herein is from the 4th day of August, 1924, until possession is surrendered by said defendant to plaintiffs herein."

Appellant in urging a reversal of the judgment presents its contentions under five headings. Inasmuch as we have concluded that the judgment must be reversed, we will confine our discussions to the two points which we deem are determinative of our conclusion.

[1, 2] Appellant first contends that the complaint does not state a cause of action, and urges this primarily for the reason that the action being one of unlawful detainer, the notice and demand set forth in the complaint does not meet the requirements of section

1161, Code of Civil Procedure. It should be noted at this point that the lease contains no provision for forfeiture on the part of the lessee in the event of default in the payment of rent or performance of any covenant. Hence, the right to accomplish a forfeiture depends upon a strict compliance with the statute. Randol v. Scott, 110 Cal. 590, 595, 42 P. 976. The notice served upon the defendant and set forth in the complaint simply demands immediate possession of the premises, and bases this demand upon the claim that the defendant had violated certain provisions of the lease regarding the billing of provisions at cost to the Long Beach store. There is no claim made in the notice that by reason of the alleged violation of these provisions that the plaintiffs had not received the full rental they were entitled to under the lease, or that there were any rentals remaining unpaid from the defendant to the plaintiffs by reason of the billing of merchandise in excess of the cost price, nor does the complaint allege that the plaintiffs were in any manner injured or damaged so far as their rights under the lease were concerned by reason of the method of invoicing merchandise to the Long Beach store. Clearly, the provisions in the lease for bookkeeping and the invoicing of merchandise were of no importance to the defendant, except in so far as these methods of conducting the business would the better enable the computation of the profit for the purpose of determining the monthly rental to be paid, matters entirely secondary to the primary consideration for the lease—the payment of the rental. Hence, if the failure to keep accurate books and issue invoice bills as provided in the lease did not operate to the damage of the plaintiffs during the months of November, December, and January, the three months of which plaintiffs complain, it would necessarily follow that plaintiffs have stated no cause of action.

[3] In order to sustain an action for unlawful detainer, section 1161, Code of Civil Procedure, clearly requires that a notice first be given to the delinquent tenant, which notice shall prescribe specifically the amount of rent due or the covenant that has not been performed, and a further notice that, in the event of the failure of the tenant to make payment of delinquent rent, or perform the defaulted covenant, the plaintiff will exercise his right under the law to regain possession of the premises. Clearly, the notice set forth in the complaint does not meet these requirements. Lacrabere v. Wise, 141 Cal. 554, 75 P. 185; Silva v. Campbell, 84 Cal. 420, 24 P. 316.

Respondents in their brief seem to concede the weakness in the demand, and the lacking allegations in the complaint, as urged by the appellant, but undertake to avoid the consequent conclusion by urging:

[4] First, that the missing provisions will be read into the notice and complaint by implication where the necessary facts appear. But do the necessary facts appear either in the notice or in the complaint? We think not. The statement in the notice that provisions were invoiced at an amount in excess of their cost may support an inference that the figures arrived at in the monthly settlements in November, December, and January were incorrect so far as they determined the amount of the profit for those months. But there is nothing that would justify the implication that there was a profit made in the business during those three months, and, of course, if there was no profit, there was no rent payable for those months. Nor do the facts set forth in the notice or complaint justify the implication that appellant had not paid every dollar which respondents were lawfully entitled to as rental under the lease for the three months specified.

[5] And, secondly, respondents urge that the covenant violated was one that could not thereafter be performed, and hence under subdivision 3 of section 1161, Code of Civil Procedure, respondents were relieved from the legal requirement to include the alternative demand in their notice. The portion of the section referred to reads as follows:

> "Provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given, * * *" etc.

We cannot agree with respondents' contention that the violated covenants could not have been performed after notice. The written demand made by respondents for possession of the premises specified in detail the several lots of fish, poultry, and meat which during the three months involved were incorrectly invoiced and also set forth in detail the cost of the various items and prices at which they were incorrectly invoiced to the Long Beach store. Certainly, there would be encountered no difficulty in correcting the final results which had been previously obtained in computing the business for the months of November, December, and January, and if when the figures were so corrected they showed no profit for the months in question, there was then no rent owing and unpaid. If, however, the corrected figures disclosed a profit, surely the amount of rental remaining unpaid for the three months in question could be readily determined. Under these conditions the appellant was clearly entitled to a demand in the alternative as provided in section 1161, Code of Civil Procedure, before respondent would have the right to declare a forfeiture. To hold otherwise would do violence to a principle of law that has long been accepted as axiomatic—the law abhors forfeitures.

[6] Nor can the fact be overlooked that the complaint is entirely devoid of any allegation that plaintiffs were injured or damaged in

any amount by reason of the failure of appellant to correctly invoice the provisions received during the months in question. Plaintiffs' failure to claim in their complaint that defendant was owing any sum that was due for rental under the lease leaves but one inference, and that is that they had received all the rent from the defendant that they were legally entitled to.

[7] Appellant's second point, that there is no allegation in the complaint to furnish a basis for the finding that the monthly rental value of the premises was $1,500, we think, must be sustained. The complaint is wholly silent upon the subject of the amount of rental, whether as determined by the computations under the provisions of the lease or as to the reasonable rental value of the premises. Evidently, the trial court was somewhat apprehensive of the complaint on this point and suggested to plaintiff's counsel that an amendment was desirable. Counsel evidently did not so conclude. The findings as to the rental value respond to no issue raised by the pleadings and hence cannot furnish support for the judgment for $500 per month for the premises and the trebling of that amount.

Other points are raised and discussed in the briefs by counsel for the respective parties, but, as we have already indicated, we do not deem it necessary to discuss other questions.

We are of the opinion that the judgment must be reversed, and it is so ordered.

We concur: HOUSER, Acting P. J.; YORK, J.

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89 Cal. App. 748

DEMENS v. HUENE et ux. (Civ. 4901.)

District Court of Appeal, Second District, Division 2, California. March 6, 1928.

1. Appeal and error 🔑766—Though memorandum of order was entered as of one date and briefs of appellant mentioned another date, appeal should not be dismissed, respondent not being misled.

Where order was entered and subsequently another order was issued, signed memorandum of which was entered confirming first order, and plaintiff appealed, stating in briefs that appeal was from first order, *held*, that appeal should not be dismissed, since it was apparent that appeal was taken from decision which was identified by signed memorandum thereof and respondent was not misled or inconvenienced thereby.

2. Motions 🔑51—Court's act is real order, and recording minutes and signing of order are but evidence order was made.

Act of court is real order, and recording minutes and signing of order are but evidence order was made.

3. Appeal and error 🔑113(1)—Order subsequent to judgment vacating another order authorizing issuance of execution held appealable.

Order made subsequent to judgment vacating order authorizing issuance of execution and recalling execution *held* an appealable order.

4. Execution 🔑74—Vacation of order authorizing execution based on affidavits to effect that debtor had property and no levy was made thereon for nine years vacating, held abuse of discretion (Code Civ. Proc. § 685).

Vacation of order authorizing issuance of execution by order based on affidavits of debtors to effect that they had property which was subject to execution during nine-year period for reason that creditor's failure to satisfy judgment barred right given by Code Civ. Proc. § 685, *held* abuse of discretion.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by V. P. Demens against E. A. Huene and wife. Judgment for plaintiff, and, from an order vacating an order authorizing the issuance of execution and recalling such execution, plaintiff appeals. Reversed.

H. L. Sacks, of Los Angeles, for appellant.

Stutsman & Stutsman, of Los Angeles, for respondents.

STEPHENS, Justice pro tem. Judgment was awarded plaintiff against defendants on June 24, 1915. On January 30, 1924, upon ex parte application and upon presentation of affidavit that no part of the judgment had been paid and that deponent was informed and believed that defendants had property not exempt from execution which should be applied upon the judgment, the trial court ordered that execution issue. Pursuant to this order execution issued and a motion to recall the same was made upon notice on the 11th of February, 1924. This motion was made upon affidavit and was based upon the ground of inadvertence. Thereafter the court made an order vacating the order of January 30th and the execution was recalled. Notice of motion was subsequently served upon defendants that plaintiff would on February 15, 1924, move the court to reconsider its order of February 11th and to deny the motion to vacate the order of January 30th. A hearing was had on February 15th, whereupon plaintiff moved in open court for a rehearing or a reconsideration of the order of February 11th upon two different grounds—upon errors of law as to laches, and upon the point that no summons and complaint had been served. Nothing relative to the latter was done at the hearing. On March 4, 1924, the court caused the following minute order to be entered:

"The ruling on the motion to set aside the order of the court to recall execution having been heretofore submitted on February 15, 1924, it is now ordered that said motion to set aside the order made herein under date of February 11, 1924, be denied and that such order recalling execution herein shall stand as entered."

On the same date a formal order was made and entered recalling and vacating the order authorizing the issuance of execution.

[1] Plaintiff appeals "from the judgment made and entered in the said superior court in the above-entitled action on the 4th day of March, 1924, in favor of the defendants and against said plaintiff, and from the whole thereof." Defendants argue that the appeal should be dismissed upon the ground that it is taken from the order signed March 4th, while appellant claims in his briefs that the appeal is from the minute order of February 11th. It is apparent from the record that the hearing of February 15th was as to whether or not the court should reconsider its order of February 11th, which order had never been suspended. When this question was submitted for decision counsel for plaintiff handed the court a form of order to be signed, which covered the exact ground of the minute order of February 11th. After consideration of the submitted question the court on March 4th caused a minute order to be entered to the effect that the original order of February 11th should not be disturbed. That this form of order was intended only as a more formal record of the order of February 11th is apparent from the fact that it was handed to the court at the conclusion of the hearing of February 15th. It was dated "February," but was changed by the judge to the date of signing. The court, coincident with the last referred to minute order, caused the formal order to be filed, and it was signed by him as of March 4th. This order further decrees that the sale of the executed property set for February 14th should be postponed. Had it been intended as the evidence of a new order made March 4th, it would not have contained an order of postponement of an act that was to have been performed about three weeks prior to the making of such order.

[2] The act of the court is the real order, and the recording in the minutes and the signing of the order were but evidences of the order made. As was said in Von Schmidt v. Widber, 99 Cal. 514, 515, 34 P. 110, 111:

> "* * * Nor is there any provision of law which requires all the orders of a court to be entered at length in its minutes, in order that they may be effective, and by section 1003 of the Code of Civil Procedure, every direction of a court or judge is an order, whether it be merely made in writing or entered in the minutes. * * * It is essential, however, that the action of the court be made a matter of record, in order that there may be no uncertainty as to what its action has been, and for this purpose it is customary, as well as expedient, to have its acts entered in the minutes kept by the clerk; but if the order is formally prepared and signed by the judge, and made a matter of record by filing with the clerk, the same end is attained as if it were spread at length upon the minutes of its daily transactions. As was said in Niles v. Edwards, 95 Cal. 47 [30 P. 136]: 'The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk.' "

See, also, Tracy v. Coffey, 153 Cal. 356, 95 P. 150.

It is apparent that the appeal is taken from the decision of the court which is identified in this instance by the signed memorandum thereof. In the case of Foss v. Johnstone, 158 Cal. 119, 110 P. 294, Mr. Justice Shaw says, at page 123 (110 P. 296):

> "With respect to the order, the notice of appeal states that Johnstone appeals 'from the order made and entered in the minutes of said court on the 7th day of April, 1909, denying the motion of the said defendant, John Johnstone, Jr., for a new trial of said action.' The order was not made on that date, but was made on July 30, 1909. It is settled that a mistake in the notice of appeal as to the date of the order or judgment appealed from does not invalidate the appeal, where there is a description of the order or judgment referred to, in other parts of the notice, reasonably sufficient to identify it" (citing authority).

In Estate of Stone, 173 Cal. 675, 161 P. 258, the notice stated that the appeal was taken "from the judgment on the verdict of the jury made and entered in the superior court * * * on the 27th day of April, 1916." The jury's verdict was received on such date, but the judgment was not entered until June 10th. The court declined to dismiss the appeal on this ground.

The case of Meley v. Boulon, 104 Cal. 262, 37 P. 931, announces the rule to be that:

> "Notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription."

There is no claim that respondent has been misled or even inconvenienced in the slightest degree in the instant case.

[3] Respondent claims that the appeal is not based upon an appealable order but there is nothing in the point. "It seems to be now the settled rule in this state that any special order made after final judgment affecting such judgment, although not dependent upon it, is an appealable order. * * * If such an order is not one made after final judgment from which an appeal will lie, then it is not difficult to conceive how a trial court could, in cases of which this court has appellate jurisdiction, make many different kinds of erroneous orders of the most oppressive and ruinous character from which the law would

afford absolutely no relief. Magee v. Superior Court, 10 Cal. App. 161, 162, 101 P. 535. There are numerous appeals in the Supreme and Appellate Court reports from orders identical with the one we are here concerned with, and their propriety has never been questioned, as far as we know.

There appears in the transcript a so-called statement of facts, which, omitting the title, reads:

> "This cause came on regularly for hearing in department 26 before Hon. Paul Burks presiding on the 11th day of February, 1924.
>
> "Upon hearing arguments by counsel for plaintiff and defendant and upon reading the affidavits submitted, this court found that the plaintiff was guilty of laches in not enforcing the judgment within the five-year period prescribed by law, and ordered the execution recalled.
>
> "The court did not consider the question of service of summons at the time of the hearing nor subsequently at the hearing on the 15th day of February, 1924, of plaintiff's motion to set aside said order of February 11, 1924, recalling said execution.
>
> "The court in making its order to recall the execution in the above action did so solely upon the ground of laches by the plaintiff and upon no other ground."

[4] The sole remaining question is as to whether or not the lower court abused its discretion when it ordered the vacation of the order authorizing the issuance of the execution, and this question must be determined from the law and the affidavits filed on the motion by both parties. The affidavit of the defendant Clara A. Huene states that she and her husband, judgment debtors, were engaged in conducting rooming houses for many years, and that up until November, 1919, she owned and possessed ample personal property consisting of furniture and leases in and of several apartment houses for varying periods in Los Angeles to have satisfied the judgment through execution, but that no effort was made to levy execution and no demand for payment was made; that up to such date plaintiff knew the above facts and knew or had means of knowing affiant's whereabouts. The affidavit of the defendant E. A. Huene states that he lived in Los Angeles June 24, 1915, and continually thereafter until June, 1918, during which time he possessed an automobile, well worth the amount of the judgment, which he used openly on the streets of Los Angeles, and that plaintiff knew or had means of knowing it; that no attempt to levy was made prior to January 30, 1924. Counter affidavits were filed by plaintiff, but for the purpose of determining whether or not there has been an abuse of discretion it will be taken that these are the true facts. "It is true, as claimed by the learned counsel for the respondents, that orders like the present, in legal parlance, rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion [citing authorities]. The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." Bailey v. Taaffe, 29 Cal. 422, 423, 424.

It is the intent of the law, and it would seem the intent, as well, of good morals, that every one being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute. Section 685 of the Code of Civil Procedure. As was said in Hovey v. Bradbury, 112 Cal. 620, at page 625 (44 P. 1077, 1078):

> "Nor, when we come to view plaintiff's conduct generally, can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. That doctrine, as has been said, is neither technical nor arbitrary It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent."

And in Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 170 P. 446:

> "Laches in legal significance is not mere delay, but delay that works a disadvantage to another."

See, also, Cahill v. Superior Court, 145 Cal. 42, 78 P. 467, and McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460.

What are the circumstances, then, which could justly move the lower court to deny the benefit of this statute to the plaintiff? We are at a loss to find any. While we are aware that the mere citation of cases where execution has issued after a long lapse of time has occurred is not decisive of any question here, still it is well to observe whether or not the court in this case was in step with the best minds in the judiciary.

In Weldon v. Rogers, 151 Cal. 432, 90 P. 1062, fourteen years between entry of judgment and the issuance of execution had passed, but the authorization of the issuance of the execution under the statute was sustained against a motion to set it aside. Ten years had passed between judgment and the issuance of execution in Harlan v. Harlan, 154 Cal. 341, 98 P. 32, wherein the court said:

> "And the mere fact that plaintiff had allowed ten years to elapse without making any effort to compel payment affords no ground for the contention that the court abused its discretion in ordering execution to issue."

In Doehla v. Phillips, 151 Cal. 488, 91 P. 330, fourteen years had passed from the date of judgment to the issuance of execution, but the court observed, at page 495 (91 P. 333):

> "We see no force whatever in the contention that in making the order for the issuance of the execution, under the circumstances here appearing, the lower court was guilty of an abuse of the discretion confided to it. Admittedly, the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and no reason whatever appeared why in equity and good conscience he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment which appellant should and could have at any time voluntarily paid, was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. *Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment.*" (Italics ours.)

The case of Brown v. Pacific Coast Agency, 53 Cal. App. 788, 200 P. 977, is one where a motion to dismiss execution had been granted and then set aside, the same as in the instant case, but upon other grounds. The court said at page 791 (200 P. 979):

> "It is also argued that the granting of the motion directing execution is within the discretion of the court, hence that the court could set aside the order at will. The right to have execution issue is statutory. Whatever discretion the court is given by the statute was exercised when the order for the enforcement of the judgment was made. An order so made can be set aside on legal grounds only. The only ground assigned in respondent's motion was that he was discharged by the release of his codebtors under section 1543 [Civ. Code].

In the instant case the statement of facts upon which the court vacated the order authorizing the issuance of execution and recalled the execution certainly did not constitute "legal grounds"—that is, afford doubts upon which the court's discretion as herein defined could act to deny the application of the benefits of the statute to the plaintiff.

The judgment vacating the order authorizing the issuance of execution and recalling such execution is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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89 Cal. App. 530

In re NACHNABER. (Cr. 1597.)

District Court of Appeal, Second District, Division 2, California. Feb. 28, 1928.

Constitutional law ⚷203—Criminal law ⚷978—Statute empowering court on granting probation to impose jail sentence not authorized at time defendants committed act held not ex post facto (Pen. Code, § 1203, as amended by St. 1927, p. 1493).

Where court in granting probation fixed confinement in county jail for first six months under Pen. Code, § 1203, as amended by St. 1927, p. 1493, and offense was committed prior to amendment, at which time court had no power to confine defendants, *held* that, since court in its mercy in endeavoring to reform individuals saw fit to inflict punishment considerably less than that imposed by law for the offense of which they were guilty, defendants were not deprived of substantial right, and therefore amendment could not be said to violate constitutional inhibition against ex post facto laws.

Application for writ of habeas corpus by Roy Nachnaber, on behalf of Elsie Richmond and Anna Nachnaber, prayed to be directed to the Sheriff of Los Angeles County to secure their release from custody on ground of irregularity in granting probation. Writ discharged.

W. T. Kendrick, Jr., of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

THOMPSON, J. This is a petition for the writ of habeas corpus on behalf of Elsie Richmond and Anna Nachnaber, who on June 30, 1927, pleaded guilty to an information charging them with having committed a burglary on May 13, 1927. After the plea was entered and prior to July 14, 1927, they filed a written application for probation, which was continued from time to time until September 14, 1927, on which day the court ordered:

> "That the proceedings be suspended and that the defendants be granted probation for a period of five years under the supervision of the probation officer and subject to the terms and conditions stated by the court, the first six

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

months of said period defendants shall be confined in the county jail of the county of Los Angeles."

Petitioner asserts that the portion of the order directing the confinement of the defendants in the county jail is void under the authority of People v. Mendosa, 178 Cal. 509, 173 P. 998, and In re Fink (Cal. App.) 250 P. 715, for the reason that, under section 1203 of the Penal Code as it existed prior to the amendment of 1927 (St. 1927, p. 1493), the court had no authority upon granting probation to order the confinement of the defendants in the county jail or elsewhere.

By the amendment of 1927 trial judges were vested with broad discretionary powers, and had the offense been committed subsequent to the going into effect of the amendment, no question could be raised concerning the validity of the order. Inasmuch as the offense was committed, the plea was entered, and application for probation was filed prior to the time the section as amended took effect, petitioner asserts that the court had no authority to order the confinement of the defendants upon granting probation, for the reason that the amendment violates the constitutional guaranty against ex post facto laws, in its application to offenses committed prior to the time it took effect, to wit, July 29, 1927. His contention is that the punishment for the offense is increased or aggravated by the provisions of section 1203 of the Penal Code, as follows:

"(1) The court, judge or justice thereof, [in the order granting probation,] may suspend the imposing, or the execution of [the] sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term for such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine. [The court, judge or justice, in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; may fine the defendant in such sum not to exceed the maximum fine provided by law in such case; or may in connection with granting probation, impose either imprisonment in county jail, or fine, or both, or neither; may provide for reparation in proper cases; and may require bonds for the faithful observance and performance of any or all of the conditions of probation. In counties or cities and counties where road camps, farms, or other public work is available the court may place the probationer in such camp, farms, or other public work instead of in jail, and subdivision twenty-nine of section 4041 of the Political Code shall apply to probation and the court shall have the same power to require adult probationers to work, as prisoners confined in the county jail are required to work, at public work as therein provided; and supervisors of the several counties are hereby authorized to provide public work and to fix the scale of compensation for such adult probationers in their respective counties. In all cases of probation the court is authorized to require as a condition of probation that the probationer go to work and earn money for the support of his dependents or to pay any fine imposed or reparation condition, to keep an account of his earnings, to report the same to the probation officer and to apply such earnings as directed by the court.]

"[The court may impose and require any or all of the above mentioned terms of imprisonment, fine and conditions and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law; for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer; provided, that if the probationer should violate the terms and conditions of his probation and the court should deem it just or necessary to revoke such probation, then and in that event any period of time which such probationer may have served in jail or other detention place or any fine paid, under the terms and conditions of his probation, shall be taken into consideration as a part of his punishment, and he shall have a credit therefor to be deducted from his term of confinement or from the amount of any fine imposed upon final judgment. Upon the defendant being released from the county jail under the terms of probation or sooner by order of court, and in all cases where he is not confined in the county jail at the time of granting probation, the court shall place the defendant in and under the charge of the probation officer of the court, during such suspension or period of probation; provided, however, that upon the payment of any fine imposed and the fulfillment of all conditions of probation, probation shall cease at the end of the term of probation, or sooner, in the discretion of the court. In counties and cities and counties in which there are facilities for taking finger prints, such marks of identification of each probationer must be taken and a record thereof kept and preserved.]" (Amendatory words are in brackets.)

In our opinion, it is unnecessary for us to extensively review here the long list of authorities relied upon by petitioner for the reason that our analysis thereof confirms the view we entertained, when with respect to a somewhat similar contention we recently said:

"The real question to be framed is whether the person accused has been deprived of a substantial right by reason of the change." People v. Edenburg (Cal. App.) 263 P. 857.

In all of the cases cited by petitioner's counsel, which appear on first examination to be in point, the defendant was deprived of some right to which he was entitled by law. For example, State v. McCoy, 87 Neb. 385, 127 N. W. 137, 28 L. R. A. (N. S.) 583, relates to an increase in the amount of a bond which a husband or father deserting his wife or minor children was required to post in order to authorize the court to suspend the sentence. A careful reading of that authority discloses, however, that such a defendant was, under the peculiar wording of that statute, entitled to be released from imprisonment upon filing the bond. The court there says that the section providing for the bond and suspension of sentence "was in the form of a proviso, and limited the first section, which defined the offense and fixed the penalties," and again:

> "The statutory right to have the sentence suspended upon giving bond in the sum of $200, in the event of conviction, was a substantial one, affording a means of escaping imprisonment. The amendment permitted the court to require a bond of $1,000 as a condition of suspending sentence. It is argued, however, that it was within the power of the court to release defendant on a $200 bond under either statute, and therefore he was not deprived of a substantial right. This argument does not meet the question. When the case was called for trial, it was within the power of the court to require a $1,000 bond, if the amendment was effective as to prior offenses. Under the new act the exercise of this power depended on the will of the court, and not on the wish or financial ability of the defendant. If he were unable to give bond in excess of $200, when required by order of the court to execute a bond in a larger sum as a condition of having sentence suspended, the change in the statute would deprive him of his liberty in case of conviction. There may be a difference between a statutory right and the mercy of a court."

The other authorities are likewise, distinguishable. In this case the defendants at no time had a statutory right to be granted probation. Assuming that they had a right to ask leave to file an application therefor, they likewise had a right when the time for the consideration of the application had been continued until after July 27, when the amendment took effect, to withdraw their application and suffer the punishment prescribed by law for the offense of which they were guilty. Whether they were granted probation rested solely in the conscience of the judge. It has been determined in People v. Dunlap, 27 Cal. App. 460, 150 P. 389, and in People v. Laborwits, 74 Cal. App. 401, 240 P. 802, "that the action of the trial court in refusing to hear such an application" is "not reviewable on appeal." See also, People v. Kirwin (Cal. App.) 262 P. 803. Assuming, however, for the sake of argument, that conditions might exist which would justify us in reviewing such an order, still we think the petition is without merit. The petitioner contends that the court having determined that he was entitled to probation, the probation indicated was of the nature and involved the terms under the law as it read when the application was filed. It is impossible to divide the proceeding up in a clear-cut way into separate steps, as is attempted to be done in petitioner's argument, and to say that it was first judicially decided that he was entitled to probation, and afterwards as a separate matter that the court concluded what terms should be imposed. The two considerations are inextricably interwoven. The weakness of petitioner's position lies in the fact that in determining that probation should be granted the court necessarily thought out the terms to be imposed—non constat, if it had not been possible, as a condition of probation, to apply the corrective of a period of time in confinement the court might and presumably would not have felt justified in granting the petition. The court, in its mercy and with the manifest object of endeavoring to reform the individuals, saw fit to inflict a punishment considerably less than that imposed by law for the offense of which they were guilty. It is perfectly apparent that the defendants have been deprived of no substantial right, and therefore the amendment cannot be said to violate the inhibition against ex post facto laws.

Writ discharged, and Elsie Richmond and Anna Nachnaber remanded.

We concur: WORKS, P. J.; CRAIG, J.

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89 Cal. App. 787

In re BARLOW et al.

LEWIS et al. v. BALL et al.

(Civ. 4867.)

District Court of Appeal, Second District, Division 2, California. March 8, 1928.

1. Boundaries ⚷48(5)—Prior owners' agreement fixing boundary line between properties, acquiesced in for 54 years, held binding on successors.

Where prior owners had agreed upon and had fixed a boundary line between their properties, and such line had been acquiesced in for 54 years before boundary dispute arose between successors in title, *held* that such settlement was binding on the successors.

2. Records ⚷9(10½)—Torrens judgment confirming boundary line established arbitrarily by petitioners' survey could not stand (Torrens Land Title Law).

Judgment, in action for registration of title under Torrens Land Title Law (St. 1915, p. 1932), confirming as boundary line between properties a line established arbitrarily by petitioners' survey, could not stand.

3. Records ⚷9(13½)—Defendants in Torrens land title registration action held not chargeable with any part of cost of petitioners' incorrect survey (Torrens Land Title Law).

Defendants in action seeking registration of title under Torrens Land Title Law (St. 1915, p. 1932) *held* not chargeable with any part of cost of incorrect land survey caused to be made by petitioners, where defendants had, because of lack of value of such survey, had another survey made.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

In the matter of the application of Charles Henry Barlow and others. Action by Edward C. Lewis and others for registration of title under the Torrens Land Title Law against Grover W. Ball and another. From the judgment, defendants appeal. Modified, and as modified, affirmed conditionally.

John B. Haas and John D. Home, both of Los Angeles, for appellants.

James W. Bell and Ronald H. Loenholm, both of Los Angeles, for respondents.

HAZLETT, Justice pro tem. Petitioners Edward C. Lewis and Bertha Johanna Lewis, hereinafter referred to as "petitioners," prayed the superior court to have their land, the east half of the southwest quarter of the northwest quarter of section 15, township 3 south, range 12 west, in Rancho Santa Gertrudes in Los Angeles county, registered under the provisions of the so-called Torrens Land Title Law. Stats. 1915, p. 1932. In their answer defendants allege that they are the owners and entitled to the possession of the land lying on the north of petitioners' land; that defendant Grover W. Ball owns the land immediately adjoining petitioners' land; and that the land of defendant Elmer E. Ball adjoins on the north the land of defendant Grover W. Ball; and that petitioners are claiming a strip of land 662.74 feet long east and west and 5 feet wide at its east end and 3.8 feet wide at its west end, off the south side of the land of defendant Grover W. Ball, and are endeavoring to have the north line of their land advanced northerly from the true line so as to include the strip.

The trial court gave judgment in favor of petitioners, awarding the strip to them and ordering the land of petitioners registered, from which judgment defendants appeal.

The question involved in the appeal is whether the evidence supports the findings and judgment.

The evidence of the parties shows the following facts without material conflict: Section 15 is a fractional section and the east and west boundary lines of the west half of the northwest quarter are more than 2,640 feet long. Ex-Governor Downey owned that land in and prior to 1867, and he subdivided it into two tracts, which were designated as 40-acre tracts. He sold the south 40 to a Mrs. Rice in 1867, and her brother, one McQuistion, bought the north 40 about the same time. By mesne conveyances, petitioner Edward C. Lewis became the successor in interest of Mrs. Rice to the east half of the south 40, and defendant Grover W. Ball became the successor in interest of McQuistion to the north 40. Mrs. Rice occupied and cultivated the south 40 and McQuistion the north 40 for a number of years, beginning in 1868. When they purchased, the boundary line between the two 40's was marked by stakes, and in 1869 Mrs. Rice and McQuistion agreed to further mark it by a fence of Osage orange trees, and McQuistion then planted the trees approximately parallel to and about 6 inches north of the boundary as marked by the stakes, planting them 4 or 5 feet apart. The trees grew to a height of 12 to 14 feet and their trunks to about 3 feet in diameter. The trees were there as late as 1908, and at some time thereafter they were cut down, some of their stumps remaining until 1923, and a wire fence was built in their place. From 1869 to 1923 the owners of each 40 cultivated their lands as close as practicable to the trees and fence. There never was any dispute as to the boundary prior to this action.

The strip of land in dispute lies next north of the agreed boundary line. A line drawn equidistant from the north and south boundaries of the east half of the northwest quarter of the section, dividing it into two equal parts, will lie at its west end about 4.40 feet north of the northwest corner of the strip in dispute, and 2.26 feet north of the northeast corner of the strip.

Petitioner Edward C. Lewis had the lands surveyed preparatory to this action and caused the surveyor to arbitrarily establish as the north line of his land the line which is the north line of the strip; but the line so established does not conform either to the boundary agreed upon by Mrs. Rice and McQuistion, or to a line which would divide the east half of the northwest quarter into two equal parts, or to any known monuments.

Fortunately the rules of law covering disputes of this character are well settled. A late decision upon the subject of agreed boundaries is found in Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 200 P. 651, in which the rules were announced as follows:

> "When two adjoining owners of land, being uncertain as to the true location of the boundary line between their contiguous land, 'agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the period of the statute of limitations, * * * such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements' (citing cases). The fact that the true position of the dividing line 'could always have been determined by a correct measurement,' or by survey, does not prevent there being an uncertainty, within the meaning of this rule, in the minds of the parties as to the position of the line on the ground. 'This condition exists in virtually every case in which the aid of the rule is sought.' (Citing cases.) * * * The word 'uncertainty' is used in the statements of the rule in the decisions to convey the idea that at the time of the location of the division line neither of the coterminous owners knew the true position of the line on the ground. * * * Having agreed upon the line as the true line, and believing that it is, it follows that neither one would intend to claim

any land beyond that line, unless he was dishonest in making the agreement."

See, also, Howatt v. Humboldt Milling Co., 61 Cal. App. 333, 339, 214 P. 1009.

The decision in the case of Silva v. Azevedo, 178 Cal. 495, 499, 173 P. 929, cited in Nusbickel v. Stevens Ranch Co., supra, was based upon facts very similar to the facts in this case, except that in that case it appeared that the line had been established by mistake in its location only six years before the discovery of the mistake, and that substantial improvements had been made by Azevedo on the tract in dispute. Azevedo had purchased a part of Silva's land, and they had employed a surveyor to locate the line dividing their holdings. The surveyor correctly surveyed their holdings, but made a mistake in marking the dividing line on the ground, placing it 70 feet over on Silva's land. The parties built a fence on the marked line and occupied and improved their lands to the fence. The court held that as there was a continued acquiescence in the line so fixed and the occupation beyond the period of the statute of limitations, and improvements made in accordance with it, it would be manifest injustice to permit Silva to be ousted merely because he discovered by a new survey that the line was established in error; and "'If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable.' Young v. Blakeman, 153 Cal. 477, 95 P. 888." The judgment of the lower court in favor of Silva was reversed.

[1] It does not appear from the record that when Mrs. Rice and McQuistion agreed upon the boundary line between their properties, that either of them knew the true line upon the ground. The agreement fixing the boundary line made by them, the predecessors of the parties to this action, and acquiesced in for 54 years before a dispute arose over the boundary, binds the parties to this action as their successors. See Howatt v. Humboldt Milling Co., supra, page 341 (214 P. 1009), and Raney v. Merritt, 73 Cal. App. 244, 250, 238 P. 767. It would be unjust should we now permit petitioners to disturb the boundary line so established and recognized and treated as the true boundary for so many years.

[2, 3] Appellants also contend that as the line attempted to be established by petitioners' survey was arbitrarily established, the judgment confirming it cannot stand. This contention is well taken. There is no evidence to support the attempted establishment of the line where laid. A judgment establishing a boundary arbitrarily selected must be reversed. Staniford v. Trombly, 181 Cal. 372, 375, 186 P. 599. The survey which petitioners caused to be made was incorrect, and it was of no value to defendants, and because thereof defendants had another survey made. Defendants should not be charged with any part of the cost of petitioners' survey.

This court concludes that the decree registering the land of petitioner Edward C. Lewis, and the strip of land in dispute, should be modified to adjudge: That defendant Grover W. Ball is the owner of the strip in dispute; that petitioner Edward C. Lewis is the owner of that part of the land claimed by him which lies south of the strip in dispute, viz., south of the boundary line established by Mrs. Rice and McQuistion, which part alone should be registered; and that defendants shall recover their costs from petitioners. But no charge against defendants shall be included for any part of the expense of the survey which petitioners caused to be made, or for costs.

Before any modified decree shall be entered the trial court shall require petitioners to cause the northeast and northwest corners of their land, at the intersections of the boundary line, so established, with the east and west boundary lines of their land, to be marked by appropriate monuments of a permanent character. If respondents shall, within 15 days after this opinion is filed, file in this court their remission consenting to the modifications of the decree which this court holds should be made, and agreeing to so mark the northeast and northwest corners of their land, the decree shall be so modified, and as so modified shall be and stand affirmed, and when the corners are so marked, the trial court shall make its modified decree to conform thereto. Otherwise the decree shall be and stand reversed.

Appellants shall have judgment against respondents for the costs of this appeal.

We concur: WORKS, P. J.; CRAIG, J.

89 Cal. App. 772

AMERICAN WOODLITE CORPORATION v. WOODLITE CORPORATION et al.★

(Civ. 6074.)

District Court of Appeal, First District, Division 2, California. March 8, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Patents 🔑213—Contract licensing sale of patented products, which authorized assignment to corporation sufficiently financed, held to require financing before assignment.

Provision in contract licensing individuals to sell lenses covered by licensor's patents, which permitted assignment "to a corporation which shall be sufficiently financed to carry out the terms of the agreement, in which event such corporation shall succeed to all the rights and privileges of licensees," *held* to authorize assignment of licensees' title only to corporation whose financial status is previously established.

2. Patents 🔑214—Plaintiff must establish by clear and convincing evidence right to cancel license to sell patented products.

In suit for cancellation of contract giving license to sell patented products, burden is upon plaintiff to establish his case by clear and convincing evidence.

3. Patents 🔑214—Finding in suit to cancel license to sell patented products that corporate assignee of license was insufficiently financed held sustained by evidence.

In suit to cancel contract licensing sale of patented products, evidence of financial condition of corporation to which licensee assigned its rights *held* sufficient to sustain trial court's findings that corporation was not sufficiently financed, within meaning of contract, which required sufficient financing before assignment could be made.

4. Estoppel 🔑83(1)—Statement that licensee could have further time to form corporation to sell patented products held insufficient basis for estoppel.

In suit by licensor's assignee to cancel contract giving licensee right to sell patented products, alleged statement of vice president of plaintiff corporation that he would allow licensees further time to raise money for financing corporation to which license was to be assigned *held* too vague and uncertain to serve as basis for claim of estoppel, irrespective of whether vice president had authority to make such promise in behalf of the corporation.

5. Patents 🔑214—Licensees' rights under contract authorizing sale of patented products were not determined as of date of preliminary notice of intention to terminate.

Where contract giving license to sell patented products provided that licensees must, within 30 days after receiving preliminary notice of licensor's intention to terminate for default, perform terms and conditions of agreement on penalty of forfeiture, rights of licensees were not determined as of date of preliminary notice.

6. Patents 🔑214—Licensees failing to comply with contract for sale of patented products before final notice of revocation held not entitled to avoid cancellation.

Where contract giving licensees right to sell patented products permitted termination of license for failure of licensees to perform terms and conditions of agreement within 30 days after receiving preliminary notice of termination, licensees who failed to make any showing of performance prior to final notice served 60 days after preliminary notice could not avoid cancellation of contract, even though subsequently able to carry out its terms.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by American Woodlite Corporation against the Woodlite Corporation and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Byrne & Lamson, of San Francisco, for appellants.

Brownstone & Goodman, of San Francisco, for respondent.

MURPHEY, Justice pro tem. This action was begun by the plaintiff to declare that a contract made between the Berkeley Light Corporation, plaintiff's assignor, and the defendants Duryea and Atwood, be canceled and terminated, and for an injunction preventing the defendants from asserting any claim thereunder. The judgment of the superior court was for the plaintiff, and the defendants appeal.

The plaintiff was the owner of a number of patents covering improvements in light projections, particularly as applied to automobile headlights. In March, 1923, plaintiff's assignor made a contract with the defendants Atwood and Duryea herein whereby the latter secured an exclusive license to sell lenses and commodities covered and protected by said patents throughout United States and Canada. The essential provisions of the contract about which the controversy of the parties to this litigation centered are as follows (the numbers are as they appear upon the original contract):

"III. Licensor will at its own cost and expense manufacture and deliver to licensees at the earliest practicable time one complete pair of headlights for use on automobiles, which lights shall be approved as a marketable commercial model by said William G. Wood. Licensor shall also furnish and deliver to licensees free of charge a complete set of blueprints of working drawings and specifications covering the above headlights.

"IV. Within 30 days after licensor shall have furnished licensees with said headlights, licensees shall take the initial steps and proceed with reasonable diligence with the manufacture of one hundred (100) pairs of automobile headlights modeled after the pair so received from licensor, and licensees shall furnish and deliver

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★Hearing denied by Supreme Court.

to licensor free of charge seven (7) pairs of such headlights for its own use as soon as the same are completed."

Paragraph VI tabulates a graduated scale of royalties to be paid by the licensees to the licensor, running from $7,500 for the first year to $100,000 for the fifth year.

"XIII. This license agreement shall not be assigned by licensees without the written consent of licensor except that licensees shall have the right without the consent of licensor to assign this agreement to a corporation which shall be sufficiently financed to carry out the terms of this agreement, in which event such corporation shall succeed to all the rights and privileges of licensees hereunder and be bound by all the terms and conditions hereof to be performed and observed by licensees. * * *"

After the contract of March 10, 1923, was entered into and on the 31st day of July, 1923, the licensees, Duryea and Atwood, formed a Delaware corporation with a capital of $500,000 to carry out the terms of the contract entered into in March of that year. On July 16, 1923, the plaintiff's predecessors delivered to Atwood and Duryea one complete set of headlights, approved as a marketable commercial model by Wood, and at the same time furnished to the licensees a complete set of blueprints, etc.

It is the contention of the plaintiff that the defendants failed utterly to comply with the agreements set forth in paragraphs IV and XIII and that by reason thereof the contract was canceled and any and all rights of the licensees thereof have been terminated.

[1] There is some contention as to the time when the corporation to be formed under paragraph XIII was required by the contract to be sufficiently financed to carry out its terms. Judged by the amounts stipulated to be paid as royalties, it is evident that the parties considered these patent rights of great value and the transaction one of considerable magnitude, and by its express terms it is apparent that the parties contemplated diligent activity to put the undertaking on a paying basis. Bearing this in mind, let us read the provisions in regard to financing. According to those provisions the licensees may assign "to a corporation which shall be sufficiently financed to carry out the terms of the agreement, *in which event* such corporation shall succeed to all the rights and privileges of licensees." Appellant contends throughout the discussion that this language means that the financing is something to occur in the future or as circumstances required. We are unable to agree with this contention or that this language may fairly be said to bear such construction. Restating the matter, the parties said in the event that the corporation formed by the licensees shall be sufficiently financed to carry out the terms of the agreement it shall succeed to the rights and privileges, etc. It seems to us that the meaning is perfectly clear that the financial status must precede the passing of the licensees' title to the corporation and any attempt at further discussion would simply result in encumbering the record. There is no contention that at the time the corporation took over the contract it was financed in any substantial sum whatever.

With respect to the real issues in controversy, the trial court, after finding that the plaintiff and its predecessors in interest had in all respects performed all the terms, conditions, and obligations required by the contract to be performed by them, proceeds and specifically finds as follows:

"Defendants R. F. Duryea and C. G. Atwood did on or about the 15th day of October, 1923, assign the said contract to the defendant Woodlite Corporation, contrary to the provisions of paragraph 13 of said contract set forth in paragraph 3 of the complaint; that at the time such assignment was made and thereafter and up to the time of the commencement of this action the defendant, Woodlite Corporation was not sufficiently financed or reasonably financed to carry out the terms of said contract, or possessed of sufficient or reasonable financial resources to carry on the operations or projects or any material or substantial part of the obligations or projects to which said corporation or its said assigns, were committed under said contract; that the finances of said corporation were during all of said period inadequate and insufficient for the performance of the obligations on its part as the assignee of the said Duryea and the said Atwood, under said contracts."

The court further found that prior to the assignment to the Woodlite Corporation the plaintiff or its predecessors had delivered to said defendants Duryea and Atwood one complete pair of headlights approved as a marketable commercial model by William G. Wood, and also that the plaintiff had supplied the said licensee with a complete set of blueprints and working drawings.

The court further found:

"That neither the said Atwood and Duryea, or the said defendant Woodlite Corporation, within 30 days after said 16th day of July, 1923, in conformity with said contract, and particularly with paragraph 4 thereof, or otherwise, took the initial steps for the manufacture, nor did they thereafter proceed with the manufacture, of one hundred or any other number of pairs of headlights, with the exception of two pairs of headlights modeled after the pair so received from said licensor, and the said defendants and each of them have done nothing whatever toward the manufacture of said 100 pairs of automobile headlights, except to manufacture the 2 pairs thereof before referred to, and the said 2 pairs were so manufactured and completed long prior to December 5, 1923; that said defendants have done nothing whatever toward the performance of any term or condition of the said contract, except to manufacture 2 pairs of headlights, and conduct certain fruitless negotiations with automobile headlight manufacturers with reference to the use or manufacture of said patented articles, nor have they or any of them furnished or delivered to plaintiff any headlights."

[2, 3] At the time the corporation took over the contract, its finances were speculative and prospective, and there is in our judgment, ample evidence in the record to sustain the findings of the trial court as above set out; and in holding thus we are not unmindful of the fact that in cases of this character the burden is upon the plaintiff to establish his case by clear and convincing evidence. It may be said with reference to the sufficiency of the evidence to support the finding as to the financial status of the corporation that it shows that the least estimate of the defendants' representations with regard to the amount required to satisfactorily finance the deal is $50,000; that the estimates ran from that amount to $150,000 or $200,000; that at no time prior to the final notice of cancellation hereinafter mentioned was there a net balance of more than one-third of the smallest amount above mentioned. It may be further said, as disclosed by the record, that on two occasions between the date of the assignment to the corporation and the final cancellation by the plaintiff and while negotiations for the manufacture of the 100 pairs of headlights named in the contract were in progress, calls for cash were made upon the corporation and the negotiations pending thereon were immediately discontinued. In the first instance when the licensees were negotiating with an Indiana corporation and they were considering the tenative plans for the manufacture of the said headlights, the manufacturer suggested to the licensees the necessity of an advance of $10,000. After this suggestion the negotiations were promptly terminated. After the preliminary notice of intended cancellation was served in December, 1923, the defendants entered into a contract with a California firm to manufacture these headlights. Immediately a demand was made to advance $20,000 before work was undertaken as in the former case. Nothing further was done in the furtherance of this activity. From all of which the conclusion seems inevitable that the determination of the trial court that the corporation was not sufficiently or at all financed to carry out the requirements of the contract is correct.

[4-6] It may be further stated as a fact not challenged or questioned that at no time either before or after the notice of cancellation did the defendants ever manufacture the 100 pairs of headlights specifically required by the terms of the contract. The defendants make the contention that their inability to make a more satisfactory financial showing and their failure to manufacture the required number of headlights was attributable to the acts, and conduct of the plaintiff. One such contention is that Wood, the vice president of the plaintiff corporation, told Duryea, one of the licensees, that because of his high regard for him he would give him further time to raise the money. Aside from the fact that the record fails to disclose any authority vested in Wood to vary the terms of the written contract made by the corporation, without which authority his promise would have no binding effect upon the corporation, the promise itself was too vague and uncertain to serve as the basis for any claim of estoppel. Other contentions are that the representatives of the plaintiff interfered with and blocked the financial plans of the defendants. In response to this contention the court specifically found that no unlawful or unwarranted act of the plaintiff interfered with any activities of the defendants in operating under the license, and there is no evidence to disturb the finding. It may be further stated that the record discloses that the plaintiffs were persistently and continually urging the licensees to fulfill their obligations under the contract. The preliminary notice of default was given on the 5th day of December, 1923, after which time, and until the 4th day of February, 1924, defendants did nothing to effectuate their agreements under the contract, contending, as we understand their position, that their rights were to be determined as of the date of the preliminary notice of intention to terminate the contract. This position is not sound. By the terms of the contract the licensees must, within 30 days after the notice, keep or perform the terms and the conditions of the agreement wherein they are in default, or the licensor shall thereupon have the right, by serving the licensees with notice in writing, forthwith to vacate the license. This final notice of revocation was not actually served for 60 days after the preliminary notice. It would seem to us that during this period of time the licensee should have made a supreme effort to wipe out the alleged default, and if during that period he had acquired the financial ability to carry out the contract program and entered into a contract financed to assure its completion for the manufacture of the headlights provided for in the contract and conveyed this information to the plaintiff before the final notice of default was given, his standing in a court of equity on an application to declare a forfeiture of his rights would then have had appealing force, if it would not have been unanswerable. On the other hand, if they were unable to and did not make this showing prior to the date of the final notice of cancellation, they would have had no standing in such a court, even though they subsequently were able to demonstrate their ability to fully carry out the terms and provisions of the contract. In this respect we call attention to the language in Hammacher v. Wilson (C. C.) 26 F. 239, a case similar in many respects to the case at bar, in which the court says:

> "We think the evidence shows that, for reasons which seemed sufficient to him at the time, he deliberately determined not to make the payments required by the license. It is true that

he has since offered to pay the sums due, and he strenuously contends that his license ought not to be forfeited for mere neglect to pay money, since he now offers to pay whatever may be due. Undoubtedly his argument would be very strong if this were an action to ascertain and declare a forfeiture. The question, however, which we have to decide is not whether we shall now declare the license forfeited, but whether it has already been forfeited by the acts of the parties, pursuant to the provisions contained therein. The respondent agreed that if he failed to perform his engagements, the license might be forfeited by a written notice served on him. We see no reason why such an agreement may not be made and enforced. White v. Lee [(C. C.) 3 F. 222, 4 F. 916, 14 F. 789] supra. He has failed to perform his engagements, the notice has been served on him, and we think, on the service of that notice, the license ceased to protect the respondent."

Substantially the same language is used in the case of Platt v. Fire Extinguisher Mfg. Co. (C. C. A.) 59 F. 900, and Russell v. Boston Card Index Co. (C. C. A.) 276 F. 4.

It follows from the foregoing that the judgment must be and is hereby affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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89 Cal. App. 779

TIERNEY v. OCCIDENTAL LIFE INS. CO. OF CALIFORNIA. (Civ. 4891.)★

District Court of Appeal, Second District, Division 2, California. March 8, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. **Insurance 🔑451(1)—Insured, killed by aeroplane propeller after flight was completed, was not participating in "aeronautics" precluding recovery on accident policy.**

While policy of life and accident insurance did not cover injuries sustained while participating in aeronautics, insured was not killed while participating in "aeronautics," which is the art of navigating the air, where his death occurred after he alighted from a flight, and in bending over to avoid a wire was struck by the propeller of the aeroplane, which was still in motion but plainly visible.

2. **Insurance 🔑451(1)—Death of insured from contact with aeroplane propeller after flight was completed held not "in consequence of having participated in aeronautics."**

Where, after completion of flight in aeroplane, insured stepped onto wing of plane, and then, in bending over to avoid a drift wire, was struck by the propeller as he straightened up, although his death was a sequence of participation in an aeroplane flight, it was not "in consequence of having participated in aeronautics," within exemption provision of life and accident policy.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by Emma Tierney against the Occidental Life Insurance Company of California. From a judgment for the plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
Dave F. Smith and Walter T. Casey, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action by the widow upon a life or accident policy issued to one William L. Tierney, deceased. Judgment of the trial court was for the plaintiff, and defendant appeals upon a bill of exceptions.

But one witness was called by the plaintiff and none by defendant; it having been stipulated that the testimony so given covered the facts relating to the circumstances of the accident. The witness testified that he piloted an aeroplane which took the insured as a passenger from Venice, Los Angeles county, to Marsh field, Riverside county; that the landing was accomplished, whereupon, and before stepping from the cockpit, deceased answered questions put to him in an ordinary tone of voice, acknowledged an introduction to two officers, and, having removed his goggles but not his leather helmet, stepped out onto the left wing of the plane and onto the ground, then forward, bent over to avoid a drift wire, and as he straightened up was struck by the propeller, which was still in motion but was plainly visible. Insured died early the next day as a direct result of the injury thus received. The witness further testified that the machine had been upon the ground five or six minutes before the accident occurred, that they arrived over the field at an elevation of 5,000 feet, and that altitude does affect the eardrums.

It was further stipulated that the only issue for the lower court to decide was whether or not Tierney's death was within the terms of the insurance policy, which insured him against bodily injuries resulting directly and independently of all other causes through external violent, and accidental means, when said policy, among other general provisions, provided as follows:

> "This policy does not cover any injury, fatal or nonfatal, sustained by the insured while participating or in consequence of having participated in aeronautics."

Defendant's specifications of error are: (1) That the evidence is insufficient to sustain the finding that the death of the deceased was not caused while participating in aeronautics; (2) that the evidence is insufficient to sustain the finding that the death of the deceased was not caused in consequence of having participated in aeronautics; (3) that the findings are conflicting; (4) that the findings do not sustain the judgment; (5) that the

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★Hearing denied by Supreme Court.

evidence does not justify the finding that the aeronautical flight and landing was successfully made or completed before the accident.

[1] The most approved definition of the word "aeronautics" is that it is "the art of navigating the air." Ency. Brit. (11th Ed.) p. 260; Bew v. Travelers' Ins. Co., 95 N. J. Law, 533, 112 A. 859, 14 A. L. R. 983. The authorities support the assertion in respondent's brief that, "when the machine clears the earth and returns successfully to the earth, and is resting securely upon the ground, the 'aeronautics'—the flight—is completed, and the aeronautics is at an end." It does not seem necessary to further consider appellant's first specification. The evidence does sustain the finding that the death was not caused while the insured was "participating in aeronautics."

[2] The next question presents apparent rather than real difficulties: Was the death caused "in consequence of insured's having participated in aeronautics"? He *had* so participated, and he met his death. Was the death caused *in consequence* thereof? The death was a sequence of the participation—that is, it followed closely and was connected therewith—but was it in consequence thereof? Did the participation cause the death? The Encyclopædic Dictionary defines "consequence" as "that which follows as the result or effect of any cause; that which produces an effect." The Standard Dictionary defines "in consequence of" as meaning "as the result of; because of." The question now presented, to state it both negatively and affirmatively, is not, Did the accident happen as a part of the aeronautics? for, as we have seen, the "aeronautics" had been completed; nor is it, Did the accident happen while the insured was still a passenger? for the insurance contract says nothing about that relation. The question presented is: Did the accident happen *as the result of or because of* that which is now past, "having participated in aeronautics"? Did the participation cause the death?

The insured might have met a similar death had he climbed into the cockpit just from curiosity after the plane had landed, in which case he would not have participated in aeronautics at all. Upon the completion of the flying and as deceased was climbing from the plane he might have been shot by the accidental discharge of a revolver in the hands of one of the officers to whom he was introduced. To be sure, the doctrine of chances would put deceased somewhere else. Had he not flown to Riverside county he probably would not have been there to climb into the machine or out of it; but by reason of this improbability can it be argued that, because he was there by flight, that the flight caused the accident? The question answers itself: The flight was not the proximate cause, but there was the intervening act of the deceased in his poor judgment in so conducting himself after climbing out of the machine as to be struck by the propeller.

In McAllister v. Tennessee, etc., Insurance Co., 17 Mo. 306, the insurance policy on a river steamer contained the following exemption or exception:

> "Nor will the company be liable for any loss or damage arising from the bursting of boilers, collapsing of flues or breaking of boilers, unless from unavoidable external cause, or from *any consequences resulting therefrom.*" (Italics ours.)

A boiler burst without an unavoidable external cause, tore away part of the deck, which fell into the furnace, and the boat was destroyed by fire. The policy covered fire damage, but the court declared that the loss was a *consequence* resulting from the bursting boiler and was within the exception, and held that no liability attached to the insurance company for the loss. In the instant case the policy contract covered the accident, as in the cited case the policy covered the fire. It excepted any benefit from the policy for injury which should happen *because of participation* in aeronautics, just as the policy in the cited case referred to *excepted any injury because of a boiler explosion.* The case cited is a clear illustration of an exception which is effective to release an insurance company from liability for an accident which otherwise would have been within the policy; and the reason it was outside the policy is not because the fire occurred *after* the explosion, but because the fire occurred *because of* the explosion.

In Orient Mutual Insurance Co. v. Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63, the insurance policy provided that the insurance company should be free from any liability for loss to a river boat "occasioned by * * * the derangement or breaking the engine or machinery, or any consequence resulting therefrom, unless the same be caused by unavoidable external violence." The boat was tied up for repairs to a mud valve. To effect this repair, it was customary to blow off the steam. While the steam was off, the captain ordered the craft loosed, and, since there was no power with which to control her, she washed helplessly over a fall and was damaged. We quote:

> "The next assignment of error is that the court erred in ruling that the loss was not within the express exceptions of the policy. The specification, under this assignment, is that the loss was the consequence of the derangement of the mud valve, and therefore within the exception that the company should be free of all claim for loss or damage occasioned by 'the derangement or breaking of the engine or machinery, or any consequence resulting therefrom.' The 'consequence' here referred to is an immediate or proximate, not a remote consequence. Even if the mud valve is a part of

the machinery of the vessel, within the meaning of the policy, its derangement cannot be said to have been the proximate cause of the loss."

The insurance company was held liable under the policy. This is in principle on all fours with the instant case.

In Wilson v. Travelers' Insurance Co., 183 Cal. 65, 190 P. 366, the plaintiff was insured against injury caused by wreckage of a railway passenger car. An exception against recovery upon the policy contained the following clause: "* * * Nor shall it cover injury * * * from * * * explosives." Plaintiff entered the passenger car, and an explosion in the toilet room *wrecked* the car, the wreckage injuring him. The company claimed that the circumstances of the accident fell under the exception—that plaintiff was injured from an explosive. It was held that the defendant company was privileged to frame its contracts of insurance in any terms it might choose, and that the established rule of construction of such contracts requires any ambiguity arising from inapt phraseology to be construed against the company. In this instance the wrecking of the car injured the plaintiff. Speaking for the court, Mr. Justice Wilbur said:

> "If we must look for the cause of the injuries to the first cause, it would never be the wreckage of the car, which is itself a result, and not a cause. * * * Although the explosion was the proximate cause of the injury, it was, by the peculiar terms of the policy, made a remote cause."

The peril insured against was not connected in any way with the exception. The policy aptly insured against injury from wreckage, unconditionally. It excepted injuries from explosives, unconditionally. Can it be doubted but that the insurance company would have been held free from liability if the policy had contained the exception, "nor shall it cover injury * * * from * * * explosives" or injury in consequence thereof? The cause would have been patent. Nor can it be doubted that the insurance company would have been held liable if with such an exception in the policy the explosion had not wrecked the car but had delayed the train so that it did not make a switch in time to avoid an on-coming train, and the insured was injured by the wreck which ensued.

Faris v. American National Assurance Co., 44 Cal. App. 55, 185 P. 1035, cites with approval the language used in Williamsburg v. Willard (C. C. A.) 164 F. 404, 21 L. R. A. (N. S.) 103, as follows:

> "Applying the maxim that in construing the terms of an insurance policy, if there be any ambiguity, it must be construed most strongly against the insurers, since the language is their own. * * *"

In the instant case, had the plane landed with a jar which threw the insured against the propeller, the injury would have been in consequence of having participated. But the evidence is not to this effect. Of course, the participation may have made the insured dizzy, or benumbed his perception, or temporarily limited his physical activities to such a degree that he could not appreciate the danger, or, seeing it, could not avoid it. In any such case a finding could properly be made that the death was "in consequence of having participated in aeronautics." But the testimony given (which was stipulated as correctly stating the facts) moved the trial court to find that the death was not caused in consequence or because of the flight, or, in effect, that none of these or other disabilities brought on by the flight were present. Certain it is that in view of the evidence as it is this court could not disturb this finding.

Both parties discuss learnedly and at great length the niceties of the proximate, dominant, and incidental causes of an effect and cite Hawthorne v. Siegel, 88 Cal. 159, 25 P. 1114, 22 Am. St. Rep. 2929; Ætna Insurance Co. v. Boon, 95 U. S. 130, 24 L. Ed. 395; Lehman v. Great Western Acc. Ass'n, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562; Hall v. National Fire Insurance Co., 115 Tenn. 513, 92 S. W. 402, 112 Am. St. Rep. 870, 5 Ann. Cas. 777; and U. S. Fidelity, etc., Co. v. Blum (C. C. A.) 270 F. 946, 957. While these discussions may be pertinent to this case, we think there is no need of analyzing them, as the trial court upon competent evidence has found that the flight, although proximately preceding the injury, did not cause it.

They also discuss when and under what circumstances a person is a passenger of a public conveyance. The decision in this case does not rest upon the principles of damage recovery. In fact we see nothing obstruse or difficult about it. At first blush, the flight and the accident being so close together, one is apt to confuse the meaning of *sequence* and *in consequence*. One is apt to broaden the word "aeronautics" to include everything concerning and surrounding an airplane and a flight. But the uncertainty clears completely when "aeronautics" is understood to mean only the flight and "in consequence" to mean the cause of a happening.

Appellant in effect asks us to rule that the exemption in the policy goes to a death or injury from any of the intermediary steps taken by an insured from the time he contacts the immediate vicinity of an aeroplane before flight until he loses such contact after the flight. Herein is confused a public passenger carrier's duty with the exemption in the insurance policy, but the language used does not accomplish what appellant contends it does—although it would have been easy to have written it so had the company desired.

There is nothing conflicting in the findings. The evidence supports them in their entirety, and the findings support the judgment.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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89 Cal. App. 690

UNITED BANK & TRUST CO. OF CALIFORNIA v. POWERS. (Civ. 3438.)

District Court of Appeal, Third District, California. March 5, 1928.

1. Appeal and error 🔑1033(7)—Second mortgagee could not complain that court did not find amount of first mortgagee's lien in action against second mortgagee for conversion, where lien claim exceeded judgment.

Where after cattle were mortgaged another mortgage was given which was foreclosed, and first mortgagee brought action for conversion, objection that first mortgagee's right to recover was measured by extent of lien on which court made no finding could not be raised by second mortgagee, since amount due first mortgagee from mortgagor was greatly in excess of judgment awarded for conversion.

2. Abatement and revival 🔑8(2)—Second mortgagee's contention that pendency of action between first mortgagee and mortgagor prevented former's action against him in conversion held meritless.

In action by first mortgagee against second mortgagee for conversion of cattle, alleged error in continuing action during pendency of action by first mortgagee against mortgagor to foreclose *held* without merit, since such action had no relevancy whatsoever to action for conversion.

3. Chattel mortgages 🔑178(1)—Demand held unnecessary in first mortgagee's action for conversion against second mortgagee, where cattle were wrongfully taken prior to commencement of action.

In action by first mortgagee against second mortgagee for conversion of cattle covered by first mortgage, which were taken and sold prior to commencement of action, where conversion was found to be wrongful, *held* that no demand was necessary.

4. Chattel mortgages 🔑150(2)—Second mortgagee may not complain of first mortgagee's failure to record mortgage on cattle within 15 days, where he was not harmed thereby.

In action by first mortgagee against second mortgagee for conversion of cattle, where second mortgagee had taken cattle and sold them, contention by second mortgagee that first mortgagee had permitted more than 15 days to elapse between taking of mortgage and recording *held* without merit, where second mortgagee was not harmed by reason of action, not having lost or acquired any rights nor had dealings with mortgagor during that period.

5. Chattel mortgages 🔑13—Mortgage of natural increase of cattle held valid.

Mortgage of increase of herd of cattle according to laws of nature held valid.

6. Chattel mortgages 🔑178(3)—Evidence held not to show that first mortgagee suing second mortgagee for conversion of cattle had lost lien through fault.

In action by first mortgagee against second mortgagee for conversion of cattle which latter sold, evidence *held* insufficient to show that first mortgagee had lost lien through any conduct of his towards mortgaged property.

7. Chattel mortgages 🔑49(1)—Mortgage purporting to cover certain number of cattle held not void for indefiniteness because mortgagor did not own quite that many.

Mortgage which purports to cover certain number of cattle, where as in truth mortgagor does not own quite that number, will not be held void for indefiniteness.

8. Chattel mortgages 🔑47—Recorded chattel mortgage containing description which by putting parties on inquiry will enable them to ascertain mortgaged property held not void for uncertainty.

Chattel mortgage of record containing description which by putting parties upon inquiry will enable them to identify and ascertain property mortgaged *held* not void for uncertainty.

9. Chattel mortgages 🔑148—Second mortgagee taking mortgage which referred to prior mortgage held guilty of conversion in selling cattle under second mortgage.

Where mortgage on cattle referred to prior mortgage, but, notwithstanding, second mortgagee sold cattle under his mortgage, *held* that since search of record would have given second mortgagee necessary data upon which, prosecuting reasonable inquiry, he could have ascertained existence of first mortgage, that second mortgagee in foreclosing was guilty of conversion.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the United Bank & Trust Company of California against Ed Powers for conversion of personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for appellant.

Hawkins & Hawkins, of Modesto, and Louttit, Stewart & Louttit, of Stockton, for respondent.

PLUMMER, J. Plaintiff had judgment in an action for the conversion of certain personal property alleged to be covered by a chattel mortgage in favor of the plaintiff and wrongfully converted by the defendant to his own use. From this judgment, the defendant appeals.

During the month of February, 1922, by an instrument dated February 2, acknowledged February 17, and recorded February 18, 1922, one Joe S. Gonsalves purported to mortgage to the plaintiff certain personal property described in said instrument as follows: 60 head of Holstein cows and increase, 60 tons hay, 1 Holstein bull, 2 horses, all situate on the ranch of Joe Gonsalves, located three miles northwest of Ripon, San Joaquin county, Cal.

The record shows that this instrument covered all the cows belonging to the mortgagor Gonsalves at that time. At a period some 17 months later, to wit, on or about the 6th day of July, 1923, Gonsalves executed a chattel mortgage, purporting to cover certain described cattle, to the defendant in this action. The record shows that some time prior to the date of the execution of this mortgage, the defendant, Powers, had sold a parcel of real estate to the said Gonsalves; that on the 6th day of July, 1923, Gonsalves was in default in an installment payment agreed to be paid on account of the purchase price of said real property, and then and there executed two mortgages in favor of the defendant Powers, one of which covered other property than that included in the plaintiff's mortgage. Thereafter, and on or about the 21st day of December, 1924, the defendant Powers, took possession of all of the property referred to herein under the mortgage executed to him by Gonsalves, as just stated, and proceeded to make sale thereof. Thereupon the plaintiff herein began this action for the recovery of the value thereof. It appears that only 29 head of the cows mortgaged to the plaintiff were discovered and identified, and it was for their value only that the trial court awarded judgment to the plaintiff.

Upon this appeal the defendant makes the following points for reversal:

(1) That the mortgage to plaintiff was and is void against the defendant by reason of the indefinite description of the cattle.

(2) That if plaintiff's mortgage was originally valid plaintiff's rights thereunder have been lost because it permitted other cattle to be commingled with those covered by the mortgage so that the mortgage description became valueless as a clue for identifying the cattle.

(3) That the mortgage to the plaintiff is and was invalid as against defendant as an existing creditor, because it was withheld for 15 days from record without any excuse therefor.

(4) That the mortgage of plaintiff did not cover calves and heifers, since it described the cattle as cows, etc.

(5) That plaintiff's measure of recovery is the extent of its lien at the time of conversion, and that the court made no finding upon this point.

(6) That the trial court erred in excluding the record of the pendency of a prior action, from the evidence, etc.

(7) That at the time of the alleged conversion plaintiff had no right to the possession of the property, since it had not exercised its option to take possession and had not demanded of defendant the possession of said cattle.

[1-3] As to the fifth, sixth, and seventh assignments of error, it may be said in a few words that an examination of the record shows them to be without merit. The amount shown to be due the plaintiff from Gonsalves is such that if any finding had been had thereon, it necessarily would have shown a sum greatly in excess of the judgment awarded the plaintiff in this action. Hence the defendant is not in a position to complain. The reference in the sixth assignment of error is to an action begun by the plaintiff against Gonsalves to foreclose the mortgage referred to herein. This statement shows it was not an action between the plaintiff and this defendant, and has no relevancy whatever to this particular action. Had it been introduced into the record it would not have constituted any defense to the prosecution of this action or constituted a bar to the prosecution against the defendant for the unlawful conversion of the property mentioned in the chattel mortgage. The record shows that the property covered by the plaintiff's mortgage was taken by the defendant and sold by him prior to the beginning of this action. The court has found such conversion to be wrongful. Therefore, no demand was necessary. Mier v. Southern California Ice Co., 56 Cal. App. 512, 206 P. 83; Daggett v. Gray, 110 Cal. 169, 42 P. 568; McNally v. Owen Connelly, 70 Cal. 3, 11 P. 320; Harpending v. Meyer, 55 Cal. 555.

[4] As to the third assignment of error, the plaintiff in this action asks, if the court is at all in doubt as to the law involved, to be permitted, under section 956a of the Code of Civil Procedure (St. 1927, p. 583), to make proof that the chattel mortgage executed by Gonsalves to the plaintiff, though bearing date of February 2, 1922, was in truth and in fact executed on the 17th day of February, 1922. We think the granting of this request, under the circumstances disclosed by the record in this action, unnecessary. Our attention has not been called to anything in the transcript, nor have we been able to discover any testimony therein indicating that the appellant in this action is in a position to take advantage of the lapse of time between the date of plaintiff's mortgage and the date of its recordation, assuming, for the purposes of this decision, that the number of days so indicated actually intervened between its execution and recordation, for the simple reason that the record does not show that the appellant parted with any rights, acquired any rights, had any business transactions with the mortgagor, Gonsalves, or became a creditor of said Gonsalves during such period of time. The law is well established in this state that in such circumstances the appel-

lant is unharmed and has nothing of which to complain.

In Williams v. Belling, 76 Cal. App. 610, 245 P. 455, the court had before it this identical question, and there said:

> "By section 2957 of the Civil Code it is provided that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value unless it is acknowledged or proved, certified, and recorded in like manner as grants of real property; and in Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371, it is held that the recordation of a chattel mortgage, having been designed by the statute as a substitute for and the equivalent of the immediate delivery and continued change of possession formerly required in this state, should be had immediately or as soon thereafter as practical upon the execution thereof in order to give notice to and bind third parties.
>
> "In the instant case it might fairly have been inferred that 14 days had elapsed between the delivery of the mortgage and its recordation. Such delay, although not affecting its validity between the parties (Summerville v. Kelliher, 144 Cal. 155, 77 P. 889), would, if not shown to be excusable, render the mortgage void as to creditors and incumbrancers, whose claims were created during the interval. Ruggles v. Cannedy, supra; Old Settlers' Investment Co. v. White, 158 Cal. 236, 110 P. 922; Civ. Code, § 2957; In re Hansen (D. C.) 268 F. 904."

See, also, Brown v. O'Neal, 95 Cal. 262, 30 P. 538, 29 Am. St. Rep. 111; Feeley v. Boyd, 143 Cal. 282, 76 P. 1029, 65 L. R. A. 943. Other cases might be cited, but the foregoing are sufficient to show the rule which we have stated to be firmly established and that assignment of error No. 3 is untenable.

[5] Assignment No. 4 relates to the increase of the cattle mortgaged. By the terms of the mortgage the increase, that is, the increase of the cattle according to the laws of nature, would be covered by the mortgage. The law is well settled in this state that such a mortgage is valid, and citation of authorities is not necessary.

[6] Proceeding in the inverse order, we are thus brought to a consideration of appellant's second assignment, to wit: If the mortgage was originally valid, has the plaintiff's rights thereunder been lost by reason of the commingling of other cattle with the mortgaged band, by the mortgagor Gonsalves? The record shows that some time during the year 1923, at what period the testimony leaves uncertain, Gonsalves purchased a number of other cattle, and that at one time between the execution and delivery of the plaintiff's mortgage in February, 1922, and the taking possession of the band of cattle involved in this action by the defendant on December 1, 1924, Gonsalves had in his possession cattle to the number of about 80 head. That during the period of time covered by both the mortgages executed to the plaintiff and the defendant, Gonsalves bought and sold several head of cattle, and the argument is made that where a mortgagee consents to such intermingling of other cattle with mortgaged cattle, the mortgagee waives his rights under his mortgage. The record, however, does not bear out the conclusion that the plaintiff was a participant in the commingling of cattle in such a manner as to lose any of its rights. Mr. T. H. Kewin, the vice president and manager of the Modesto branch of the plaintiff in this action, who acted for the plaintiff in the matter of the execution of the Gonsalves mortgage to the plaintiff, testified as follows (after stating that his action was based upon a report made to him by one Mr. Gandy):

> "Q. I would like to have that written report, Mr. Kewin, if you would get it? A. If it is possible to get it, I will be glad to do so.
>
> "Q. Not having the written report here, therefore I will not ask you to be exact, because the written report is the best evidence. We might progress in the trial—it will not delay the trial—what is your best remembrance now as to whether or not, at the time that Gandy made his report, there were more or less than 60 head of cattle on the Gonsalves' ranch? A. My recollection of the report is that the stock which was covered in my mortgage, that is, the dairy herd, was intact. My understanding was, though, that Gonsalves in the meantime had bought some cattle and had traded some other cattle on the ranch which were covered by another mortgage.
>
> "Q. Other Holstein cattle? A. I could not answer that question. Q. At that time when you understood from Gandy's report that Mr. Gonsalves had brought other cattle on the ranch, did you make any objection to other cattle going on the ranch at that time? A. No, sir.
>
> "Q. That was perfectly satisfactory to you and your bank? A. I was not concerned about that.
>
> "Q. You knew, did you not all the time that those very cattle were mingled with the Gonsalves' cattle on the Gonsalves' ranch? A. I didn't know they were mingled, no, sir.
>
> "Q. You were going by there every few months and saw the cattle? A. I saw the cattle; yes, sir.
>
> "Q. Was there anything you did hear that led you to believe that the other cattle were not mingled with the cattle you had a mortgage on? A. I knew Joe had some cattle over on another ranch part of the time. I didn't follow that up.
>
> "Q. You never objected to the mingling of the cattle he brought from some other place with the cattle you had your mortgage on? A. I did not, because I had absolute confidence in Joe's honesty, and I figured he would play the game clean with me."

No other testimony has been called to our attention bringing home to the plaintiff any act of the mortgagor, Gonsalves, relative to the commingling of other cattle with those mortgaged to the plaintiff, and therefore we conclude that the record shows nothing which would justify the court in holding that the plaintiff lost its lien by reason of any act of the mortgagor The rule as to subsequent confusion or commingling of chattels is clearly stated in 11 California Jurisprudence, 464, § 85, to wit:

> "If, when the mortgage was given, the property mortgaged was separate, the fact that it was afterwards commingled with other similar property does not affect the validity of the description, unless the confusion of the property occurs with the consent of the mortgagee, in which case the mortgage will be valid only in respect to those articles which can be identified."

The authorities there cited in support of the rule are numerous. To the same effect is Jones on Chattel Mortgages (4th Ed.) §§ 481 to 483, inclusive. See, also, Cobbey on Chattel Mortgages, §§ 765, 992. Upon the question of the commingling of chattels we may further cite the case of Page v. Jones, 10 A. L. R. 761, and the note thereto beginning on page 765. The authorities cited all hold that the mortgagee must be shown to have been in some manner at fault before there can be any forfeiture of a mortgage lien. This, we think, is not shown by the record in this case.

[7] This leaves undisposed of but one question: Was the mortgage executed and delivered to the plaintiff void as against the defendant because of the indefinite description of the cattle mortgaged? As herein stated, the mortgage recited 60 head of Holstein cows and increase and one Holstein bull all situate on the ranch of the mortgagor three miles northwest of Ripon, in San Joaquin county. A very searching cross-examination of the mortgagor Gonsalves by the appellant failed to disclose that there were any more cows on the ranch described than the number mortgaged to the plaintiff. In fact it leads to the conclusion that there were fewer cows on the ranch described and fewer cows belonging to the mortgagor at the date of the execution of the mortgage than were actually described therein. although there is some testimony to the effect that there were then and there 60 head of cows, but if we take the result of the cross-examination of the mortgagor Gonsalves and conclude that there were some three to five cows less in number owned by him and upon his ranch at the time of the execution of the mortgage to the plaintiff, the result is in nowise affected. As a matter of coincidence we may state that the record shows that on the 6th day of July, 1923, the chattel mortgage executed by Gonsalves to the defendant Powers purported to describe just 60 head of cows. A statement also made by Gonsalves to a third party in October, 1922, was admitted in evidence, or rather, upon its being presented it was stipulated that the statement of Gonsalves showed that he then had on his ranch 56 head of cows. This was at a period some seven or eight months after the execution and delivery to the plaintiff of the mortgage purporting to cover 60 head of cows. As we have heretofore stated, the record shows that at the time of the execution by Gonsalves of the chattel mortgage delivered by him to the plaintiff, he had on the premises described and in his ownership and possession no more cattle than were mortgaged, and that the mortgage covered all the cattle belonging to him. While a mortgage of a definite number of cattle belonging to the mortgagee, of a larger band of cattle belonging to him, will be held void for uncertainty or indefiniteness, it does not follow that where a mortgagor purports to mortgage a certain number of cattle, whereas in truth and in fact he does not own quite that number, that the mortgage will be held void for indefiniteness. Thus, in Watson v. Pugh, 51 Ark. 218, 10 S. W. 493, a chattel mortgage purporting to mortgage eight bales of cotton weighing 500 pounds each, which the mortgagor should raise in a designated locality, is not void for uncertainty, when in fact the mortgagor's whole crop did not amount to as many as eight bales of the specified weight. Also, it is held that where the number specified is more than the whole number of such articles, and there is no other property of the same kind from which a selection is to be made, there is no uncertainty in the description. Jones on Chattel Mortgages, § 59; Washington v. Love, 34 Ark. 93; Croswell v. Allis, 25 Conn. 301; Kelly v. Reid, 57 Miss. 89; Draper v. Perkins, 57 Miss. 277.

[8] The rule is well settled that where a chattel mortgage of record contains a sufficient description, which, by putting parties upon inquiry, will enable them to identify and ascertain the property mortgaged, the mortgage will not be held void for uncertainty (Jones on Chattel Mortgages, § 64; 5 Cal. Jur. p. 54), where it is stated that a description of property is sufficient if it is such as to enable third parties, by inquiry, to identify the property covered by it. Or, as said in Cobbey on Chattel Mortgages, § 170:

> "A description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient."

In view of these authorities, the following cases, where chattel mortgages have been held insufficient where the description is no more definite than in the one at bar, are pertinent:

In Knapp, Stout & Co. v. Deitz, 64 Wis. 31, 24 N. W. 471, we find the following held by the Supreme Court of Wisconsin to be a sufficient description, to wit, 41 Berkshire hogs and 65 grain sacks giving the location of the property. In the case at bar we have the 60 Holstein cows, identical with the Wisconsin case. Again, in the case of Waggoner v. Oursler, 54 Kan. 141, 37 P. 973, the Supreme

Court of Kansas held valid, as against a charge of indefiniteness, a chattel mortgage which described property as follows: "45 head of three year old steers, 59 head of two year old steers, now being pastured on the Pottawatomie Reserve by said party of the first part." That holding was in an action for conversion by a third party, and in that particular is identical with the case at bar. And in that case it also appears that the mortgagor did not have exactly the same number of steers which he purported to mortgage, and it was held that the mortgage covered the steers which the mortgagor then possessed, although he purported to mortgage a greater number.

In Rudolph v. National Live Stock Commission Co., 76 Kan. 789, 92 P. 1103, the Supreme Court of Kansas again held that:

> "If a person of ordinary prudence, reading such mortgage, and making such reasonable inquiries as the mortgage * * * suggests, would identify the cattle * * * then the mortgage, being duly filed in the proper office, is sufficient to charge third persons with notice."

That case also holds that it is a question of fact for the jury to determine whether a person of ordinary prudence, reading such mortgage and making inquiries as would be suggested thereby, would be enabled to identify them. To the same effect is McConnell et al. v. Landgon, 3 Idaho, 157, 28 P. 403, where the Supreme Court of Idaho held that:

> "A description of property is sufficient if it will enable a third person, aided by inquiry suggested by the instrument, to identify the property." (Citing a number of authorities.)

Likewise, in the case of Ehrke v. Tucker, 99 Kan. 52, 160 P. 985, the Supreme Court of Kansas decided that:

> "It is not necessary that the description of cattle intended to be included in a chattel mortgage, shall be so definite that third parties can identify the property from that alone. It is enough if the description and the inquiry suggested by it, furnish a reasonable basis for identification; but the suggestions which indicate the line of inquiry must be taken from the mortgage itself and not rest alone in the mind of the mortgagor or mortgagee."

[9] Here the mortgage gave the kind of cattle and the location. It was but a mere matter of inquiry at the time the defendant accepted his mortgage from Gonsalves to ascertain what cows the mortgagor had on his premises at the time of the execution and delivery by Gonsalves of a chattel mortgage thereon in the month of February, 1922. The description in the mortgage under consideration is readily distinguishable from that contained in the mortgage under consideration in the case of Parker v. Chase, 62 Vt. 206, 20 A. 198, 22 Am. St. Rep. 99, relied upon by the appellant. In that case the chattel mortgage purported to mortgage three out of five cows, without any further description. This, of course, did not designate the cows mortgaged. We might cite to the same effect the case of Tindall v. Wasson, 74 Ind. 495, where a similar description was held insufficient, but where it was held also that parol evidence is admissible to identify the particular property described in the mortgage; that is, parol evidence may aid but not make a description. Here, parol evidence could easily have been obtained by the defendant and the identity of the property mortgaged ascertained. In Bank v. Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332, a description in a chattel mortgage which read, "120 head of feeding cattle now on feed in Audrain county, Missouri," was held sufficient. It must be stated, however, that this holding was had in an action against the mortgagor. The rule in relation to descriptions of chattels is well settled in 11 Corpus Juris, p. 457, which reads:

> "As against third persons the description in the mortgage must point out its subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggests inquiries or means of identification which, if pursued, will disclose the property covered. This rule is based upon the maxim, that is certain, which is capable of being made certain. So a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified."

The record before us discloses that the mortgage executed by Gonsalves and delivered to the defendant referred to a prior mortgage. The reference is to a mortgage other than the one belonging to the plaintiff and was described as a chattel mortgage executed in favor of a bank located at Manteca, in San Joaquin county, but it does evidence the fact that the defendant's attention was called to the existence of a prior mortgage, and a search of the record would have given him the necessary data upon which, prosecuting reasonable inquiries, he could have ascertained the existence of the plaintiff's mortgage and the property covered and included therein.

The judgment is affirmed.

We concur: HUGHES, Justice pro tem.; FINCH, P. J.

203 Cal. 634

ANSTEAD v. PACIFIC GAS & ELECTRIC CO. (Sac. 3856.)★

Supreme Court of California. March 20, 1928.

Rehearing Denied April 19, 1928.

1. Electricity ⚷14(3)—General practice or custom did not excuse defendant's negligence in running power line through trees, unless custom was consistent with due care.

Where a boy 9 years of age while in an apple tree on a ranch occupied by his parents suffered burns from contact with high-tension wire, which ran through an opening in the tree, general practice or custom of running electric wires through fruit and shade trees did not excuse power company's negligence therein, unless such practice or custom was consistent with due care.

2. Electricity ⚷19(5)—Evidence held to sustain finding of negligence in running power line through opening in tree.

Where a boy 9 years of age while in an apple tree on ranch occupied by his parents suffered electric shock and burns because of a power line which passed through an opening in the tree, wires of which at time of plaintiff's injury were sagging, evidence *held* to sustain finding of negligence in maintenance of power line.

3. Electricity ⚷14(2)—Power company could be held negligent in maintaining high-tension wire through tree, though proof did not show wires were uninsulated.

Where a boy while in an apple tree on his father's ranch suffered burns from high-tension wire which ran through an opening in the tree, power company could be charged with negligence in maintenance of its wires even in absence of proof that wires were not insulated, where it appeared from evidence that even though the wires had been insulated, insulation was insufficient to prevent passage of electric current through the tree and accident itself showing that insulation was ineffective.

4. Electricity ⚷14(2)—Negligence in maintaining power line through tree was measured by use which defendant might reasonably anticipate would be made of tree.

Negligence of power company in maintaining high-tension power line through an open-

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★Rehearing denied.

ing in a tree on a ranch and which caused injury to son of occupant of ranch is measured by use which company might reasonably anticipate would be made of the tree.

5. Electricity 🔑15(1)—Boy burned by power line had right to be in tree when injured, where his family occupied ranch and its appurtenances.

Where a boy of 9 years of age while in an apple tree on ranch occupied by his parents suffered burns from a high-tension wire, which passed through an opening in the tree, he had right to be in the tree at the time of the injury, where evidence showed his family were in occupation of ranch, with implied authority to use all its appurtenances.

6. Electricity 🔑19(4)—Evidence showing that location of power line had been changed shortly after accident held not admissible.

Where a boy of 9 years of age while in an apple tree on ranch occupied by his parents was injured by burns origin of which was high-tension power line, which ran through the tree, admitting evidence that location of power line had been changed shortly after the accident was error.

7. Evidence 🔑194—Refusal to exclude from evidence charred limb of tree, where witness' knowledge about date of burning was conjectural, held error.

Where a boy while in an apple tree on ranch occupied by his father suffered burns originating in high-tension wire, which ran through opening in the tree, overruling motion to exclude from evidence charred limb of tree, which plaintiff's father testified he cut therefrom, was error, where witness' knowledge about date of burning of limb was vague and conjectural.

8. Appeal and error 🔑1170(7)—Admitting evidence showing change in power line after accident and refusal to exclude burned branch held not reversible error, where defendant's negligence was proved (Const. art. 6, § 4½).

In action for injury to a boy from burns originating in high-tension power line, which ran through opening in tree, error in admitting evidence of change in location of power line after accident and overruling motion to exclude from evidence charred limb of tree *held* not to require reversal, in view of Const. art. 6, § 4½, where evidence apart therefrom justified finding of defendant's negligence in maintenance of its power line.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by William Anstead, a minor, by and through R. J. Anstead, as guardian of his person and estate, against the Pacific Gas & Electric Company. From a judgment for the plaintiff, defendant appeals. Affirmed.

See, also, 256 P. 209.

Thomas J. Straub, L. H. Susman, and Charles E. Finney, all of San Francisco, and Carr & Kennedy and Chenoweth & Leininger, all of Redding, for appellant.

T. W. H. Shanahan, of San Francisco, and Carter & Smith, of Redding (Jesse W. Carter, of Redding, of counsel), for respondent.

LANGDON, J. This is an appeal by defendant from a judgment of the superior court of Shasta county, after verdict by a jury, awarding plaintiff damages in the sum of $15,000 for personal injuries.

The plaintiff was but 9 years of age at the time of the accident which resulted in his injuries. He suffered an electric shock and electric burns while in an apple tree on a ranch in Shasta county, which ranch was occupied by his father and family. The plaintiff had climbed the tree to pick apples. Through one side of this apple tree, in a space cleared for the purpose, defendant and its predecessors in interest had for many years maintained an electric power line of two wires, suspended from poles, which power line was used for the distribution of electricity for public use. The ranch upon which the apple tree was situated and which was being occupied by the plaintiff's family was known as the "Spann ranch." There is a fence along the boundary line between the "Spann" and "Graham" ranches, and the wires constituting this fence were nailed on the south side of the poles on which the power wires on this line were strung. The "Spann" ranch was on the south side and the "Graham" ranch on the north side of this fence. A large apple tree was situated 5 feet south of the fence on the "Spann" ranch, about 200 feet east of the county road, which runs north and south and constitutes the western boundary of the "Spann" ranch. This apple tree was 33 feet in height and had a spread northeasterly and southwesterly of 39.7 feet on the north side of the tree. About 14 feet from the ground an opening had been cut in the limbs and the wires of his high-tension line were suspended from the poles so that the same passed through this opening. The poles from which these wires were suspended were 172 feet apart. The average vertical opening between the limbs which had been cut out of the tree was between 4 and 5 feet in height. The wires of this power line were suspended 9 feet inside the spread of the tree. The tree forks near the ground, and the lowest limbs and branches projecting from the tree were only about 2 feet above the ground. The high-tension wire suspended through this tree at the time of the injury to the plaintiff sagged—the witnesses vary greatly in their testimony as to how much—from the cross-arm from which they were suspended, and the tree was situated about halfway between the two poles so that the wires were at their lowest point where they passed through the tree. There is some testimony to the effect that the cross-arms on the poles on either side of the tree were insecurely fastened to the poles and tilted so that they were not horizontal and that the entire line was in need of repair, although other witnesses contradict this. The apple tree was a fruit-bearing tree, and the apples were suitable for cooking and eating. R. J. Anstead, the father of the plaintiff, had resided with his wife and children on the "Spann" ranch for over a year at the time of the accident and had been operating a dairy on shares with Mr. Charles Spann, the owner of the place, up to about June 1, 1923. They then terminated their arrangement for the operation of the dairy, but Anstead and his family were permitted to remain on the place and occupy it without paying rental, upon condition that he should pay for the electricity consumed for light and power used by him and his family on the premises.

On July 31, 1923, the plaintiff in this action and his cousin, Rex Campbell, climbed up into the apple tree to pick apples. The plaintiff did not see the wires suspended through the tree; he knew nothing about electricity. No warning sign was placed around the tree, and there was nothing to indicate that it was dangerous to climb the tree to gather the apples. The record discloses that the brother of plaintiff heard a cry or scream from the tree, and a little later saw Rex Campbell crying, and Rex stated that the plaintiff was hanging dead in the apple tree. The brother ran to the rescue and was assisted by his uncle in removing the plaintiff from the tree, where he was found hanging by his suspenders, unconscious. He was about 9 feet from the ground. The plaintiff was severely burned and shocked and spent months in the hospital recovering from the burns. His left hand was badly burned and scarred, involving three fingers and the palm of the hand. He also received a burn behind his right ear and a severe burn on the back of the left thigh, just below the buttocks, leaving a scar 4 inches by 2 inches, in triangular shape. He also received a burn over the upper outer surface of the right thigh, extending down from the great trochanter, about 6½ inches in length and 5 inches in width, irregularly shaped; also a burn about an inch and a half in diameter, oval-shaped, on the posterial center portion of the right thigh. At the time of the trial the testimony showed a shrinkage of plaintiff's right leg and left arm and of the muscles of the left side of the chest. Prior to the accident plaintiff was in good health, and since the accident he has been ill and nervous. He is unable to walk or run without pain and has developed a nervous affliction known as St. Vitus dance, or chorea, as the direct result of the electric shock. The medical testimony offered by plaintiff was to the effect that plaintiff's injuries would permanently impair his health and strength and his power to walk and exercise.

Several questions are presented upon appeal. Those which merely involve arguments upon the weight of the evidence we shall not discuss in detail, but shall accept the findings of the jury in favor of plaintiff where the record contains any substantial evidence upon which to base such finding.

[1] Appellant argues that the evidence does not show negligence in the maintenance and operation of its power line because it was the custom for power companies to run their wires through fruit and shade trees, after pruning out the trees. The general practice or custom would not excuse defendant unless such practice or custom was consistent with due care. 19 Cal. Jur. 581, 582; Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449.

[2] The finding of negligence made by the jury, we think, was justified by the record before it. A case involving a similar principle is presented in Howell v. San Joaquin Light & Power Co. (Cal. App.) 261 P. 1107. A high degree of care is required of one who is operating a dangerous instrumentality, such as transmission wires for electricity. 10 Cal. Jur. 184; 19 Cal. Jur. 579, 581; 20 Corpus Juris, 342; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Tackett v. Henderson Bros., 12 Cal. App. 658, 108 P. 151; Stott v. Southern Sierras Power Co., 47 Cal. App. 242, 190 P. 478; Fairbairn v. American River Electric Co., 170 Cal. 115, 148 P. 788; Bergen v. Tulare County Power Co., 173 Cal. 709, 161 P. 269; Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 106 P. 587; Robinson v. Western State Gas & Electric Co., 184 Cal. 401, 194 P. 39.

[3] Appellant contends that it cannot be charged with negligence, in the absence of proof that the wires were not insulated. There does not appear to be any direct proof in the record upon this question. However, we find the testimony of Herbert Anstead, the young brother of plaintiff, to the effect that he had climbed the apple tree before his brother was injured and had seen the wires move and touch the limbs of the tree. "I seen the wires move, touch the limbs; they were touching the wire, and I saw the limbs sparking where the wires touched the limb and a spark came." There was also the testimony of plaintiff's father that he cut a limb from the tree, which limb, he states, projected to within 6 or 8 inches of the wire in question, and this limb was burned and charred. It appears, therefore, that if the wires were insulated, the insulation was not sufficient to prevent the passage of the electric current to the tree. The accident itself shows that the insulation was not effective. As was said in the case of Giraudi v. Electric Imp. Co., 107 Cal. 125, 40 P. 109 (28 L. R. A. 596, 48 Am. St. Rep. 114):

"If there was any excuse for not so locating the wires (so high above the roof that those having occasion to go there would not come in contact with them) it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, res ipsa loquitur."

[4] The negligence of the defendant is to be measured by the use which it might reasonably anticipate would be made of the apple tree. Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 194 P. 39; Minter v. San Diego Con. Gas, etc., Co., 180 Cal. 723, 182 P. 749; Foley v. Northern Cal. Power Co., 14 Cal. App. 401, 112 P. 467; Giraudi v. Electric Imp. Co., 107 Cal. 121, 40 P. 108, 28 L. R. A. 718, 48 Am. St. Rep. 146; Thompson v. Slater, 197 Mo. App. 247, 193 S. W. 971.

Under the facts in evidence and the rule of law announced by the cases just cited, there is ample justification for the finding of negligence.

[5] There is no merit in the contention that plaintiff has not shown his right to be in the apple tree at the time of the injury. The evidence shows that his family were in occupation of the ranch, with implied authority to use and enjoy all its appurtenances.

[6] It is contended that the trial court erred in the admission of certain evidence showing that the location of the power line had been changed shortly after the accident. The first instance pointed out is a question asked of the witness Wiegel and his answer thereto. This witness was the surveyor who made the map of the tree which was introduced in evidence. He was describing and explaining the map, and he stated, without objection, that the poles from which the old line had been suspended had been cut off. Later, when the map was offered in evidence, the defendant objected on the ground that the map did not show conditions at the time of the accident, but at a date two years later. The objection was overruled. Counsel for plaintiff then asked the witness whether or not the power wires were running through the tree at that time or when the witness "was down there." Over objection, the witness answered: "No; the power wires are above the top of the tree, about a foot or so." The father of the plaintiff testified that the power line was removed shortly after the injury, over the objection of defendant, as did the witness Milford. These objections of the defendant should have been sustained, as the rule is without conflict that such evidence is inadmissible in an action for damages for negligence. Morris v. Sierra, etc., Power Co., 57 Cal. App. 281, 296, 207 P. 262; Parkin v. Grayson-Owen Co., 157 Cal. 41, 106 P. 210; Helling v. Schindler, 145 Cal. 303, 78 P. 710.

[7] Objection is made to the action of the trial court in ruling upon defendant's motion to exclude from evidence a charred limb of a tree which the father of plaintiff testified he had cut from the apple tree. It was admitted in evidence over the objection of defendant and the examination of the witness regarding it disclosed that his knowledge about the date of the scarring or burning and the cause thereof was vague and conjectural. It would seem that, under the circumstances, the motion of the defendant to exclude this evidence should have been granted, as there was nothing but surmise to connect the charred branch with the alleged injury.

[8] It is unfortunate that these errors in the admission of evidence occurred during the course of the trial, but it does not appear that they resulted in a miscarriage of justice. Section 4½ of article 6 of the Constitution of this state was designed to prevent delay and expense incident to a new trial in a case such as this one. Prejudice is no longer presumed from error, and it appears to us, from an examination of the entire record, including the evidence, that justice has been done by the verdict and judgment rendered. The evidence, apart from that to which objection may properly be made, justified the finding of negligence on the part of the defendant, which proximately caused the injuries to plaintiff from which he has suffered greatly in the past and will continue to suffer in the future.

We also find no merit in the contention that the verdict is excessive as a matter of law. The verdicts of juries are rarely interfered with upon this ground, and only when, as has been repeatedly stated, the verdict is so grossly excessive as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.

There are no other assignments of error which require discussion, and the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

89 Cal. App. 759

VAUGHN v. PINE CREEK TUNGSTEN CO.★

(Civ. 5260.)

District Court of Appeal, Second District, Division 1, California. March 7, 1928.

Hearing Denied by Supreme Court May 3, 1928.

1. Judgment ⚷153(2)—Default judgment cannot be vacated for matters dehors record without allegation of extrinsic fraud after one year from date of judgment on personal service (Code Civ. Proc. § 473).

Although motion to set aside default and vacate judgment entered thereon was not made under Code Civ. Proc. § 473, yet such motion to vacate judgment on matters dehors the record in a case where no extrinsic fraud was alleged should be limited to one year from date of entry of judgment on personal service.

2. Judgment ⚷153(2)—Attack on default judgment as void on its face is not subject to one-year limitation (Code Civ. Proc. § 473).

Attack on judgment entered pursuant to default on ground that judgment was void on its face is not subject to limitation of one year, under Code Civ. Proc. § 473.

3. Process ⚷135—Return of substituted or constructive service must show all facts necessary for jurisdiction.

In case of substituted or constructive service, return of service must show all facts necessary to establish jurisdiction.

4. Process ⚷156—In absence of fraud, misstatements in affidavit of service are subject to attack only within reasonable time after judgment.

Misstatements in affidavit of service, in the absence of fraud on court or by plaintiff, are subject to attack only within reasonable time after entry of judgment, which does not extend beyond one year from entry of judgment.

5. Judgment ⚷153(2)—Default judgment held not subject to attack for defective service of summons after one year without showing fraud.

Where motion to set aside default and vacate judgment on ground that judgment was void on its face because service of summons was fatally defective failed to allege extrinsic fraud, the affidavit of service was not subject to attack more than one year after entry of judgment.

6. Corporations ⚷662—Failure of foreign corporation to pay license tax did not make it immune from service of process.

Failure of foreign corporation to pay its corporation license tax, as required by state law, did not make it immune from service of process within state at a time when it appeared to have been actually transacting business of corporation within state.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by O. E. Vaughn against the Pine Creek Tungsten Company. From order denying defendant's motion to set aside default and vacate judgment entered thereon, defendant appeals. Affirmed.

Richard S. Miner, of Independence, and J. F. Peck, of San Francisco, for appellant.

A. H. Swallow, of Los Angeles, and Robert Richards, of Bishop, for respondent.

YORK, J. Appeal by defendant, a foreign corporation, from an order of the trial court denying its motion to set aside a default and vacate a judgment against it entered thereon.

[1] The motion to vacate was made upon the ground that the service of summons and complaint was made by a process server upon one Shapley as the general manager and "designated agent" of defendant, a foreign corporation, and that said Shapley was not the general manager or designated agent of said corporation, and said corporation was not doing business in the state of California at the time of the service of the summons and complaint. There is no charge of fraud against the plaintiff, except that incidentally fraud is charged against the process server, in that Shapley, upon whom he made the service, was not the general manager or designated agent of defendant. No charge was made by defendant in its motion that any fraud was committed on the court by plaintiff. The motion, therefore, is not supported by the case of McGuinness v. Superior Court, 196 Cal. 223, 237 P. 42, 40 A. L. R. 1110, cited by appellant, as the motion in that case was based upon extrinsic fraud of the party to the action wherein the review was sought, and which fraud was committed upon the court. In the instant case, the service is alleged to have been invalid for matters dehors the record, in that Shapley was not the general manager or "designated agent" of defendant at the time of the service of the summons and complaint, and that defendant was not doing business in the state of California at the time of the service, and had forfeited its right to do business in California. No fraud having been alleged, in the notice of motion herein, to have been committed on the court or by plaintiff, that case does not determine the propositions of law considered in the instant case. The motion was not made under the provisions of section 473 of the Code of Civil Procedure. Although the motion was not made under the provisions of section 473 of the Code of Civil Procedure, it is the settled law of this state that, by analogy to the limitation of a motion for leave to answer after judgment, to one year from the time of its rendition in case of constructive service, a motion to set aside a default and vacate a judgment entered thereon on matters dehors the record in a case where no extrinsic fraud is alleged should be limited to one year from the time of entry of judgment on personal service. Smith v. Jones, 174 Cal. 513, 163 P. 890. In the case of

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★Hearing denied by Supreme Court.

Smith v. Jones the moving party sought to prove that there was no service of summons and complaint at all upon the moving defendant, although the affidavit of service showed service made. It is held in such cases that, although a direct attack on the judgment can be made by motion in a case where the default has been entered, the time in which such attack can be made should be limited to one year from the time of entry of judgment.

[2] There was, therefore, no error in sustaining the objection to the affidavits offered by the defendant, in that the notice of motion was served more than one year after entry of judgment. At the time the notice of motion was given, the judgment was not open to a direct attack in said action, except on the ground of extrinsic fraud, which was not alleged, and which the evidence offered would not have established. The attack on the judgment on the ground that the judgment was void on its face is not subject to that limitation. In support of that contention, appellant asserts that the service of summons was fatally defective, as shown by the affidavit of service itself. The unimpeached affidavit was as follows:

> "State of California, County of Inyo—ss.:
>
> "L. J. Horton, being duly sworn, deposes and says: That he is, and was at the time of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and was not a party to nor interested in the within entitled action; that on the 30th day of June, 1922, in the county of Inyo, state of California, he personally served the within summons on Pine Creek Tungsten Co., the defendant, by delivering to Cooper Shapley the general mgr & designated agent for service of process of said defendant personally in the said county of Inyo a copy of said summons attached to a copy of the complaint in the action therein mentioned. L. J. Horton.
>
> "Subscribed and sworn to before me this 7th day of July, 1922. [Seal.] W. P. Yaney. Notary Public in and for the County of Inyo, State of California.
>
> "My commission expires October 28, 1922."

The criticism is made that the affidavit does not state that the defendant was a foreign corporation, or that it was doing business in the state of California. We look to the judgment roll to ascertain the facts as to whether the defendant was, at the time of the commencement of the action, a foreign corporation, and doing business in the state of California, and to the affidavit of the process server for proof of the time, place, and method of service. The complaint alleges that defendant was a foreign corporation at that time, and doing business in the state of California, and the note which was the foundation of the action was made in California, and by its terms was to be paid in California, and the affidavit of service shows that the service was made in Inyo county in California by a person qualified to make the service, and that the service was made on defendant by the service on its general manager.

[3-5] The case of Willey v. The Benedict Co., 145 Cal. 601, 79 P. 270, cited by defendant and appellant, treats of a substitute or constructive service, and in services of that character the return of service must show all the facts necessary to establish jurisdiction. In the case of Eureka, etc., Co. v. California Ins. Co., 130 Cal. 153, 62 P. 393, cited by defendant, an action had been brought on a foreign judgment. In such a case, in considering the validity of such foreign judgment, the court can consider evidence dehors the record the same as in an action in equity challenging a domestic judgment for defective or no service of summons. Our attention has been called to the case of Hanson v. Hanson, 3 Cal. Unrep. Cas. 66, 20 P. 736. It seems to be conceded by respondent that that case decides that a direct attack upon a judgment, though not founded on intrinsic fraud, can be made after one year from the date of the judgment. That decision is not in accord with Smith v. Jones, supra, and is not supported by any decision called to our attention. It is now well settled that a direct attack upon the ground of false statements in the affidavit of service can be made by proof of the falsity of the statement or statements, and that, if the direct attack is upon the ground of extrinsic fraud committed upon the court or by the plaintiff, the time when the attack can be made is unlimited. It is the settled law that misstatements in the affidavit of service, in the absence of fraud on the court or by the plaintiff, must be made within a reasonable time after the entry of judgment, as hereinbefore shown, and that time does not extend beyond one year from the entry of judgment. It is also well settled that, when a judgment on the face of the judgment roll is void, an attack can be made upon it at any time, and that the court can set it aside of its own motion. But that is not the case here. No extrinsic fraud having been alleged, and the proof offered not having tended to establish such fraud, in that it appears that Shapley was doing assessment work on defendant's claims, and that that was the only business defendant was doing in California, the process server, therefore, under the circumstances, might have made an innocent mistake in believing Shapley was defendant's business manager.

[6] The fact, if it was a fact, that defendant had failed to pay its corporation license tax, as required by the laws of California, did not make it immune from service of process in California at a time when it appears to have been actually transacting business of the corporation in California, as above stated.

It therefore follows that the order appealed from should be affirmed. So ordered.

We concur: CONREY, P. J.; HOUSER, J.

SWALLOW v. TUNGSTEN PRODUCTS CO. (Civ. 5261.)★

District Court of Appeal, Second District, Division 1, California. March 7, 1928.

Hearing Granted by Supreme Court May 3, 1928.

1. **Judgment 🔑452—Purchaser of property thereafter sold under judgment had right to impeach judgment, if void by reason of facts appearing on judgment roll.**

Purchaser of property thereafter sold under judgment lien had right to impeach judgment on which sheriff's sale and deed depended for their validity, if such judgment was void by reason of facts appearing on judgment roll.

2. **Assignments 🔑24(3)—Bare right of assignee to sue for fraud committed on assignor will be denied as against public policy.**

A bare right of assignee to file a bill in equity for fraud committed on assignor will be denied, because a transfer of such right is against public policy.

3. **Judgment 🔑452—Purchaser, without knowledge of judgment lien, has right, for purpose of establishing invalidity thereof, to show that judgment was void.**

Where purchaser of property subject to judgment lien had no knowledge thereof at time of purchase, it had right, after sale under such lien, to show that judgment was void for purpose of establishing invalidity of judgment lien on alleging sufficient facts to show meritorious defense to action in which judgment was entered.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by A. H. Swallow against the Tungsten Products Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Richard S. Miner, of Independence, and James F. Peck, of San Francisco, for appellant.

A. H. Swallow, of Los Angeles, and Robert Richards, of Bishop, for respondent.

CONREY, P. J. This is an appeal from a judgment for plaintiff in an action to quiet title to an interest in certain mining claims located in Inyo county in this state. The defendant in its answer, among other things not necessary to consider here, alleged that from the 28th day of October, 1918, and up to the 28th day of December, 1922, the Pine Creek Tungsten Company was the sole owner and in possession of a one-half undivided interest in the said mining claims; that on the 28th day of December, 1922, said Pine Creek Tungsten Company sold and conveyed its said one-half undivided interest therein to the Natural Soda Products Company, which thereupon entered into possession of said mining claims, and operated the same until the 14th day of March, 1923, when it sold and conveyed said one-half interest in said mining claims to the Tungsten Products Company, the defendant in this action, and that defendant then entered into the possession of said mines, and operated the same, and was operating the same when its answer was filed herein. The defendant alleged that the title claimed by plaintiff was based wholly upon a certain sheriff's sale (of date March 29, 1923) of said property of said Pine Creek Tungsten Company, made by virtue of the execution issued on a judgment which had been entered on the 17th day of July, 1922, in the case of Vaughn v. Pine Creek Tungsten Co., and that said judgment was void for several reasons; the facts alleged being the same referred to in the decision this day filed in Civil No. 5260, Vaughn v. Pine Creek Tungsten Co., 265 P. 491, an appeal from an order of the superior court refusing to set that judgment aside. In the appeal in that case we held, on the authority of Smith v. Jones, 174 Cal. 513, 163 P. 890, that the judgment could not be set aside on the grounds urged by the moving party, because more than a year had elapsed after the judgment was entered before the motion was made.

[1] It is contended by respondent here that, even if that judgment was void, as alleged, for want of service of summons, nevertheless that the defendant in this action had no right to impeach it, because this defendant was not a party to the action in which the judgment in Vaughn v. Pine Creek Tungsten Co., was entered, and had no interest in said mining claims at the date of that judgment. The judgment was entered in the superior court of the state of California, in and for the county of Inyo, the county in which the mines are located, and, if valid, became a lien on the title of said Pine Creek Tungsten Company in those mines on the date of its entry. If that judgment was void, it was not such lien. Unquestionably, appellant herein, claiming title in the manner hereinabove stated, would have a right to impeach the judgment on which the sheriff's sale and deed depend for their validity, if the judgment was void by reason of facts appearing on the judgment roll. In Vaughn v. Pine Creek Tungsten Company, supra, we have held that the judgment was not void on account of any such apparent defects. But appellant herein further contends that the court erred in refusing to allow appellant to show, by evidence extraneous to the record in the former action, that there was no service of summons upon any authorized representative of the Pine Creek Tungsten Company, and that therefore the default judgment rendered against that defendant was void.

Respondent relies upon the rule that one who comes before the court solely as assignee of a defendant's right to have a judgment

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★For opinion of Supreme Court adopting opinion of Court of Appeal, see 270 P. 366.

set aside on grounds of fraud will be denied relief, because such right is not assignable. He further contends that this rule applies in a case where, although fraud is not alleged, the judgment is sought to be impeached on account of some error extraneous to the record which left the court without jurisdiction and the judgment void as between the parties thereto. The decision in Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207, lends a degree of support to respondent's argument. On July 17, 1896, Wilson had obtained a money judgment against a corporation. At that time there was outstanding another money judgment against the corporation in favor of one Swearingen, and a second judgment in favor of Bennett. On July 18, 1896, under an execution on the Swearingen judgment, certain real property of the corporation was sold to one Cole. On January 15, 1897, Bennett, as redemptioner by virtue of his judgment, redeemed from the sale to Cole. Thereafter, and within 60 days from the date of Bennett's redemption, Wilson, claiming a right of redemption under his judgment, attempted to redeem by paying the redemption money to the sheriff. Bennett refused to acknowledge Wilson's right of redemption, and demanded a deed from the sheriff. Bennett then brought his action, wherein he attacked the validity of Wilson's judgment lien, and sought to compel the sheriff to convey the property to him in accordance with the sale to Cole under the Swearingen judgment. Wilson's judgment had been entered after default of the corporation, which default was based upon a return of summons showing that the summons had been served on the corporation through service on one Fant as general manager thereof. Bennett alleged, and sought to prove, that Fant was not such general manager, but that, in fact, Wilson himself was the general manager, and that the service and default were obtained by collusion between the sheriff and Wilson. The trial court, in the case of Bennett v. Wilson, found that the charges of fraud and collusion were not sustained, but also found that Fant was not the general manager, and did not represent the corporation; that there had been no service of summons on the corporation; and that the default and judgment were void. Wilson and the sheriff appealed to the Supreme Court, and the judgment against them was reversed. In its decision, after outlining the facts, including those to which we have referred, the Supreme Court said:

> "These facts are not sufficient to bring the plaintiff within any class recognized by the authorities as entitled to impeach a judgment regular on its face. It is ingeniously put by the respondent's counsel that the entry of the judgment was 'an imposition on the court.' But this was not the case. The judgment was entered by default by the clerk, whose legal duty it was to enter it, and who had no discretion in the matter. Nor, had there been such imposition, would it have been any concern of the plaintiff. The relations of Wilson to the corporation, in the absence of explanation, might give rise to a presumption of fraud against it. But fraud against the corporation, even had it been found, would not entitle the plaintiff to impeach the judgment. Meckley's Appeal, 102 Pa. 536; Sponsler's Appeal, 127 Pa. 410 [17 A. 1097]; Biddle v. Tomlinson, 115 Pa. 299 [8 A. 774]."

The foregoing decision appears to have been grounded upon the proposition that, because the judgment of Wilson against the corporation was regular on the face of the record (although there was in fact no service of summons), and because, at the date of entry of that judgment, Wilson had not yet become a redemptioner from the execution sale under the Swearingen judgment, it followed that no rights of Bennett existing on the 17th day of July, 1896, were affected by the entry of Wilson's judgment, and that therefore he had no right to impeach the Wilson judgment.

Before accepting the decision in Bennett v. Wilson as conclusive of the matter at issue, let us see how the rule has been stated and applied in some other cases. In People v. Mullan, 65 Cal. 396, 4 P. 348, it appeared that on January 4, 1881, judgment had been rendered against Mullan in an action affecting the title to certain land. A motion was made by the Cucamonga Company to set aside that judgment on the ground that there was no service of summons on Mullan. The Cucamonga Company was a corporation "to which the land involved in the action has been conveyed, and a certificate of purchase therefor assigned by Mullan on the 20th of October, 1881." The superior court rejected the company's offer to prove that no affidavit of publication of summons was ever made, and that there was no order authorizing such publication. (It should be noted that at that time the affidavit for publication of summons and the order of publication were not by law included in the judgment roll.) The judgment was reversed; the Supreme Court holding that the corporation was in legal effect the assignee and legal representative of Mullan, and standing in his shoes. In Crossman v. Vivienda Water Co., 136 Cal. 571, 576, 69 P. 220, 223, the Mullan Case, supra, was cited as authority for the proposition that "one who succeeds to property that is subject to a judgment may appear to have it vacated, though he was not party to the judgment."

[2] Whitney v. Kelley, 94 Cal. 146, 29 P. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106, is a case wherein the plaintiff, as grantee of defendants in a former action, filed his complaint to set aside the former judgment upon the ground that it was procured through certain frauds practiced upon plaintiff's grantors, defendants in said former action. The appeal was from a judgment dismissing the

action, after demurrer sustained, and this judgment was affirmed. Sundry decisions and paragraphs from text-writers are quoted and discussed in this decision in relation to the rule which denies to any person the right to proceed in equity "against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights." The rule is not without its exceptions. Of course, a bare right to file a bill in equity for fraud committed upon the assignor will be denied, because the transfer of such right is against public policy. Again, it has been laid down as a general rule that:

> "Where an equitable interest is assigned in order to give the assignee a locus standi in judicio in a court of equity, the party assigning such right must have some substantial possession and some capability of personal judgment, and not a mere naked right to overset a legal instrument or to maintain a suit."

In some of the cases cited in Whitney v. Kelley, emphasis was laid upon the fact that the parties claiming the right to attack upon grounds of fraud the validity of judgments rendered against the assignors were claiming as assignees of a mere naked right, and not as subsequent purchasers in possession of property conveyed to them under circumstances which made the right of setting aside the prior fraudulent judgment, or other fraudulently obtained instrument, a mere incidental right for the protection of the assignee's property rights. So the Supreme Court in Whitney v. Kelley summarized its conclusions thus:

> "If plaintiff's grantors had nothing but a mere naked right to file a bill to set aside this judgment, then this plaintiff, their grantee, can have no title. It is essential that a party complaining in equity should have some present substantial interest in the subject-matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact. The plaintiff here has no interest in this land, for his grantors had no interest when they transferred to him."

The former judgment rendered against Whitney's grantors had been a judgment denying their claim of title. Therein we find a difference between that case and the case now before us. At the time, when the Pine Creek Tungsten Company conveyed to the Natural Soda Products Company, the grantor was the owner, and in possession of the property conveyed. The same is true respecting the conveyance by the Natural Soda Products Company to the Tungsten Products Company on March 14, 1923. The Tungsten Products Company became owner, and was in possession, of the property from and after said 14th day of March, 1923. It is true that there was an outstanding judgment which created an apparent lien against the property, but there had been no execution sale or conveyance by way of enforcement of that judgment lien. Appellants alleged and offered to prove these facts, and further to prove that neither appellant nor said Pine Creek Tungsten Company had any notice or knowledge of said action or judgment of Vaughn v. Pine Creek Tungsten Company until the month of April, 1924; that, during the intervening period of time since the entry of said judgment of Vaughn, appellant and its predecessors laid out and expended at least $150,000 in the development of the mining claims which are the subject of this action, and that during said period of time both Vaughn and plaintiff, Swallow, knew that said work was being carried on and said expenditures were being made on said property, and stood silently by, and permitted said work to be done and said money to be expended, without giving the said corporations or any agent of them any notification of the existence of said former judgment or of any proceedings connected therewith. The offered evidence was rejected. If the facts be such as appellant alleged and offered to prove, it is manifest that a grave injustice has been done and will be confirmed, if it be held that the offered defense must be rejected merely because the title of the owner of the property has been conveyed to appellant. If the Pine Creek Tungsten Company through its responsible officers had known of the existence of said judgment, and if in substance and essence appellant's claim was primarily and principally in the nature of a cause of action directed against that judgment, the rule might well be applied which denies the right of an assignee of such claim to assert his claim by way of equitable action or defense.

In Emmons v. Barton, 109 Cal. 662, 42 P. 303, the court referred to the rule stated in Whitney v. Kelley, supra, that a mere right to complain of fraud is not assignable. But the court said that this rule "does not apply to a case where the right to sue for a fraud is merely incidental to a subsisting substantial property which has been assigned, and which is itself intrinsically susceptible of legal enforcement." The same proposition is repeated in Kemp v. Enemark, 194 Cal. 748, 756, 230 P. 441. In the case at bar, we are now considering appellant's contentions, not upon the basis of fraud used in the obtaining of the judgment in question, but only upon the basis of the court's failure in that action to obtain jurisdiction over the defendant therein. Nevertheless, the principles controlling the right of the assignee to protection against the results of the void judgment and of the proceedings thereunder are practically the same, whether the infirmity of the judgment has resulted from fraud or has resulted from mistake in connection with the service of the summons in that action. In Marriner v. Smith, 27 Cal. 649, the plaintiffs were grantees of one Goode, pursuant to purchase of the land from Goode after entry of a money judgment obtained by Smith against Goode. The facts alleged were sufficient to show extrinsic fraud committed by Smith, which prevented Goode from defending against the action. Referring to the limitations upon the right of a grantee of the judgment debtor, where the grant has been made after entry of the judgment, the Supreme Court said:

> "Goode * * * is not a party to this action. He has made no complaint against the judgment. Of course the plaintiffs cannot interfere on his behalf, and they have no interest in the matter, except so far as the judgment lien may affect their property. They have no right to have the judgment absolutely vacated and annulled. The only question is, as to whether plaintiffs stand in such a relation to the judgment against Goode and the parties thereto, as to entitle them to the aid of a court of equity to remove a judgment lien upon the land described in the complaint, and to an injunction against a sale under said judgment."

[3] So here, although appellant cannot interfere on behalf of the Pine Creek Tungsten Company to have the judgment set aside, or ask to have it absolutely vacated and annulled, nevertheless appellant, so far as its status in relation to such judgment is concerned, has the right to show the void character of the judgment, for the purpose of establishing the invalidity of the judgment lien, which is the very foundation of the plaintiff's claim of title. To the extent necessary for that purpose, appellant had the same right that the Pine Creek Tungsten Company would have had to allege and prove that the judgment was void, either by reason of fraud or by reason of mistake leading to the default and the entry of judgment thereon. In the exercise of this right appellant was, of course, subject to the same limitations which would have bound the Pine Creek Tungsten Company in seeking to obtain equitable relief against such judgment. It is a necessary condition to the allowance of such relief that facts be alleged sufficient to show that there was a meritorious defense to the action in which the judgment was entered. "Even though a judgment may have been obtained through fraud, or without service of process, a court of equity will not grant relief against it in favor of a party who 'claims only the barren right of being permitted to defend against a claim to which he had no defense.'" Lee v. Colquhoun, 175 Cal. 16, 164 P. 894. Appellant herein alleged, in his answer, facts which, if established, would constitute a defense in the former action, in that the note sued on was made without consideration, and without any authorization for execution of the same. At the trial, appellant made ample offers of evidence tending to establish these defenses, and the offered evidence was excluded; the court holding that the defendant "must rely upon what the judgment roll records show."

We are of the opinion that the rulings of the court were erroneous in the particulars hereinabove stated, and that appellant was thereby deprived of the opportunity to present an apparently good defense to the action.

The judgment is reversed, and cause remanded for a new trial.

I concur: YORK, J.

I concur in the judgment: HOUSER, J.

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89 Cal. App. 702

FINNEGAN v. GIFFEN et al. (two cases). (Civ. 3441.)

District Court of Appeal, Third District, California. March 5, 1928.

1. Automobiles 🔑242(2)—Presumption of negligence arises as to injury to guest in automobile, which would not have resulted if properly operated.

Presumption of negligence arises from an injury suffered by a guest riding in an automobile, which, if propelled and controlled in the usual and ordinary manner, the accident would not have occurred, and no injury would have been inflicted.

2. Appeal and error 🔑1170(9)—Instruction that operating motorcycle more than 20 miles per hour in residence section, was unlawful, did not require reversal, in view of evidence (Motor Vehicle Act, § 113; Const. art. 6, § 4½).

In action for injuries to 14 year old boy, resulting when motorcycle on which he was riding as a guest collided with parked automobile, instruction that operating a motorcycle at speed exceeding 20 miles per hour in residence section was unlawful, if erroneous under Motor Vehicle Act, § 113 (St. 1923, p. 553), because not including the words "prima facie," *held* under Const. art. 6, § 4½, not to require reversal, in view of fact that testimony relative to excessive speed was sufficient to support verdict for plaintiff.

3. Automobiles 🔑246(35)—Instruction that age and experience should be considered in considering contributory negligence of minor injured when riding on motorcycle held proper (Civ. Code, § 41).

In action by 14 year old boy for injuries resulting in collision of motorcycle on which he was riding as guest with a parked car, instruction that, in determining contributory negligence, age, experience, intelligence, and ability to appreciate danger should be considered, *held* not erroneous in accordance with provisions of Civ. Code, § 41, exempting minors from civil liability for exemplary damages when incapable of knowing act was wrongful.

Appeals from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Separate actions by C. C. Finnegan and by John Q. Finnegan, by his guardian ad litem, C. C. Finnegan, against Hale Giffen and another. Judgments for plaintiffs, and defendants appeal. Affirmed.

Butler, Van Dyke & Desmond, of Sacramento, for appellants.

Ralph H. Lewis and Martin I. Welsh, both of Sacramento, for respondents.

PLUMMER, J. These actions were brought to recover damages for injuries suffered by the plaintiff, John Q. Finnegan, while riding as a guest upon a motorcycle driven by the defendant Hale Giffen, and also for medical attention, etc., were tried as one action, and are presented upon one record.

The injury constituting the basis of this action was suffered by the plaintiff John Q. Finnegan on September 9, 1924, while riding on a motorcycle driven, as just stated, at the intersection of Eleventh and H streets in the city of Sacramento. It may be here stated that in the section of Sacramento just mentioned the numbered streets run approximately north and south, and the lettered streets running easterly and westerly intersect the numbered streets at right angles. The plaintiff John Q. Finnegan and the defendant Hale Giffen were minors at the time of the collision; Finnegan being of the age of 13 years and Giffen of the age of 15 years, or, as stated more accurately, Finnegan lacked six days of being 14 years of age and Giffen was 15 years and 6 months old. Hale Giffen had applied for a license to operate a motorcycle, and his father, the defendant R. B. Giffen had signed his application. It is by virtue of this situation that R. B. Giffen was held as the party responsible in this action. No issue is raised as to the amount of damages awarded by the court, nor as to the amount allowed to cover expenditures for medical services, etc., by the plaintiff C. C. Finnegan. Following the statement in appellants' brief, which appears to be correct as we examine the record, John Q. Finnegan lived near the intersection of Nineteenth and H streets, and Hale Giffen lived between Eighteenth and Nineteenth streets on F street, approximately two bocks from the residence of the plaintiff John Q. Finnegan. The boys had known each other for some time. On the day in question Hale had been working on his motorcycle, and John was visiting with him while Hale was so at work. Hale's aunt requested Hale to go to a grocery store at Eighth and G streets, and the two boys rode there on the motorcycle. There is a conflict in the evidence as to whether Hale asked John to go with him or whether John asked Hale for permission to go. The boys went to the grocery store, obtained a parcel, mounted the motorcycle, and started home. Hale was riding on the seat of the motorcycle and operating the same. John was seated astride the gas tank, forward of the seat and back of the handlebar. The boys proceeded north on Eighth street from G to H, turned into H street, and ran east thereon to Eleventh street. The rate of speed was the subject of sharply conflicting testimony. Several witnesses testified that the boys went into the intersection of H and Eleventh streets at a speed of about 45 miles per hour. Others testified that the rate of speed was from 15 to 20 miles an hour. The territory around H and Eleventh streets is a residence district and close to a populous section of the city. As the motorcycle entered the intersection of H and Eleventh streets, a truck running north on Eleventh street passed in front of them. The motorcycle was swerved slightly to the right and passed the rear of the truck, and then ran into the rear end of an automobile parked on the south side of H street some 25 feet east of the east line of Eleventh street. In this collision the plaintiff John Q. Finnegan suffered the injuries for which judgment in damages against the defendant was entered in this case. It is from this judgment that the defendants appeal.

Only one ground for reversal is urged upon our attention by the appellants, to wit: That the court misdirected the jury in giving two certain instructions. The first instruction complained of is in the following words:

> "The jury is instructed that it is and was, at all times involved in this action, unlawful for one to operate a motorcycle at a rate of speed greater than twenty miles per hour in a residence section."

The second instruction, which we need not quote in full, is, in substance, a statement to the jury that, in considering whether John Q. Finnegan was guilty of contributory negligence, the jury should consider all the facts and circumstances of the case, also his age, experience, intelligence, and ability to appreciate the danger to which he was subjected, if any, at the time of the accident. The care which a child is required to exercise is that degree of care which ordinarily prudent children of his age, maturity, and capacity, under similar circumstances, ordinarily exercise and possess. And then, further, that, if he did not do so, he would be guilty of negligence, and, if that contributed to his injury, plaintiffs could not recover.

Appellants, in urging error on the part of the court in instructing the jury as to a speed greater than 20 miles per hour being unlawful, call our attention to section 113 of the Motor Vehicle Act (St. 1923, p. 553) as it read at the time mentioned herein. Parenthetically, it may be here stated that it was admitted that the situs of the collision was a residence district as defined by the Motor Vehicle Act. The section of the Motor Vehicle Act just referred to reads as follows:

"Subdivision (a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person. Subdivision (b) Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: (1) Fifteen miles an hour in traversing a grade crossing of any steam, electric or street railway when the driver's view is obstructed," etc. "(2) Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed," etc. "(3) Fifteen miles an hour in traversing or going around curves," etc. "(4) Fifteen miles an hour when passing a school," etc. "(5) Fifteen miles an hour in a business district, as defined herein. (6) Twenty miles an hour in a residence district, as defined herein. (7) Thirty-five miles an hour under all other conditions. Subdivision (c) In all charges for a violation of this Section, speeds in excess of those set forth in Subdivision (b) of this Section shall be taken as prima facie but not as conclusive evidence of a violation of this Section."

Basing their argument upon this section, it is contended that the trial court was in error in instructing the jury in the language which we have quoted, and that the court should have instructed the jury that traveling at a rate of speed in excess of 20 miles an hour in a residence district was only prima facie evidence of a violation of the section, but not conclusive evidence of such violation. It is further contended that there is no absolute limitation or fixed speed in excess of which it may be said that one is traveling unlawfully. In other words, the statute simply says it is lawful to drive in certain places at 15 miles an hour, in other places at 20 miles an hour, and at the date of the collision under consideration, at still other places, at a rate of 35 miles per hour, and that the rate of speed, whether it be 15, 20, or 35 miles per hour, is not the measure of negligence in the propelling of a motorcycle or automobile, but that, if a greater speed is attained under any of the conditions named, it is only prima facie evidence of a wrongful act on the part of the person so propelling the motorcycle or automobile. In other words, that the section means only what it says in subdivision (a) thereof, that at all times, a person driving a vehicle on a public highway shall drive the same at a careful and prudent speed, not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and that no person shall drive a vehicle upon a public highway at such a rate of speed as to endanger the life, limb, or property of another person.

[1, 2] We appreciate the force of appellants' argument, but, for the reasons hereinafter stated, the decision in this case does not necessitate a construction of section 113 of the Motor Vehicle Act relative to the propositions advanced by the appellants. The jury in this case was amply warranted in finding that Hale Giffen was driving the motorcycle, upon which the plaintiff John Q. Finnegan was riding as a guest at the time of the collision, at such a rate of speed as to endanger life, limb, and property. The evidence, if believed by the jury—and the verdict shows that it did accept such testimony as true—leads to the conclusion that the motorcycle was traveling at a speed between 25 and 40 miles an hour just immediately preceding the swerving to the right to escape the truck moving northward on Eleventh street, and its momentum was not sufficiently lessened to enable the driver thereof to escape collision with the standing automobile 25 feet to the east of the east line of Eleventh street, as hereinbefore stated. The fact that the parked automobile was standing on the south side of H street 25 feet east of the east line of Eleventh street with which the motorcycle collided, presented circumstances for the jury to take into consideration, and from which the inference of negligence might very properly be drawn, as the jury might very well reason that there was ample distance within which to have changed the direction of the motorcycle sufficiently to avoid a collision had it not been traveling at an excessive rate of speed. The motorcycle was exclusively under the control and direction of the defendant Hale Giffen. The plaintiff was riding as a guest, which brings the case within the principle announced by this court in Brown et al. v. Davis, 257 P. 877, where it is held that the presumption of negligence arises when an injury is suffered by a guest riding in an automobile which, if propelled and controlled in the usual and ordinary manner, an accident would not have occurred, and no injury would have been inflicted. See, also, Morris v. Morris (Cal. App.) 258 P. 616. We may also state that the testimony shows that the motorcycle in its course ran over a portion of the cement runway from the pavement to the curb, and came in contact with the curbing before colliding with the automobile. In brief, it may be said the testimony set forth in the record is amply sufficient to support the verdict. The only question remains, did the defendants suffer any injury by reason of the instruction given by the court, assuming, for the purposes of what is hereinafter stated, that the wording of the instruction was erroneous in that it did not include the words "prima facie"?

A careful reading of the instructions given by the court in this case discloses that the jury was nowhere instructed by the court that the driving of a motorcycle, at a rate of speed greater than 20 miles per hour, raised either the presumption or inference of negligence, nor was the instruction objected to in any manner tied up with any other instruction in the case. The jury were not instructed that, if any injury occurs while one is engaged in some unlawful undertaking, and the injury results as a consequence thereof, such unlawful act is negligence per se. There is not a word in any of the instructions given by the court to the effect that driving at a greater rate of speed than 20 miles per hour in a residence district constitutes negligence, nor is there a word in the instructions to the jury that they may either infer or presume negligence from the fact of driving at a greater rate of speed than 20 miles per hour in residence district. The instruction objected to simply stands alone. Thus, irrespective of whether it is a correct or incorrect statement of the law, we do not see how it could have had any possible influence upon the jury in arriving at its decision. The court very fully instructed the jury that negligence was a question of fact; that the jury was the exclusive judge of the facts; that, before a verdict could be rendered for the plaintiff, the jury must find that the defendant Hale Giffen was propelling his motorcycle at a negligent rate of speed; and that his negligence was the proximate cause of the injury, without any contributory negligence whatsoever on the part of plaintiff John Q. Finnegan. Every element of the law of negligence necessary to charge the defendant Hale Giffen was very carefully and fully explained to the jury, and, as we have said, in such explanation no attempt was made whatever to tie up to or apply the instruction relative to speed, the giving of which is assigned as error in this case and as sufficient ground for reversal.

In view of what we have just stated, section 4½ of article 6 of the state Constitution, prohibiting the reversal of cases on account of erroneous instructions where prejudice does not follow, applies, and therefore we must hold that irrespective of whether the appellants' contention relative to the true interpretation of section 113 of the Motor Vehicle Act is or is not correct, and whether the instruction objected to is or is not a correct statement of the law, it can be given no bearing upon the determination of this cause.

No instruction was requested by the defendants relative to the age of Hale Giffen, nor was there any suggestion that he did not fully understand the perils of excessive speed.

[3] As the circumstances are disclosed by the record before us, section 41 of the Civil Code appears applicable. That section reads:

> "A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful."

In other words, the defendant Hale Giffen in this case, even though a minor, is liable for the damages done by him, but would not be liable for exemplary damages were it to be conceded that he was so young as not to know that what he was doing was wrong. On the other hand, when it comes to a question of contributory negligence, the common law applies, and a general summary thereof, taken from 29 Cyc. 535, supports the instruction given by the court, and while a minor may be charged with contributory negligence as shown by the citations which we are about to give, it is proper to instruct the jury on this subject, that it may take into consideration the age and capacity of the minor. We quote from 29 Cyc. p. 535, as follows:

> "Prudence on the part of a child might be negligence in an adult, and a child of immature years is not required to exercise the same degree of care and caution to avoid injury as is required of adults under similar circumstances. The degree of care required has been variously stated as a care reasonably to be expected of a child of his age and discretion, maturity and capacity, youth and inexperience, mental and physical capacity, age and intelligence or intellectual capacity. * * * It is said that there is no inflexible rule by which to determine the capacity of children for observing and avoiding danger, but a child is bound to use the reason he possesses and exercise the degree of care and caution of which he is capable."

All of these different propositions are supported by numerous authorities which we need not cite, and show that it was proper on the part of the court to instruct the jury that such matters should be taken into consideration when determining whether or not John Q. Finnegan was guilty of contributory negligence, and for that reason could not recover. We may also quote from 31 California Jurisprudence, 1093:

> "A minor may reasonably be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion, and experience would naturally and ordinarily use."

This was just what the court in effect instructed the jury.

Finding no prejudicial error in the record, it follows that the judgments of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

90 Cal. App. 165

OLMSTEAD v. GLENDORA BANK.

(Civ. 6157.)

District Court of Appeal, First District, Division 2, California. March 16, 1928.

Banks and banking ⚷153—Bank was not liable for conversion of bonds withdrawn from its custody by broker under agreement for investment between plaintiff and broker.

Bank was not liable as for conversion of plaintiff's bonds withdrawn from bank's custody under agreement for investment between plaintiff and a broker introduced to her by bank's cashier, where bank knew nothing of investment dealings of broker, its officer, and plaintiff, except as it had constructive notice because of its official relationship to bank, and further it received no compensation in connection with transaction under which broker and the officer withdrew, and invested bonds in a corporation which became financially involved.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Cora Olmstead against the Glendora Bank. From a judgment for the defendant, plaintiff appeals. Affirmed.

Perry F. Backus, of Los Angeles, for appellant.

L. G. Shelton, of Glendora, and W. D. Isenberg, of Glendora, for respondent.

MURPHEY, Justice pro tem. This is an action in tort brought by the plaintiff to recover the reasonable value of certain bonds of the aggregate and par value of $3,390, together with interest thereon at the rate of 6 per cent. per annum as provided in said bonds. It is the contention of the plaintiff that these bonds were converted by defendant to its own use and benefit. Judgment was for the defendant, and the plaintiff appeals.

At the time the negotiations and transactions resulting in this litigation were initiated, plaintiff, a widow residing in Glendora, Los Angeles county, was the owner of cash and securities amounting in the aggregate to about $3,500. In the early months of 1922, January or February, the bulk of these funds, being the plaintiff's capital, were deposited in the First National Bank of Glendora; she having, however, at that time a small account in the Bank of Glendora, the defendant in this action. Being dissatisfied with merely a bank interest return on her capital, the plaintiff consulted one Boye, the cashier of the defendant bank, with regard to investing her funds in more remunerative ventures. Boye suggested real estate loans, to which the plaintiff demurred, being desirous of having something more readily convertible into cash, and suggested safe stocks and bonds. She was informed by the cashier that the bank did not undertake to handle investments of that character, but that he would recommend a Los Angeles man who frequently acted for him and for the bank in such matters, and was highly recommended for that character of employment. This resulted in the introduction of plaintiff by Boye to a man named Pearman, who was a salesman for a Los Angeles brokerage firm. There are no specific findings as to the exact relationship or as to the specific terms of any arrangement or agreement as between the plaintiff and Boye and Pearman or plaintiff and either of them. However, there is no objection in the record as to the lack of specific findings on this issue. The testimony in this regard is contradictory, and wholly lacking in convincing force. It may, however, be said from a consideration of the entire record that it was the purpose and intention of the plaintiff that Pearman, in conjunction with Boye, should invest and reinvest her funds and deposit the profits to her credit in a savings account opened in the Bank of Glendora in her name at the suggestion of Pearman. As to the plaintiff's understanding in this matter we quote from the record:

"Q. What did you think was meant by the conversation between Mr. Boye and Mr. Pearman, telling him to be more careful of your money? A. Well, I thought Mr. Boye would tell him what to do with it.

"Q. Then you did know that he was going to do something with it? A. Of course I knew.

"Q. Did you know he was going to invest your funds? A. Why, of course, yes; that is what Mr. Boye said that he was—he would let him."

"Q. Well, then, when was it that you did tell Mr. Pearman that it would be all right to invest your funds if Mr. Boye thought so? A. I don't know that I particularly told him—I don't remember; there was quite a bit said the day that we were in the bank, and we were talking about it, and Mr. Boye said that he was going to have him invest some of his money, and I said, 'Very well, whatever you say.'"

Subsequent to the introduction of Pearman to the plaintiff by the cashier, her money was transferred from the First National Bank of Glendora to the Glendora Bank, and thereafter several purchases and sales of securities were made by Pearman, the profits of which were credited to the account of the plaintiff in her savings account in the Glendora Bank, and the securities were kept in a box in this bank, accessible to Pearman and Boye.

In November, 1922, the plaintiff being about to depart for an extended visit in the East, asked Boye for a statement of her investments or bond account, and was given a receipt in words and figures followig:

"Glendora, Cal., 11-22, 1922. No. ——.

"Received of (in printing) holding for Mrs. Cora Olmstead 3 N. Y. Central 6% bond, amount pd. 113, total $3,390.00, all former bonds having been sold and traded.

"Glendora Bank, Glendora, Cal.,
"By W. F. Boye, Cash."

The bonds named in this receipt had been purchased by Pearman, and are the bonds alleged to have been converted by the bank. In January, 1923, while the plaintiff was still in the East, these bonds were either sold and the proceeds invested in, or they were traded for, 35 shares, par value $100, of the capital stock of the Foothill Finance Company, a building concern, of which corporation Boye was president and Pearman secretary.

With respect to the transaction, the court finds:

"The defendant did not convert the said bonds to its own use and benefit, and the plaintiff is not damaged in any sum whatever by reason of any action of the defendant. The plaintiff did not deliver to G. C. Pearman the bonds in question, but she had delivered other bonds to him, and he had sold them and reinvested the proceeds thereof in other securities for the benefit of said plaintiff, and deposited any profits made on said transactions to the benefit of the plaintiff in a savings account in defendant bank, but at the time that these particular bonds were delivered, and for some time previous thereto, the plaintiff had had no savings account in defendant bank.

"The securities that Pearman had at different times were placed in a box under his control in the defendant bank, but these particular bonds, as shown by said receipt, were in the possession of the defendant bank.

"Pearman did not have the sum of $3,500 belonging to the plaintiff in his possession, and he did not invest $3,500 in money belonging to the plaintiff in the preferred stock of the Foothill Finance Company, but Mr. Boye, the cashier of the defendant, turned over to him, or allowed him to take, the three New York Central bonds above referred to, and to trade them for preferred stock of the Foothill Finance Corporation, and Pearman took a certificate of stock in said company in the name of the plaintiff for stock of $3,500 par value. Three dividends on said preferred stock were not paid to the plaintiff, but three dividends were in her absence put to her credit in her checking account in defendant bank. The certificate for stock of the Foothill Finance Corporation was delivered to the plaintiff by the said Boye, but it is not true that she made no objection untill the Foothill Finance Corporation became financially involved and ceased to pay dividends.

"The plaintiff did not know that the three New York Central bonds were left with G. C. Pearman for the purpose of sale and reinvestment. She did not know that those bonds had been traded for stock of the Foothill Finance Corporation."

There is evidence to support these findings, and whether the bonds were given to Pearman by Boye or withdrawn by Pearman from the box in which they were deposited in the bank would seem to be of no particular consequence, as the deal was in furtherance of, and in conformity with, the arrangement made for the investment of the plaintiff's capital that had been in operation before she departed for the East. There is nothing in the record that would warrant a finding or conclusion that the bank had converted any property of the plaintiff. It may be further stated that the bank did not know of the dealings of Boye, Pearman, and Mrs. Olmstead, except in so far that it had constructive notice by reason of Boye's official relationship to the bank, and it may be further said in this connection that the bank received no compensation whatever in connection with the transaction involved in this litigation. The use of its vaults and safety boxes was entirely gratuitous. Furthermore, the purchase of the Foothill Finance Company's stock, in so far as the record discloses, was not in violation of the business deals sanctioned and ratified at various times by the plaintiff. Her misfortune may be attributed to the fact that the business sagacity of her agents and representatives was bad, or worse than bad.

There is no direct evidence as to the value of the stock of the Foothill Finance Company at the time they were taken over for the account of the plaintiff. It may be fairly inferred, however, that it was worthless, otherwise this litigation would not have materialized.

Judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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90 Cal. App. 136

LAIRD v. McPHEE. (Civ. 3433.)

District Court of Appeal, Third District, California. March 14, 1928.

1. Mines and minerals 🔑58—Acceptance of offer to make oil lease may be oral, but must be unequivocal, positive, and unambiguous, and comply with terms of offer.

Where offer to make oil lease was sufficient under statute of frauds, acceptance need not be in writing, but must be unequivocal, positive, and unambiguous, and must comply with terms of offer.

2. Mines and minerals 🔑59—Landowner unequivocally accepting offer to make oil lease may request modifications, but contract is formed whether request is granted or not.

Landowner accepting offer to make oil lease may add, as request, that some modification be made, but, so long as it is clear that meaning of acceptance is positive and unequivocal to accept offer, contract is formed whether such request is granted or not.

3. Specific performance 🔑119—One seeking specific performance of agreement to make oil lease must prove that he accepted owner's offer to lease.

In action for specific performance of an agreement under which defendant was alleged to have agreed to execute oil lease to plaintiff, burden was on plaintiff to prove that he accepted ed defendant's offer and not on defendant to prove that plaintiff rejected such offer.

4. Specific performance ⚷121(4)—Evidence held to support finding that landowner did not agree to execute oil lease as alleged in complaint for specific performance.

In action to enforce specific performance of contract under which defendant was alleged to have agreed to execute oil lease to plaintiff, evidence *held* sufficient to support finding that defendant did not execute any agreement to lease to plaintiff designated premises on terms specified in complaint, in view of disagreement as to location of land to be leased.

5. Mines and minerals ⚷74—Stipulation in oil lease for assignment to certain company without provision against reassignment authorizes subsequent assignments, notwithstanding general covenant against assignments.

General covenant in oil lease that lessee shall not have right to assign or sublet to any one does not run with land, so that stipulation for assignment to certain company without provision against reassignment by such company leaves owner without protection against subsequent assignments, notwithstanding general covenant.

Appeal from Superior Court, Kern County; Erwin H. Owen, Judge.

Suit by F. C. Laird against Anna McPhee. Judgment for defendant, and plaintiff appeals. Affirmed.

Brittan & Brittan and Borton & Patrini, all of Bakersfield, for appellant.

Wiley & Harvey, of Bakersfield, for respondent.

BUCK, Justice pro tem. This is an action to enforce specific performance of an agreement alleged to have been entered into between plaintiff and defendant, whereby defendant agreed to execute and plaintiff agreed to accept an oil lease from defendant of certain designated lands owned by defendant.

The trial court made a finding to the effect that defendant never did execute any agreement with plaintiff whereby defendant agreed to lease to plaintiff the designated premises upon the terms and conditions specified in the complaint. Judgment was given for defendant, and plaintiff appealed.

The sole question arising on this appeal is whether the evidence is sufficient to sustain the above finding of the trial court.

Plaintiff was a resident of McKittrick, near Bakersfield, in the county of Kern, and was engaged in the business of buying, selling, leasing, and operating oil lands. Defendant, a married woman, was a resident of the state of Washington and the owner of a 560-acre tract of prospective oil lands in Kern county. To assist her locally in carrying on negotiations with plaintiff for the leasing of a portion of said lands with an option to purchase, she employed Mr. William Beaizley, an attorney at law of Bakersfield, in Kern county. After some preliminary negotiations by correspondence with plaintiff, the defendant received, on February 28, 1925, from plaintiff the following telegram:

> "Received your letter visited Mr. Beaizley am prepared to pay seventeen fifty acre bonus four hundred acres option to buy at sixty wire Mr. Beaizley authority to write up papers so property can be turned to me so I can be sure of deal as I have other land in view but wish to settle your proposition before starting anything else wire box 536 Bakersfield, F. C. Laird."

To which defendant made answer as follows:

> "Your offer accepted. Sending Beaizley letter instructions immediately acreage designated."

Up to this time there had been no attempt by either party to designate out of what particular part of defendant's 560-acre tract the 400 acres desired by plaintiff was to be selected. But, in order to make definite that matter, as well as some of the other terms of the proposed lease, defendant on March 2d wrote to Mr. Beaizley at Bakersfield, in substance, that she had wired the plaintiff Laird that:

> "I would accept his offer and would consult you immediately by following letter. Am inclosing you the original Standard Oil lease which prevailed on the property, which I believe fills the needs and embodies everything necessary, and I would like embraced in the Laird lease, and may serve as a copy * * * and no subleasing or sequestration of the property to another, as you may remember the siege you had in disposing of other sublessees. * * * Now, as to that designated 160 acres to be retained by me, I would reserve the following acreage as diagram indicates."

In this connection it may be noted that the 560-acre tract owned by defendant embraces the whole of one section of land, except the east half of the southeast quarter of the section, and that the 160 acres reserved by defendant was all in one body and consisted of "the southeast quarter of the northwest quarter and the southwest quarter of the northeast quarter of said section, and also the 80 acres designated as the west half of the southeast quarter." This also left the 400 acres offered to plaintiff in one body, though of a somewhat irregular shape. Possibly the land was so designated in order to give the portion reserved by defendant a closer contact with the different portions of the 400 acres to be developed by plaintiff as oil-producing land. But, in any event, the proposed designation was certain and explicit. And, as was said of old, "it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." Brian in Year Book, 17 Edw. IV, 1.

As regards the other terms and conditions upon which defendant was offering to lease, she inclosed, as stated, also for the information and instruction of her attorney and the plaintiff, a lease which she had at one time given to the Standard Oil Company.

On March 7th, and very soon after receipt of the above letter by the attorney, plaintiff called at the office of Mr. Beaizley and was informed of the contents of the letter and of the terms upon which defendant was offering to lease, and was also shown the diagram and a description which designated the 400-acre tract which she was offering to lease to the plaintiff.

[1, 2] For the purpose of satisfying the statute of frauds, it may be assumed that the foregoing writings and memoranda made by the defendant constituted a sufficient offer in writing to bind the defendant, if accepted by the plaintiff before its withdrawal by defendant. Johnson v. Krier, 59 Cal. App. 330, 210 P. 966; Albion Lumber Co. v. Lowell, 20 Cal. App. 782, 793, 130 P. 858, 864; Moss v. Atkinson, 44 Cal. 3; Estate of Robinson, 142 Cal. 152, 75 P. 777. It would not be necessary that such acceptance by the plaintiff prior to the withdrawal be in writing. Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124. The acceptance, however, of course, must be unequivocal, positive, and unambiguous, and must comply with the terms of the offer. It is also the rule that, after making a positive acceptance of the offer, the party so accepting may add, as a request, that some modification be made. And "so long as it is clear that the meaning of the acceptance is positive and unequivocal to accept the offer, whether such request is granted or not, a contract is formed." Volume 1, Williston on Contracts, p. 138; Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904; Curtis Land, etc., v. Interior Land Co., 137 Wis. 341, 118 N. W. 853, also reported in 129 Am. St. Rep. 1068; Berthiaume v. Doe, 22 Cal. App. 78, at page 80, 133 P. 515.

The above rule is earnestly invoked by the plaintiff's counsel in this case. And plaintiff, in his examination in chief, regarding what he remembers he said at his conference on March 7th with defendant's attorney, places himself by his own testimony well within the rule invoked by his able counsel; his testimony in chief being, in substance, as follows:

"Q. Upon receipt of the last telegram just referred to, what, if anything, did you do with reference to Mr. Beaizley? A. I went to see Mr. Beaizley and had a talk with him about paying for the acreage.

"Q. Relate the conversation you had with Mr. Beaizley. A. I showed him this telegram, and told him the offer of Mrs. McPhee was accepted; I was able, ready, and willing to pay the money and offered him the money for the proposition. He said, 'About the acreage?' I said, 'Don't make any difference about the acreage, as long as you get 400 acres.' I had the money, I said, and was prepared to pay him then. He said he didn't care about taking the money; he said to put it in the bank to her order. So he brought up the subject about the acreage; said that she wanted it all in one piece, the remaining 160 acres, and the 400 acres all in one piece. I said, 'That is all right with me; whatever will be convenient to her and better for her will be all right with me.' I said, 'I simply want 400 acres of land.' He said, 'That is the only point necessary to complete the deal.' He said that he would take up with her again. I said, 'All right.' I told him the deal was accepted by me, and I was ready to pay the money. 'All right,' he said, he would write up the papers. I asked if he had authority to do that, and he said, 'Yes.' That is the last I heard of the matter."

"Q. What was said about the money you were to pay to Mr. Beaizley at that time? A. Well, he just simply said, 'You have the acceptance. This land is yours. Nobody has any chance to get it now, at all. It is yours. If you want to pay the money, just pay it to the bank. * * *

"Q. How much money did you have there with you at Mr. Beaizley's office, and afterwards deposited with the Security Trust Company? A. Seven thousand dollars to pay the bonus."

And, in his cross-examination on the subject of his unequivocal acceptance of the acreage designated by the defendant, he testified as follows:

"Q. Did you get any selection of the 160 acres from Mr. Beaizley? A. No, sir.

"Q. As to what she wanted? A. No, sir.

"Q. Didn't Mr. Beaizley tell you he had a letter that she wanted to reserve 160 acres? A. She wanted to reserve 160 acres in the letter I had here; she stated she wanted that all in one piece. I told Mr. Beaizley that it didn't make any difference, didn't matter how it was arranged, as long as I got 400 acres, she could have it all in one piece; it was agreeable to me. He said that was all right.

"Q. Don't you remember telling Mr. Beaizley you would like to have that selected differently from what she had designated it? A. No."

But it is apparent from the finding of the trial court that the court did not choose to accept the foregoing unqualified testimony of the plaintiff in regard to what he remembered was said at the conference of March 7th, but chose rather to accept the recollection of defendant's attorney, Mr. Beaizley, in regard thereto. Aside from any question as to the relative interests of the parties and their manner of testifying, as well as the intrinsic probability of their respective testimony, it appears that on the very day of the conference Attorney Beaizley, in pursuance of his duty under his instructions, wrote to the defendant a letter giving an account of what took place at that time between himself and the plaintiff. From this letter, written as it was before there was any controversy between the parties, he was able to refresh his recollection, and he further testified that this letter "substantially states the facts as they occurred at that time, substantially reports the occurrence"; the letter being as follows:

"This will acknowledge yours of the 2d inst. with inclosures of form of lease and also diagram showing the land you desire to reserve for yourself in section 36, 29, R. 21, E. M. D. B. & M. Mr. Laird has called to-day and states that the reservation you suggest would make it extremely difficult for his operations on the property and would in fact necessitate the establishment of two shipping places. He asks if you would not be satisfied to reserve the northeast quarter rather than the parcels you have described. * * * The form of the lease and the limit of December 1, 1925, for exercise of option will be acceptable, and I think if you would be satisfied to reserve the northeast quarter rather than the parcels you have described, the matter could be closed along these lines. Kindly let me know your decision in the matter, and I will proceed accordingly.

"W. B. Beaizley."

And, further testifying, Mr. Beaizley states:

That he had been an attorney practicing law in Bakersfield more than 17 years, and knew both of the parties to the action, and that he acted on behalf of Mrs. McPhee "in the negotiations and preparation of the lease and so on." That plaintiff was in his office shortly after the receipt of the letter of March 2d, and "I there showed him the letter, or practically disclosed all of its contents to him. * * * I showed him the diagram that Mrs. McPhee inclosed in the letter. I remember, after he looked it over he said: 'That won't suit me,' or 'I can't use it that way,' or something of that kind. He expressed dissatisfaction. I can't recall the exact language or phrase he used, but he expressed a dissatisfaction with the reservations that Mrs. McPhee had indicated on the diagram. That was his statement. After the statement made by Mr. Laird, I asked him why the reservation was not satisfactory. 'Well,' he said, 'I would have two shipping points,' or something of that kind. I don't know whether I am right as to my recollection as to two shipping points. Made it inconvenient for him to operate here due to the contour of the country. He said, 'I wonder if she wouldn't be satisfied to have a different division.' I said, 'In what way?' Then he began to plan out a division that would suit him, and, in fact, we both began to figure on what kind of an acreage would perhaps suit him and at the same time leave Mrs. McPhee the acreage she had reserved.

"Q. Did he then make any request as to any particular acreage she would reserve? A. Yes; Mr. Laird suggested how he would like it divided. And I had in mind Mrs. McPhee's letter, and, of course, I was seeking, as desired by Mrs. McPhee, to have what was to be reserved by Mrs. McPhee, in a compact, single parcel; and the division that I finally suggested to Mrs. McPhee in the letter that I wrote, was the one that Mr. Laird indicated that he would wish and asked that I would write to her and see if that would be suitable to her."

No immediate reply being received to his letter of March 7th, Beaizley telegraphed defendant as follows on March 16th:

"Have you my letter of seventh Laird wishes to know if reservation of Northeast quarter of Section to you is satisfactory. W. B. Beaizley."

To which defendant answered as follows:

"Reservation requested in offer made by you not accepted. Do not desire to negotiate further."

This telegram was then shown to the plaintiff, whereupon, according to Beaizley's testimony, the following occurred:

"I did communicate the wire to Mr. Laird.

"Q. What, if anything, did he say? A. I can't recall the exact sequence of the conversation but the substance of it. Mr. Laird said: 'I suppose that throws me back on the original proposition.'"

Thereafter on March 21st Beaizley, at the request of the plaintiff, mailed to the defendant for her signature a draft of a lease containing the description originally proposed by defendant.

[3, 4] Bearing in mind that the burden rested, not upon the defendant to prove that the plaintiff rejected her offer, but upon the plaintiff to prove that he accepted her offer, it would seem to be quite evident that the evidence was amply sufficient, in view of the testimony of Mr. Beaizley and the subsequent conduct of the plaintiff, to sustain the implied finding of the court that, prior to his claimed request for a mere modification, the plaintiff did not definitely, unequivocally, or at all, accept any proposal of the defendant in regard to the subject-matter of the lease.

Referring again to the letter of Beaizley of March 7th, it will be noted that the only thing he attempted to report from the plaintiff as "acceptable" about the lease was "the form of the lease"; but that, as regards the subject-matter of the proposed lease, the defendant had nothing to express except dissatisfaction, dissent, and disagreement. Also, from the stipulation inserted in the very lease which plaintiff was sending to defendant, in pursuance of his belated attempt to accept the lady's original proposal, it is quite apparent that, as regards the form of lease in one important particular, he never had any intention of accepting defendant's original proposal. For, in the Standard Oil lease, as well as in defendant's letter of instructions to her attorney, of which plaintiff was fully advised, it was expressly provided that the lessee should not have a right "to assign or sublet to anybody." But, in the lease afterwards drafted and mailed on March 21st to the defendant, at the request of the plaintiff, it is stipulated that the lessee shall have the right to assign the lease to the "Olig Hill Oil Company, a California corporation, having its principal place of business at Bakersfield," and there is no provision made in the lease that such company, when it is so transferred, shall not have a right to assign or sublet at pleasure.

[5] The defendant was thus left without any protection against subsequent assignments, even though there was a general covenant against assignments, for such a gen-

eral covenant does not run with the land. Webb v. Jones (Cal. App.) 263 P. 538.

The evidence, therefore, being sufficient to sustain the finding of the trial court that there was no agreement for a lease between the parties, the judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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89 Cal. App. 768

JOHNSON v. RISDON et ux. (Civ. 6234.)

District Court of Appeal, First District, Division 1, California. March 8, 1928.

1. Process ⚿4—Court properly required defendants to proceed without appearance of plaintiff's husband pursuant to cross-complaint directed against him without obtaining leave or issuance of summons (Code Civ. Proc. § 368).

Where, in action in ejectment, defendants filed a cross-complaint alleging that note assigned to plaintiff by her husband had been fraudulently procured and prayed for cancellation thereof, together with damages against plaintiff's husband arising out of another transaction, without obtaining leave of court to file such cross-complaint or issuing or serving summons as to plaintiff's husband, trial court properly overruled objection to proceeding with trial for failure of plaintiff's husband to appear, any damages recoverable against plaintiff's husband being subject under Code Civ. Proc. § 368, to set off against note, notwithstanding assignment.

2. Parties ⚿54—Plaintiff's husband held not proper party under cross-complaint to litigate respecting transactions in which plaintiff had no part.

In action in ejectment, presence of plaintiff's husband against whom cross-complaint was directed *held* not proper merely to litigate with him other transactions in which plaintiff had no part or asserted no interest.

3. Appeal and error ⚿993—Effect of testimony by one witness as against seven testifying to contrary is for trial court.

Question as to effect of testimony by one witness as against seven testifying to the contrary constitutes a matter for the trial court.

4. Witnesses ⚿344(1), 362—Proof of suspension of real estate agent's license is not impeachment, or if so did not require rejection of evidence.

Proof of suspension of real estate agent's license is not an impeachment, or, if so, did not require trial court as matter of law to reject all evidence by such witness.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Catherine M. Johnson against Stephen H. Risdon and wife, wherein defendants filed a cross-complaint against plaintiff and her husband. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Metson and E. B. Mering, both of San Francisco, for appellants.

Glensor, Clewe & Van Dine, of San Francisco, for respondent.

PARKER, Justice pro tem. Plaintiff's action was in ejectment, seeking also damages for the retention of the premises. Defendants answered and also filed their cross-complaint. In this cross-complaint it was alleged that the husband of plaintiff, one Alvah M. Johnson, had by a series of fraudulent acts induced defendants to purchase the property involved in the present action along with other properties not affected by this particular litigation. The cross-complaint, among other things, alleged that the property involved here was acquired by plaintiff as the result of a sale under a trust deed; that the obligation supporting the trust deed was a promissory note executed by defendants to Alvah M. Johnson and by him fraudulently procured. The defendants in the said cross-complaint alleged further that the note and the security had been assigned to plaintiff, Catherine Johnson, without consideration, and the prayer was for the cancellation of the note and trust deed and of the assignment thereof to plaintiff, Catherine Johnson. In the same cross-complaint it was alleged that in another transaction (setting forth the details thereof) Alvah M. Johnson had defrauded the defendants Risdon to the extent of $25,275, and judgment against Alvah M. Johnson for that amount prayed.

The plaintiff, Catherine Johnson, for herself alone filed her answer to the said cross-complaint, specifically denying all of the allegations therein contained.

The cross-complaint was directed against plaintiff, Catherine M. Johnson, and Alvah M. Johnson, the latter not being a party to the action. No leave of court was obtained granting permission to file the cross-complaint, and no summons was ever issued thereon, nor does it appear that the same was ever served on Alvah M. Johnson.

At the commencement of the trial in the court below defendants Risdon objected to the trial proceeding on the ground that the case was not at issue, inasmuch as Alvah M. Johnson had not appeared, and the trial court overruled the objection and proceeded with the hearing. This action of the court below presents the first point on the appeal.

[1] We find no error in the court's action. No order was ever sought making Alvah M. Johnson a party to the action, and, as indicated, no service of any kind was ever made upon him. Some two months had elapsed from the filing of the cross-complaint until the date of the trial, and the plaintiff was en-

titled to have her issues determined. In any event the presence of Alvah M. Johnson was not necessary to a full determination of the controversy. If defendants proved the allegation of the fraudulent procurement of the note and the trust deed given to secure the payment thereof, and further proved that Catherine M. Johnson took the same without consideration and as a mere assignee, the relief accorded in the action would have been the same whether Alvah M. Johnson was or was not a party. The appellants themselves by their argument uphold the action of the court. For instance, to quote from appellants' brief:

> "The plaintiff was the assignee of a nonnegotiable chose in action and stood in the shoes of Alvah Johnson, who perpetrated the fraud upon defendants, and every defense that was open against him was open to defendants against plaintiff. Helmer v. Parsons, 18 Cal. App. 450, 452, 123 P. 356; Pitman v. Walker, 187 Cal. 667, 203 P. 739. The defendants had a cause of action for damages against Alvah Johnson, and the damages recovered could have been offset against any sum owing from Risdon to Johnson; consequently had Johnson held the note and trust deed the damages could have been set off against the note as the assignment could not prejudice the rights of defendants. C. C. P. 368."

If all of this is true the defendants could not have been in any manner prejudiced by the court's action, conceding that discretion was vested in the court whereby it could have brought Alvah M. Johnson into the proceeding. In passing it might be noted that the transfer from Alvah M. Johnson to Catherine M. Johnson was part of a settlement of property rights contemporaneous with a divorce action then pending.

[2] Obviously, the presence of Alvah M. Johnson was not proper in this action merely to litigate with him other transactions in which Catherine M. Johnson had no part or asserted no interest. Incidentally, it might be noted that all of the transactions alleged in the cross-complaint had been made the basis of another action instituted by defendants Risdon against Alvah M. Johnson and then pending in another department of the superior court. Further, the trial court, on the issues tendered by plaintiff in response to the cross-complaint of defendants, found all of the allegations thereof to be untrue and unsupported in fact, so quite obviously the presence of Alvah M. Johnson as a party was unnecessary. The judgment of the trial court on all of the issues was in favor of the plaintiff, Catherine M. Johnson.

Defendants next contend that the evidence was and is insufficient to support the findings and the judgment entered thereon.

We get little help from appellants in determining this question. The evidence is not presented even by reference. We have general statements as to what the testimony was; but neither in the briefs of counsel nor in any supplement thereto is the record presented. Notwithstanding this failure on the part of appellants, we have read the typewritten transcript and find the judgment amply supported.

[3, 4] It is the appellants' contention that the plaintiff's case is made by one witness as against seven testifying to the contrary. That is a matter for the trial court, even if the ratio was one to seventy. Further, appellants contend that this one main witness for plaintiff was unworthy of belief because the record discloses him to be a real estate broker whose license was at one time suspended. Proof of suspension of a real estate agent's license is not an impeachment; and if it were, it would not follow that the trial court must as a matter of law thereupon reject all evidence given by such a witness. We find absolutely no merit in the appeal.

The trial court denied defendants' motion for a new trial, which order is included in the appeal herein.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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89 Cal. App. 756

BATTERSBY v. SHEPEARD et al.

(Civ. 6216.)

District Court of Appeal, First District, Division 1, California. March 7, 1928.

1. Mechanics' liens ⚷132(3)—Filing mechanic's lien 32 days after completion of building held not premature under contract providing for payment 35 days after completion (Code Civ. Proc. § 1187).

Where contractor agreed to construct building for defendants under contract providing that payment was to be made 35 days after completion of building, filing of lien 32 days after completion was not premature under Code Civ. Proc. § 1187, requiring lien to be filed within 60 days after completion; amount being due under contract after completion of building, though not payable until 35 days thereafter.

2. Mechanics' liens ⚷132(1)—Filing of contractor's lien is "within" time specified by statute when it does not extend beyond time specified (Code Civ. Proc. § 1187).

Under Code Civ. Proc. § 1187, providing that claim of lien by general contractor must be filed within 60 days after completion, word "within" means "not beyond," and any act is within time named when it does not extend beyond that time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Within.]

3. Mechanics' liens ⚿132(1)—Contractor's lien may be filed at any time after completion of contract and until expiration of 60 days (Code Civ. Proc. § 1187).

Under Code Civ. Proc. § 1187, providing that claim of lien by contractor must be filed within 60 days after completion, completion of building marked starting of the time within which liens may be filed, and hence contractor may file notice of lien at any time after completion of contract and until expiration of 60 days.

Appeal from Superior Court, City and County of San Francisco; **J. J. Van Nostrand**, Judge.

Action by G. M. Battersby against Frank Shepeard and another. Judgment for plaintiff for part of relief demanded, and plaintiff appeals. Reversed and remanded with directions.

C. A. Linn and C. Harold Caulfield, both of San Francisco, for appellant.

Gus L. Baraty, of San Francisco, for respondents.

TYLER, P. J. [1-3] Action to foreclose an original contractor's lien. The complaint alleges, in substance, that on the 30th day of September, 1922, plaintiff and defendants entered into an agreement in writing, under the terms of which plaintiff agreed to furnish the material and erect a building on property owned by defendants. The contract price was the sum of $1,497.20. With reference to the time payments that were required to be made, the contract contained the following provisions:

> "The party of the first part, agrees to pay the party of the second part upon the presentation of receipted bills and the balance thirty-five days after the completion of the contract and the work herein specified."

The building was completed November 13, 1922, and no partial payments having been made, the entire contract price became due 35 days after completion. Plaintiff filed his claim of lien on December 15, 1922, and an action to foreclose the same was instituted by him January 18, 1923. At the trial defendants claimed that they had paid plaintiff the full amount of the contract price; that the same was paid in bills, except the sum of $3.70, which was paid in silver. They had no receipt for the payment, and plaintiff denied that they had ever made any payment whatsoever. It appeared in evidence that, while defendants had two bank accounts, no order was drawn upon these accounts to make payment, defendants testifying that they had the amount in their bedroom, and that plaintiff had called for, and they had paid him, the amount due. It further appeared that defendants filed a homestead upon the premises prior to the time the contract price was due plaintiff. Under the evidence, plaintiff claimed below that defendants deliberately planned to defraud plaintiff out of the amount due him. The trial court found that plaintiff had performed his contract, and that no part of the $1,497.20, the amount of the contract price, had ever been paid, and judgment was rendered for this sum. This finding is not here assailed. It was contended below by defendants that the lien contained a false statement, and was prematurely filed, for which reason the court had no power to decree a foreclosure of the same. No finding was made upon this subject, nor did the judgment decree a foreclosure of the lien.

Plaintiff appeals from that portion of the judgment refusing to allow the lien and to decree its foreclosure.

As above set forth, the contract price for the work was the sum of $1,497.20. The building was completed November 13, 1922, and notice of acceptance was filed. No part of the contract price was paid. The claim of lien was filed December 15, 1922. The action to foreclose was instituted January 18, 1923. According to the contract, the final payment was to be made 35 days after the completion of the building. The due date of final payment, therefore, was December 18, 1922. The claim of lien disclosed this fact upon its face. Respondents here claim in support of the judgment that, as the complaint alleges, and the lien states, that payment was to be made 35 days after the completion of the building, the due date of the final payment was December 18, 1922, and the filing of the lien on December 15, 1922, was therefore premature, as no sum of money was due at that time, for which reason there was no lien, and the trial court was correct in not decreeing one to exist. We see no merit in this contention. The amount was certainly due after the completion of the building on November 13, 1922, as evidenced by the notice of acceptance, though not payable until 35 days thereafter. It therefore contained no incorrect statement. The statute provides that a claim of lien on behalf of a general contractor must be filed within 60 days after completion. Code Civ. Proc. § 1187. The word "within," as used in the statute, means "not beyond," and any act is within the time named when it does not extend beyond it. French v. Powell, 135 Cal. 636, 68 P. 92. The completion of the building marks the starting point of the time within which liens may be filed. Jones v. Kruse, 138 Cal. 613, 72 P. 146. A contractor, therefore, at any time after the completion of his contract, and until the expiration of 60 days, may file his notice of lien. Knowles v. Baldwin, 125 Cal. 224, 57 P. 988. Here the claim was filed 32 days after the acceptance of the building. It was therefore properly filed. The validity of the lien was a material issue in the case upon which a finding should have been made. The lien being a valid one, and there being no dispute as to the amount due, the case is remanded to the lower court, with instructions to find accordingly and to enter judgment foreclosing the same.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

90 Cal. App. 69

PEOPLE v. PIETRI. (Cr. 1452.)

District Court of Appeal, First District, Division 2, California. March 10, 1928.

1. Criminal law ⊂⇒1005—Statute respecting repeal of statute relative to appeal should be read as entirety, and, when so read, is statute of repeal with saving clause (St. 1927, p. 1047; Pen. Code, § 1247).

St. 1927, p. 1047, relative to repeal of Pen. Code, § 1247, providing for procedure on appeal, should be read as an entirety, and, when so read, is statute of repeal with saving clause added thereto.

2. Criminal law ⊂⇒1071—Appeal from conviction will be dismissed, in absence of application to trial court stating grounds of appeal (St. 1927, p. 497; Pen. Code, § 1247).

Where defendant, appealing from conviction of possessing still, in violation of St. 1927, p. 497, did not file application to trial court stating in general terms grounds of appeal, such appeal is wholly ineffectual, and will be deemed dismissed, under Pen. Code, § 1247.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Louie Pietri was convicted of possessing a still, and he appeals. Appeal dismissed.

W. E. Foley and William L. Southwell, both of San Jose, and Wm. J. Gloria, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. [1, 2] The defendant was informed against by the district attorney for having the unlawful possession and control of a still in violation of the provisions of chapter 277 (page 497) of the Statutes of 1927. The defendant pleaded not guilty. A trial was had in the lower court before the court sitting with a jury. The jury returned a verdict of guilty. The defendant made a motion for a new trial, the motion was denied, and the defendant has appealed.

The defendant filed a brief on appeal January 3, 1928. The plaintiff filed its brief on February 8, 1928. Therein it objected to a hearing, and asked the court to dismiss the purported appeal because the record on appeal did not show that the provisions of section 1247 of the Penal Code had been complied with, and although for certain purposes said section was repealed, for other purposes it was continued in force as the law of the land (Stats. 1927, c. 620, p. 1047), and applied to this action. On February 14, 1928, the defendant filed a reply brief, but did not at that time suggest, and has not since suggested, a diminution of the record. In his brief he contends there is a conflict in the terms of the statute; the first section provides for the continuation of the provisions of section 1247 of the Penal Code; and section 4 provides for the repeal thereof. He then contends that the latter section controls. People v. Dobbins, 73 Cal. 257, 14 P. 860. The authority is not in point. The statute should be read as an entirety. And so read, it is a statute of repeal with a saving clause added thereto.

An examination of the record shows that the defendant did not file any document which even purports to be "* * * an application to the trial court, stating in general terms the grounds of the appeal. * * *" The purported appeal is therefore "wholly ineffectual and shall be deemed dismissed. * * *" Pen. Code, § 1247; People v. Pierce (Cal. App.) 264 P. 519, and cases there cited.

The appeal is dismissed.

We concur: KOFORD, P. J.; NOURSE, J.

90 Cal. App. 101

GENERAL PETROLEUM CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5966.)★

District Court of Appeal, Second District, Division 1, California. March 13, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Master and servant ⊂⇒416—Commission's finding that death from gas explosion was caused by serious and willful misconduct of managing foreman held sufficient to determine issue (Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b]).

Finding of Industrial Accident Commission that injury and death of employee was caused by reason of serious and willful misconduct of the executive or managing foreman or general superintendent of employer, under Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b], being St. 1917, p. 834, *held* finding of ultimate fact constituting sufficient determination of issue without making specific findings on probative matters.

2. Master and servant ⊂⇒405(6)—Evidence held to support finding of commission that death from gas explosion was caused by serious and willful misconduct of employer's foreman (Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b]).

In proceeding under Workmen's Compensation, Insurance and Safety Act 1917(St. 1917,

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★Hearing denied by Supreme Court.

p. 831), for death of employee resulting from injuries sustained in explosion of gas, finding of Industrial Accident Commission that said injury and death was caused by reason of serious and willful misconduct of the executive or managing foreman or superintendent of employer, under section 6, subd. [b], *held* supported by evidence.

Proceeding under the Workmen's Compensation, Insurance and Safety Act 1917 by dependent members of the family of Joseph E. Parks for compensation for his death, opposed by the General Petroleum Corporation, employer. To review an order of the Industrial Accident Commission awarding compensation, employer applies for certiorari. Writ denied.

See, also, 265 P. 510.

A. L. Weil, of San Francisco, and W. L. Appleford, of Berkeley, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CONREY, P. J. [1, 2] Application was made to the Industrial Accident Commission for a compensation award on account of the accidental death of Joseph E. Parks, resulting from injuries occurring in the course of and arising out of his employment by petitioner, General Petroleum Corporation; the applicants being dependent members of the employee's family. In addition to an award made against the insurance carrier, the commission found that said injury and death was caused by reason of the serious and willful misconduct of "the executive or managing foreman, or general superintendent," of said employer, and for that cause an additional award was made against the employer. The employer, after proceedings in due course, applies to this court for a writ of review.

Awards of this class are provided for by section 6 (b) of the Workmen's Compensation, etc., Act of 1917 (St. 1917, p. 831). In the recent case of Clarke v. Industrial Accident Commission, 262 P. 471, we referred to some of the decisions which have explained and illustrated the phrase "serious and willful misconduct." We also held in that case, in accordance with cited decisions, that the finding of the commission of the fact of serious and willful misconduct as charged was a finding of ultimate facts, and that it was not necessary to make specific findings upon probative matters. The findings now before us, which are of similar form and effect to those in the Clarke Case, are a sufficient determination of the issue.

It further appears that the evidence is sufficient to support these findings. Briefly stated, the accident occurred as follows: Certain work of the employer was being carried on under a wharf at Wilmington, and it became necessary to make a change in a gasoline pipe line. The job was being performed under the direction of one George Leinbach, who as foreman was in charge of the work. At a certain stage of the work when some welding of pipe flanges was about to be done, the employees discovered a strong odor of gas, and went out from under the dock to allow the gas to escape. After waiting "fifteen minutes to half an hour," the welder, one Merle Wilson, went back to the work and lighted his torch. It is contended by petitioner, first, that Wilson acted on his own responsibility and not under orders of the foreman, and, second, that the conditions were not such as warrant a finding that it was serious or willful misconduct of the foreman to give the order, even if he had given it, for Wilson to resume the work. On both points there is a conflict in the evidence. Nevertheless, it is a fact, according to the witness Sampson, that the foreman at the time in question told Wilson to come down and light the torch; that it was all right to light it. As to the second suggestion, there is evidence that, at the time when these last-mentioned instructions were given, the men present under the wharf were conscious of the smell of gas and expressed some fear of the danger. In the answer to the petition herein, counsel for the commission calls attention to testimony of experts to the effect that there are certain scientific methods and appliances by which it is practical to determine the amount of gas present in enclosed spaces, and that, where gas is known to be present, it is unsafe to carry on welding work without first making the test. There being in the record evidence of the character above stated, and that no test was made, it is apparent that the commission did not exceed its jurisdiction in making the findings of fact to which we have referred.

The petition for a writ of review is denied.

We concur: HOUSER, J.; YORK, J.

90 Cal. App. 104

GENERAL PETROLEUM CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5969.) ★

District Court of Appeal, Second District, Division 1, California. March 13, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Master and servant ⚷416—Commission's finding that death from gas explosion was caused by serious and willful misconduct of managing foreman held sufficient to determine issue (Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b]).

Finding of Industrial Accident Commission that injury and death of employee was caused by reason of serious and willful misconduct of the executive or managing foreman or general superintendent of employer, under Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b], being St. 1917, p. 834, *held* finding of ultimate fact constituting sufficient determination of issue without making specific findings on probative matters.

2. Master and servant ⚷405(6)—Evidence held to support finding of commission that death from gas explosion was caused by reason of serious and willful misconduct of employer's foreman (Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b]).

In proceeding under Workmen's Compensation, Insurance and Safety Act 1917 for death of employee resulting from injuries sustained in explosion of gas, finding of Industrial Accident Commission that said injury and death was caused by reason of serious and willful misconduct of the executive or managing foreman or superintendent of employer, under section 6, subd. [b], *held* supported by evidence.

3. Master and servant ⚷417(4)—Adequacy of policy to cover injury could not be raised for first time on petition to review finding of commission (Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. [b], and § 31, subd. [b]).

Where compensation was awarded for death of employee against employer in addition to award against insurance carrier, as provided by Workmen's Compensation, Insurance and Safety Act 1917, § 6, subd. (b), and section 31, subd. (b), being St. 1917, pp. 834, 860, in cases where accident occurs because of willful misconduct of employer's foreman, contention that award was invalid because finding was not made that liability of insurance carrier did not extend to amount of award in addition to normal compensation *held* not properly presented by record; it appearing that at hearing by referee it was stipulated that at time of injury insurance carrier was liable for normal compensation and that effort by employer to introduce evidence of policy was presented for first time in petition for review.

Proceeding under the Workmen's Compensation, Insurance and Safety Act of 1917 by the wife of Rudolph Jaeger for death of her husband, opposed by the General Petroleum Corporation, employer. To review an order made by the Industrial Accident Commission, employer applies for certiorari. Writ denied.

See, also, 265 P. 508.

A. L. Weil, of San Francisco, and W. L. Appleford, of Berkeley, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CONREY, P. J. Application was made to the Industrial Accident Commission for a compensation award on account of the accidental death of Rudolph Jaeger, resulting from injuries occurring in the course of and arising out of his employment by General Petroleum Corporation; the applicant being the wife of said Jaeger. In addition to an award made against the insurance carrier, the commission found that said injury and death was caused by reason of the serious and willful misconduct of the employer corporation, and for that cause an additional award was made against the employer. The employer, after proceedings in due course, applies to this court for a writ of review.

[1, 2] The facts concerning the accident and the surrounding circumstances thereof are identical with those shown in General Petroleum Corporation v. Industrial Accident Commission et al. (Civ. 5966) 265 P. 508, in which the order of this court has been this day made denying a petition for a writ of review. The applicants for compensation in that case were dependent members of the family of one Joseph E. Parks, who was killed by the same explosion of gas which destroyed the life of Jaeger. Our conclusions as stated in deciding upon that petition are hereby adopted and applied to this proceeding.

[3] In addition to the questions raised in the other case, the petitioner herein calls attention to the fact that no finding was made that the contract of insurance between the employer and the insurance carrier did not extend to the amount of the award in addition to normal compensation, and contends that without a finding on that question of fact the award made by the commission against the petitioner was contrary to law. In this connection petitioner further contends that section 31 (b) of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 860), which forbids insurance covering such additional compensation, is unconstitutional. The record is insufficient to present these questions for decision. It appears that at the hearing before the referee it was stipulated that at the time of the injury the insurance carrier for the employer was "liable for the normal compensation, if any, which the employer is liable to pay." It does not appear that any effort was made by petitioner to introduce in evidence the policy of insurance, or in any way to raise the ques-

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★Hearing denied by Supreme Court.

tion now presented for the first time. Neither does it appear that this question, or the subject-matter thereof, was included in the grounds upon which petitioner made its application for rehearing before the commission.

The petition for a writ of review is denied.

We concur: HOUSER, J.: YORK, J.

C. GANAHL LUMBER CO. v. THOMPSON et al. (Civ. 6153.)★

District Court of Appeal, First District, Division 2, California. Feb. 29, 1928.

Hearing Granted by Supreme Court April 26, 1928.

1. Mechanics' liens ⊂⇒132(1)—Time of filing of mechanic's lien commences to run from date of timely filed notice of completion of building (Code Civ. Proc. § 1187).

The time of filing a mechanic's lien commences to run from date of filing notice of completion of building, when such a notice is timely filed in compliance with Code Civ. Proc. § 1187.

2. Mechanics' liens ⊂⇒132(1)—Owner's notice of completion, filed 70 days after completion, held not to give lien claimant 30 days thereafter within which to file lien (Code Civ. Proc. § 1187).

Notice of completion filed by owner 70 days after completion, thus being in direct conflict with Code Civ. Proc. § 1187, requiring such notice to be filed within 10 days after completion, was a mere nullity, and did not give lien claimant 30 days after date of such filing within which to file his lien claim.

3. Mechanics' liens ⊂⇒132(4)—Owner held not estopped from denying completion of building as stated in invalid notice of completion as affects mechanic's lien (Code Civ. Proc. § 1187).

Notice of completion filed by owner 70 days after completion, in direct conflict with Code Civ. Proc. § 1187, being a mere nullity, owner is not estopped as affects mechanic's lien from denying completion of building as stated in such notice, in view of section 1962, subd. 3.

4. Appeal and error ⊂⇒544(2)—On appeal on judgment roll, in absence of bill of exceptions or transcript of testimony, court cannot determine issue on which there was no finding.

On appeal on judgment roll, there being no finding on issue of estoppel, appellate court is foreclosed from determining question, in absence of bill of exceptions or transcript of testimony taken at trial.

5. Mechanics' liens ⊂⇒313—Laborers' and materialmen's bond held valid and binding, though not signed by principal, and another than surety was named therein as surety (Civ. Code, §§ 1636, 1643).

Where laborers' and materialmen's bond was attached to and made part of contractor's bond, *held* that, in view of Civ. Code, §§ 1636, 1643, bond was valid and binding, notwithstanding it was signed only by surety, and not by the principals, the contractors, and fact that another than surety was named in bond as surety.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by the C. Ganahl Lumber Company against W. Thompson and another, copartners doing business as Thompson & Stowell, and others, to foreclose a mechanic's lien. From the judgment, plaintiff appeals. Affirmed in part, and reversed in part.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Walter M. Campbell, of Los Angeles, for respondents Milton M. Longshore and Faith M. Longshore.

Richard Kittrelle, of Los Angeles, for respondent McWhinnie.

MURPHEY, Justice pro tem. This is an action brought for foreclosure of a mechanic's lien for materials furnished and to recover on a statutory bond given by the contractor.

The facts are substantially as follows: On July 14, 1923, the defendant Milton M. Longshore, as owner, entered into the contract with Thompson & Stowell, as contractors, to erect for the owner a building for an agreed price. The contract was in writing and signed by the parties. At the same time the defendant McWhinnie, as surety, entered into a written undertaking in the sum of $2,000 whereby he undertook to pay for all labor and materials furnished to the contractors for use in constructing the building and not paid for by them, which bond, at the time of its execution, was attached to the building contract, printed on the same piece of paper, and specifically referred to said contract. In its recitals the bond named the owner as surety, and was signed by the surety, McWhinnie, only, and not by the contractors. The building was completed on or before the 21st day of September, 1923, at which time the owners moved in, took possession, and occupied said building, which occupancy was accompanied by a cessation of labor, all of which facts are found by the court and unchallenged by appellant. On November 30 the owner filed a notice of completion of the building in the office of the county recorder in the county of Los Angeles, which notice embraced a recital that the building was completed on the 15th day of November, 1923, and that it was filed in pursuance of section 1187 of the Code of Civil Procedure. Between July 24 and September 20, 1923, the plaintiff furnished lumber to the contractors that was actually used in the construction of the building and was not paid for, in the reasonable value of $841.51; that on the 27th day of December, 1923, the plaintiff filed a lien for his claim in the statutory form in

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★Superseded by opinion of Supreme Court, 270 P. 965.

the office of the county recorder of Los Angeles county.

Plaintiff brought suit in this state of the facts on his claim and to foreclose his lien and for judgment against the surety. At the conclusion of the trial, the court concluded as a matter of law: First, that the plaintiff was entitled to a judgment against the contractors for the sum demanded in his complaint, with costs and interest; second, the plaintiff was not entitled to enforce his lien against the real property; third, that the plaintiff was not entitled to a judgment against the surety on the bond.

The case comes to us on the judgment roll without any statement or bill of exceptions. The plaintiff appeals on the ground that the court erred on the two conclusions last above named, and we will consider the points in the order set out.

[1] It is definitely found by the court, and conceded by the plaintiffs, that the building was completed and occupied on or before the 21st day of September. It may be stated, as the settled law of this state, that at the time of filing a lien commences to run from the date of filing the notice of completion when such notice of completion is timely filed in compliance with the provision of section 1187 of the Code of Civil Procedure. If notice is so filed, that is, within 10 days after completion, the claimant has 30 days from the date of filing within which to file his claim of lien. If such notice is not filed within 10 days after date of completion of the claimant has 90 days from the date of completion in which to file his claim of lien. The building, having been completed and occupied on or before the 21st of September, and no notice of completion having been filed within the ten days thereafter by the owner, the lien claimant would have had until the 20th day of December in which to file his claim of lien, unless excused from so doing by some act of the owner. In the case of Emigh-Winchell Hardware Co. v. Pylman, 38 Cal. App. 509, 176 P. 723, the District Court of Appeal, Third District, on rehearing said:

> "The language of the statute seems entirely too plain to permit of serious disagreement. Unless we are to disregard its unequivocal mandate, that the lien must be filed in any event within ninety days of the completion of the building, we must hold that appellant was too late. To the authorities cited in our former opinion we may add these two late decisions by our Supreme Court, in which the ninety-day period of limitation is emphasized: Bird v. American Surety Co., 175 Cal. 625, 631, 166 P. 1009; Hogan Lumber Co. v. Boyle (Nichols) 177 Cal. 477, 170 P. 1106."

In this same case, referring to the ultimate length of time within which time the lien must be filed, the court states:

> "But the ninety-day limitation applies to all cases. The concluding clause of the section makes this plain: 'Provided that all claims of lien must be filed within ninety days,' etc.
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> "Such is, also, the view taken by the courts. In the Robison Case [159 Cal. 581, 114 P. 984], supra, referring to the foregoing clause, the court said: 'This would seem to fix a time limit within which all claims must be filed, regardless of whether the owner has filed his notice of completion or not.'
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> "In the Hughes Case [174 Cal. 44, 161 P. 1159], supra, it is declared: 'If no notice of completion is filed, the claimant is required to see that his claim is filed before the expiration of the period of ninety days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section.'
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> "National Lumber Co. v. Kennedy, 28 Cal. App. 780, 154 P. 25, contains this declaration: 'The Legislature deemed such period ample time for otherwise obtaining information as to the time of completion. The provisions that "all claims of lien must be filed within ninety days after the completion of any building" would serve no purpose other than to terminate the time within which the claim of lien must be filed. Such is the plain import of the language used.'
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> "The foregoing ought to set the matter at rest, and no further comment is called for."

[2, 3] As appears from the statement of facts above set out, the owner, on the 30th of November, 1923, 70 days after the completion of the building, as determined by the unchallenged finding of the court, filed a notice designated "A Notice of Completion," in which he stated that the building was completed the 15th day of November, 1923. It is appellant's contention that this notice gives him 30 days after the 30th day of November on which to file his lien, and hence that on the 27th day of December, the date on which he filed his lien, he was within the time designated by the statute. This contention, we feel, cannot be sustained. The notice was not in response to any provision of law, and by its terms was in direct conflict with the provision of the statute bearing in mind that this building was completed on the 21st day of September and that notice of completion was filed on the 30th day of November, and stated therein, as the conclusion of the owner, that the building was completed on the 15th day of November, a period of 5 days longer than the statute awards the owner in which to file such notice. It is our judgment that as the law now stands, as stated in the decision hereinabove quoted, the owner could do no act that would add to or subtract from the 90-day period awarded by the law, in view of the fact that no notice of completion was filed within the 10-day period after the actual completion of the building as found by the court. The filing of the so-called notice 70 days after the completion was a mere nullity as far as the statement of any fact therein contained was concerned. It is appellant's contention that the owner is estopped from denying the completion of the building as stated in the notice filed on

the 30th day of November, 1923. If the conclusion above stated is correct, there is no merit in the contention. It may furthermore be said that it is doubtful if any estoppel may be predicated on this record, in view of the provisions of subdivision 3 of section 1962 of the Code of Civil Procedure, which reads as follows:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

[4] The appeal being on the judgment roll, and there being no finding on the issue whether appellant was misled by or acted upon the so-called notice of completion in filing his lien this court is foreclosed from determining that fact, in the absence of any bill of exceptions or transcript of the testimony taken at the trial, and, furthermore, there is no mutuality apparently pleaded or found with respect to such estoppel.

[5] Appellant's next contention is that the court erred in refusing judgment against the surety on the contractor's bond. The findings set out in full the builder's contract, with a specific finding that it was signed and executed by the owners and the contractors. The contract is in the usual form, and no purpose would be subserved in a detailed statement of its contents. Attached to the contract and a part of the same printed document was a bond entitled "Laborers' and Materialmen's Bond," which the court found was executed by the defendant McWhinnie and delivered to the contractor. The bond is in the usual form of such instruments, with the exception that in the recitals it is stated:

> "That Thompson & Stowell (contractors) as principals, and W. M. Longshore, as surety, are held and firmly bound to any and all persons furnishing materials to be used in the work described in the building contract hereinafter mentioned or in any modification thereof in the sum of $2,000."

The bond further provides, in the usual way, that the building contractor shall furnish the necessary labor to complete the work described in said contract, and, if such contractor should well and truly pay and cause to be paid all claims for labor or material or either or both so performed or furnished, as the case may be, then this obligation will be null and void otherwise to be and remain in full force and effect, and the same is hereby expressly made to inure to the benefit of any and all persons who perform labor upon, or furnish material to be used in, the work described in the said contract.

It will be observed that Longshore is named in the bond as surety. The bond is signed only by the surety, McWhinnie, and not by the principals, the contractors. Under these circumstances the trial court concluded and found that the instrument designated a bond is not a "good, sufficient and valid bond." For the reasons hereinafter set forth, we are unable to agree with this conclusion. It is manifest from an inspection of the document that the mention of the name of Longshore, the owner, as surety, was and is an inadvertence, and does not speak the intention of the parties.

Under Civ. Code, § 1636, "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Civ. Code, § 1643, provides:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

In 6 California Jurisprudence, § 163, p. 252. we find the following:

> "However, the intention of the parties should be given effect regardless of technical rules of construction.
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> "Intention is to be ascertained from a consideration of the language employed and the subject matter of the contract. Resort is first had to the contract itself; and if the intention is doubtful under the terms of the instrument, the surrounding circumstances may be considered to determine its meaning. The court will ascertain the relation of the parties to each other, and to the subject matter, and if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if it can be done without disregarding the language of the instrument. But the intention is to be ascertained, not from the facts as they actually were, but from the facts as the parties supposed them to be."

4 Ruling Case Law, pp. 50 and 51:

> "The fact that an obligor's name is not recited in the body of the bond, or is incorrectly recited therein, does not affect the validity of the bond or his liability thereunder, if the bond is otherwise properly executed and signed by him, and if the bond and circumstances clearly show an intention to charge him."

There cannot be the slightest doubt as to the intention of the parties to this transaction. The contractors agreed to erect a building for certain price, and the surety in the same document agreed that the laborers and materialmen should receive their pay to the extent of the amount of his obligation. That the bond was not signed by the principals, the contractors, in view of the record as disclosed by the findings is of no consequence, and the respondents' contention in that respect has no substantial merit in support of it. The contract and the bond constitute one printed document or paper. The contractors signed a building contract obligating themselves to construct the building and furnish all necessary labor and materials therefor. The bond which was signed by the surety, McWhinnie, specifically provides that, in the event that the contractor does not pay for the labor and material, he will be responsible therefor to the full extent of his bond. The failure to sign that part of the paper designated as the bond did not release the contractors from any responsibility under the contract, and did not add in any way to the burdens assumed by the surety. We are satisfied from all the facts and circumstances that the bond set out in the findings is perfectly valid, binding, and an enforceable obligation.

It follows from the foregoing that the judgment of the trial court should be affirmed in so far as it awarded a judgment to the plaintiff against the contractors and denied a lien to the plaintiff as against the owners, and reversed in so far as it denied relief to the plaintiff against the surety on the bond, and it is so ordered; appellant to recover costs against respondent McWhinnie, respondent Longshore to recover costs against appellant.

We concur: KOFORD, P. J.; STURTEVANT, J.

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90 Cal. App. 37

BLACKFORD v. BECKWORTH. (Civ. 5038.)

District Court of Appeal, Second District, Division 2, California. March 9, 1928.

1. New trial 🔑70—Evidence held to sustain finding, supporting grant of new trial, that deceased, killed in collision of his motorcycle with truck, was not negligent.

In action for death of plaintiff's husband resulting from head-on collision of motorcycle which he was riding with truck driven by defendant on public highway, evidence *held* sufficient to sustain finding that deceased was not guilty of negligence preventing recovery, which was basis of order granting new trial, after verdict for defendant.

2. Appeal and error 🔑979(2)—New trial 🔑70—New trial for insufficiency of evidence rests largely in trial court's discretion, and ruling will be disturbed only for abuse of discretion.

Granting of a new trial on ground that evidence is insufficient to justify verdict is a matter resting very largely in the discretion of the trial court, and its action will not be disturbed, unless record discloses manifest and unmistakable abuse of discretion.

3. Automobiles 🔑243(5)—Testimony that deceased, killed in collision of motorcycle with truck, had six months previously traveled at excessive speed at different place, held inadmissible.

In action to recover for death of plaintiff's husband resulting from head-on collision of motorcycle on which he was riding with truck driven by defendant on public highway, admission of testimony as to habit of deceased, six months prior to collision, of traveling at excessive speed at a place 8 miles distant from scene of collision, *held* erroneous.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Emma Blackford against E. L. Beckworth. Judgment for defendant, and, from an order granting a new trial, defendant appeals. Affirmed.

Arthur E. Koepsel, of Santa Ana, for appellant.

Marks, Launer & Collins, of Fullerton, for respondent.

HAZLETT, Justice pro tem. Plaintiff, Emma Blackford, is the surviving wife of Lewis Blackford, who died as the result of a basal fracture of the skull and other injuries, resulting from the head-on collision of a motorcycle he was riding with a Dodge truck driven by defendant, Beckworth. The collision occurred on February 21, 1923, on the public highway running between Riverside and Anaheim.

Plaintiff sued for $15,922.55 as damages resulting to her by reason of her husband's untimely death, including loss of his earnings and companionship and her disbursements. The case was tried by a jury, and the verdict and judgment thereon went for defendant. Plaintiff moved for a new trial, which was granted on the grounds that errors of law occurred in the trial, that the evidence was insufficient to justify the verdict, and that the verdict was against the law. Defendant appeals.

The evidence introduced by the parties, considered together, shows the following additional facts, without conflict:

The highway was paved with a 16-foot pavement, and on its south side at the place of collision the dirt shoulder of the highway was about 9 feet wide, and suitable to be driven upon. The deceased was traveling easterly and the truck westerly. Immediately preceding the collision defendant was driving the truck following other vehicles, all going slowly, because the head vehicle was a gravel wagon drawn by horses. Defendant observed deceased approaching from the west, distant about 400 to 500 feet, and swerved his truck to the south upon the south half of the pavement to pass the other vehicles, whereupon he observed deceased about 100 feet away. He applied his brakes, and stopped his truck so that the left front wheel was from 2 to 3 feet from the south edge of the pavement. Deceased was traveling near the center of the south half of the pavement; he swerved a little to the north, striking his motorcycle against the front end of the truck and he was thrown to the dirt and injured, as the result of which he died ten days later. Deceased was given the medical treatment usually administered in cases of fractured skulls.

Defendant testified that deceased was traveling at 40 or more per hour, and plaintiff's witnesses testified that his rate of speed was 25 to 30 miles per hour.

One witness for defendant, over plaintiff's objections, testified that, during a period of some months ending about six months before the collision, he observed the deceased twice a day riding his motorcycle on that highway at a place 8 miles distant from the place of collision, and that deceased then traveled there at a speed of 40 to 50 miles per hour. A witness for plaintiff testified that he observed deceased traveling on that highway twice a day for some time immediately preceding the collision, near the place of collision, and that he traveled not more than 25 to 30 miles per hour.

Appellant contends that deceased was negligent, and that his negligence contributed proximately to his injuries, that the court erred in holding that error was committed in admitting evidence of prior habit of deceased in driving his motorcycle at a speed of more than 40 miles per hour, and that the proximate cause of his death was improper and inefficient medical attention between the time of the collision and his death.

[1] There is ample evidence in the record indicating lack of due care on the part of defendant in attempting to pass the vehicles in advance of his when he had observed deceased approaching, as he testified, at high speed, and only 400 to 500 feet distant upon the narrow pavement, and there is some conflict in the evidence as to whether deceased was negligent, but there is sufficient in the record to justify the court in his determination that deceased was not guilty of negligence which would prevent recovery by plaintiff.

[2] While appellant's counsel says that the only question in the mind of the trial judge when considering the motion for a new trial was the error of law later discussed in this opinion, yet we are confronted by the ruling which recites another ground also. The other ground is that the evidence was insufficient to justify the verdict. Under these circumstances, the granting of a new trial is a matter resting very largely in the discretion of the trial court, and its action will not be disturbed, unless the record discloses manifest and unmistakable abuse of discretion. Where a reasonable or even a fairly debatable justification under the law for the ruling of the court is shown, the ruling will not be disturbed. These rules have been so often announced that no citation of authorities is necessary. No abuse of discretion is shown.

[3] It appears that the trial court did commit error in admitting testimony as to the habit of deceased 6 months prior to the collision in traveling at a place 8 miles distant at a speed greater than 40 miles per hour. The collision occurred very near a turn and a bridge in the road. This testimony does not necessarily indicate that he was accustomed to travel at an excessive speed at the place of collision. He may have continued to travel at high speeds on the straight roads where there was little or no other travel, and, if he did, it does not necessarily follow that he continued his high speed where it was not reasonably safe to so travel. This error was sufficient basis for a new trial.

Evidence of previous conduct and habit of the injured person continued up to and at the time of the injury has been admitted when there were no eyewitnesses to the occurrence. Wallis v. Southern Pac. Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. 117. See, also, Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 281, 201 P. 599; Larson v. Larsen, 72 Cal. App. 169, 172, 236 P. 979; Craven v. Central Pacific R. Co., 72 Cal. 345, 347, 13 P. 878; People v. Crossan (Cal. App.) 261 P. 531. There were eyewitnesses to the occurrence complained of in this action who testified at the trial.

The evidence indicates that deceased received proper medical attention, although the fracture in his skull was not discovered by the attending physician until after his death.

The order granting a new trial is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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90 Cal. App. 19

BERGER v. LODGE et al. (Civ. 6158.)

District Court of Appeal, First District, Division 2, California. March 9, 1928.

Usury 🔑32—That time price under conditional sales contract was considerably higher than cash price held not to render contract void as usurious.

Conditional sales contract, under which seller of automobile exacted price considerably above price demanded for cash, *held* not void as usurious, where it was not shown that difference was reserved as interest of a charge for a loan or forbearance of money; owner of property having right to name price at which he is willing to sell.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Paul Berger against R. E. Lodge and another, copartners doing business under the name and style of Lodge & Wilkerson. From a judgment for defendants, plaintiff appeals. Affirmed.

Hyams & Himrod and Overton, Lyman & Plumb, all of Los Angeles, for appellant.

John G. Sinclair and Lowenthal, Collins & Lowenthal, of Los Angeles, for respondents.

MURPHEY, Justice pro tem. This is an action for declaratory relief and to determine the legality of a conditional sales contract for the purchase of an automobile. The question at issue is whether or not the contract violates the usury law of the state of California. The trial court held the contract was legal and enforceable, and gave judgment in favor of the defendants and against the plaintiff on which judgment the plaintiff prosecutes this appeal.

After disposing, by stipulation, of the formal and generally immaterial paragraphs of the pleadings by the respective parties, the cause was submitted to the court upon a stipulated statement of facts, substantially as follows: That at the time the conditional sales contract, referred to in the complaint, was executed, the plaintiff inquired of the defendants if it were possible for him not to purchase said automobile for cash, but to purchase said automobile on time. Defendants informed plaintiff that the price of $1,010 was a cash price, but that, if the plaintiff desired to purchase the said automobile on time payments, the times sales price on said automobile would be $1,112.69. It was further stipulated that there was no conversation between plaintiff and defendants relative to any interest charge or a charge for the loan or forbearance of money and there was no conversation that the sum of $102.69, being the difference between the cash price and the time sales price, was to be in any way interest or a charge for the loan or forbearance of money. It was further stipulated that at no time did the plaintiff state to the defendants that he was unable to pay the full purchase price of said automobile in cash, and in this behalf it is further stipulated that the plaintiff informed the defendants that he preferred to buy said automobile at the time sales price rather than for the cash price. This latter stipulation negatived an allegation in plaintiff's complaint to the effect that at the time of the negotiations for the purchase of the car the plaintiff informed the defendants that he was unable to pay the full purchase price of the car in cash.

At the time the appeal in this case was taken, the question as to whether a transaction of this character fell within the purview of the usury laws of this state had not been specifically passed upon by our appellate or Supreme Courts. The great weight of authority, however, in other jurisdictions having similar laws, extends little comfort to the appellant's contention. However, since this case was briefed, the Supreme Court in the case of Verbeck v. Clymer, 261 P. 1017 (decided in December of 1927), has definitely and finally determined that under conditions disclosed by the stipulated facts of this case there is no infringement upon or invasion of the provisions of our usury law. The court says:

> "But we have no hesitancy whatsoever in declaring that the transaction set up in the answer and cross-complaint is not in any sense a loan within the meaning of said usury law. The contract is admittedly a bona fide one of sale and purchase of real property where the title is retained by the vendor. The purchase price is therein named, and the terms of sale are fixed, and certain deferred payments are provided for. There is in the transaction no element of a loan. The parties were unfettered, dealt with each other at arm's length and in apparent good faith. The transaction was not a subterfuge devised to conceal what was in fact a loan. In view of this conclusion there is no room whatsoever for the contention that the usury law will intervene to give equitable relief to defendants or to penalize the plaintiffs. * * * This principle is announced as follows in 39 Cyc. p. 926: 'It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such a sale, if bona fide, cannot be usurious, however unconscionable it may be.'
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> "The principle is stated in 27 R. C. L. pp. 213, 215, §§ 14, 15, as follows: '* * * On principle and authority, the owner of property, whether real or personal, has a perfect right to name the price on which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury however great the difference between the two prices, unless the buying and selling was a mere pretense.' * * *
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> "In the case of Holland-O'Neal Milling Co. v. Rawlings, 217 Mo. App. 466, 479, 268 S. W. 683, 686, the court said: 'The owner of property, whether real or personal, has a right to name the price at which he is willing to sell. He may offer to sell at a designated price for cash, or at a much higher price on a credit, and a credit sale will not constitute usury."

It is apparent that the contract involved in this action, in view of the stipulated facts, was not a subterfuge designed to conceal a loan, nor is there a suspicion of any undisclosed purpose lurking in the background. The contract was exactly what it purported to be, and is not tainted with any suggestion of unlawful purpose.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

90 Cal. App. 114

BAGWILL v. PACIFIC ELECTRIC RY. CO.

CONSOLIDATED LUMBER CO. v. SAME.

(Civ. 6276.)

District Court of Appeal, First District, Division 1. California. March 14, 1928.

1. Appeal and error 🔑927(3)—Established facts must be viewed favorably to plaintiff in considering ruling on motion for nonsuit.

In considering court's ruling on motion for nonsuit, established facts must be viewed in the light most favorable to plaintiff.

2. Railroads 🔑348(6)—Negligence of truck driver held to have proximately contributed to collision with electric cars on highway crossing.

In action to recover for personal injuries and property damage arising out of collision of truck with electric cars on highway crossing, evidence *held* to show as matter of law that negligence of truck driver proximately contributed to accident.

3. Negligence 🔑83—"Doctrine of last clear chance" presupposes that defendant, having chance to avoid injuring negligent plaintiff, fails to avail himself of opportunity.

"Doctrine of the last clear chance" presupposes that plaintiff had been negligent and finds himself in a situation of danger from which he cannot escape by exercise of ordinary care, and that defendant is aware of such situation, and, having a clear chance to avoid injuring plaintiff by exercise of ordinary care, fails to avail himself of opportunity so presented.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

4. Railroads 🔑350(33)—Evidence of electric railroad's liability for collision with truck at highway crossing under doctrine of last clear chance held insufficient for jury.

In action to recover for personal injuries and property damages resulting in collision of truck with electric cars on highway crossing, evidence of railway's liability under doctrine of last clear chance *held* insufficient for jury.

Appeals from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Separate actions by Sam R. Bagwill and by the Consolidated Lumber Company against the Pacific Electric Railway Company. Judgments for defendant, and plaintiffs appeal. Affirmed.

William Kehoe, of San Francisco, and Andreani & Haines, of Los Angeles, for appellants.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

PARKER, Justice pro tem. These actions arose out of the same state of facts as will hereinafter appear. By order of court and stipulation of counsel, the actions were consolidated for trial.

The plaintiff Bagwill in the first action was the employee of Consolidated Lumber Company, plaintiff in the second action. While employed as a truck driver and while operating the truck of the Consolidated Lumber Company the plaintiff Bagwill collided with a train of cars owned and operated by defendant Pacific Electric Railway Company, and out of this collision the two actions arose. Bagwill sued for damages resulting to himself, and the lumber company brought the action for damage to the truck.

Upon the conclusion of the testimony offered on behalf of both plaintiffs, the court below granted defendant's motion for a nonsuit in both cases; hence the appeals, which present the question of the sufficiency of the evidence to justify a submission of the case to the jury.

[1] In considering the court's ruling on the motion for nonsuit, the established facts must be viewed in the light most favorable to plaintiff. Young v. S. P. Co., 189 Cal. 754, 210 P. 259.

The accident occurred in the county of Los Angeles at a place between Los Angeles and Long Beach, and more particularly described as the point of intersection of American avenue and Willow street. Willow street runs east and west, and American avenue at a right angle thereto. South of Willow street, American avenue is divided by the private right of way of defendant railway company, upon which was operated the train in this case, one-half of the avenue lying east and the other half west of the right of way; whilst north of Willow street the avenue lies wholly on the east side of such right of way. Two parallel railroad tracks run along the right of way, and a short distance from Willow street there is a spur track starting from the westerly track of the two, which spur extends across and north of Willow street, so that, where Willow street and the right of way intersect there are three parallel railroad tracks to be crossed in crossing American avenue. The traffic regulations, supported by ordinance, require that all traffic going south on American avenue turn to the right at Willow street, cross the tracks and proceed southerly on that portion of American avenue west of the right of way. As heretofore noted, American avenue north of Willow street is on the east side of the right of way. At Willow street are traffic signs reading, "Turn to right," and "South-bound traffic must drive on right-hand side of tracks." American avenue is one of the principal thoroughfares running from Los Angeles to Long Beach, and this crossing at Willow street is the scene of much traffic, though nothing appears in the present record indicating that at the time of the accident in question there was any traffic other than the truck driven by plaintiff Bagwill. About 10:30 a. m. on May 14, 1923, the weather being clear, Bagwill drove the truck south on American avenue to Willow street, where he turned to the right to pass over the crossing, and while the rear wheels of the truck were on the easterly railroad track the train hit it.

There are three points discussed in the briefs, and within these three is embraced the entire case, first, the question of defendant's negligence; second, plaintiff's contributory negligence, if any; third, the doctrine of last clear chance. For the purposes hereof at this stage, we pass the question of defendant's negligence, and consider the conduct of plaintiff.

Plaintiff Bagwill was a young man, aged 28 years, and, as far as the record discloses, in possession of all of the ordinary faculties. Up to the date of the accident he had been driving truck for Consolidated Lumber Company over a period of 8 months. Before the accident he had gone over that crossing six or eight times a week during the time he was driving. His truck was a 5-ton truck, 28 feet long, and weighing in the neighborhood of 11,000 pounds when empty, and it was empty at the time of the accident. On the morning in question, driving south on American avenue, he was proceeding alongside of the railroad tracks. There was nothing to obstruct his view except that the record discloses that along the right of way telephone poles had been set and stood at a distance of approximately 100 feet apart. As he was driving south on American avenue close to the tracks, the course of the train would be north on the same avenue on a straight stretch; in other words, had he continued his course south, the train and truck would have passed each other going in opposite directions. When he came to Willow street he followed the usual traffic and turned to the right to make the crossing. The tracks were about 18 inches above the level of the road, and this difference was graded by an incline of about 5 feet. The rails of the tracks protruded about 3 or 4 inches above the surface. Considering the length and weight of the truck and the condition of the crossing and grade,the highest speed at which the truck could be driven empty over the crossing was not to exceed 3 to 5 miles an hour. The weather on that morning was dry, and it had not been foggy. The plaintiff Bagwill does not recall what happened at the time of the collision, nor does he recall anything about approaching the crossing or going over the tracks or of being struck. The last thing he remembers of occurrences just before the accident was that some 20 minutes before reaching the crossing he stopped on the road and purchased a cigar. The speed usual for him in coming down American avenue was 15 miles per hour. Further he testified that in his daily work he had to cross many tracks and rights of way, and that it was his habit in crossing to look and listen as he approached crossings. The tires on the front wheels of the truck were solid. In making this particular crossing, it was necessary to approach the track square, for the reason that, if an oblique or cutting-in approach were attempted, the wheels would skid, and the truck go down the car track. The truck could be stopped in one second. All of the foregoing statement is from the testimony of plaintiff Bagwill.

The train in question was traveling north on the extreme easterly rails, being the rails first encountered in crossing. It was a four-car train, and prior to the happenings here discussed was traveling at a speed of from 40 to 45 miles per hour. Nothing in the record indicates that the speed was unusual at the time and place. No claim of violation of any law or ordinance is pleaded or urged here. A passenger on the train, one named Frank West, gave testimony as follows:

> "When the car was within 300 feet of the crossing I saw the truck nearing the incline to go across the track. He had not gotten on the track at all. He proceeded on the track when we were about 150 feet from the crossing. The motorman was sounding his bell. The condition of the weather was clear. There was no fog, and it had not been raining. I had no trouble seeing the truck as I was seated in the front seat of the front car in the rear of the motorman's cab. I saw the truck before he made the turn. He made a big wide swing to get around there with the big truck like that, 28 feet long."

The remainder of the testimony differs little from that already outlined. This is particularly true with reference to the conduct of plaintiff Bagwill.

[2] We think this shows sufficiently that the negligence of plaintiff proximately contributed to the accident. In fact, we could go further and conclude that it did more than that. There is no doubt but that plaintiff was guilty of contributory negligence. There is no escape from the conclusion from the uncontradicted evidence that the driver of the truck closed his eyes to the danger necessarily involved in an attempt to cross the track and blindly drove his truck into the path of the on-coming car. Martz v. Pacific Electric R. Co., 31 Cal. App. 592, 161 P. 16.

The appellants herein lay much stress on the claim that it must be presumed that the driver looked and saw the train coming, this presumption arising from the driver's statement that it was his custom to stop and look at all crossings though he had no memory as to his conduct at the time in question. Under the facts here little aid can be derived from this presumption. The driver did not get on the track until the train was within 150 feet of him; and, as the witness West could easily see the truck when 300 feet away, it is an inevitable inference that the driver if he looked must have seen the approaching train. The case seems so plain that it is unnecessary to digest the authorities on the subject.

The case of New York Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, is particularly in point. By merely changing the names of the parties, the cited case would suffice as an opinion here as to the facts. This case reviews the authorities and announces the law which sustains the action of the lower court in the instant case.

[3] Lastly, appellants urge that the trial court should have resorted to and applied the doctrine of the last clear chance. This doctrine presupposes that the plaintiff has been negligent; that as a result thereof he is in a situation of danger from which he cannot escape by the exercise of ordinary care; that the defendant is aware of plaintiff's dangerous situation under such circumstances that he realizes or ought to realize his inability to escape therefrom; that the defendant then has a clear chance to avoid injuring the plaintiff by the exercise of ordinary care and fails to avail himself of the opportunity so presented. If all of these elements are present, the rule applies and enables the plaintiff to recover notwithstanding his own negligence; but, if any of them be absent, the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence. Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36; Chappell v. San Diego & Arizona R. R. (Cal. Sup.) 258 P. 73. The doctrine is applicable when the defendant actually perceives the perilous position of plaintiff in time to avoid the accident by the exercise of ordinary care. Chappell v. San Diego & Arizona R. R., supra; N. Y. Oil Co. v. United Railroads, supra. In the last-mentioned case we find this apt language:

> "Conceding * * * that the motorman, while he was yet some distance from the point of collision, was aware of the approach of the truck, nevertheless * * * the driver of the truck was * * * aware of the approach of the" train and "could have brought [his] truck to a standstill within a distance of three feet. There was a concurrent duty, as a matter of law, upon the part of the driver of the truck to stop, if possible, before the actual collision occurred. Obviously the truck proceeding at the slow rate of speed mentioned, and with the ability to stop within the short distance of three feet, had the greater opportunity to avoid the collision. And so long as the negligence of the driver of the truck in continuing on in his course to the point of crossing the tracks of the defendant was contemporaneous and concurrent with that of the defendant's motorman, plaintiff cannot rightfully rest [his] case upon the doctrine of last clear chance."

In the instant case the witness West, a passenger upon the train, testifies that he saw plaintiff going onto the track at a point 150 feet distant from the point of collision, and that the brakes took hold about 75 feet from said point of contact, and that the train slowed down and started to slide up to the collision. It would be and is a matter of common knowledge that, even if we assume that thought and action were simultaneous on the part of the motorman, it would take a little time for the brakes to take hold after the motorman had operated whatever mechanical devices were employed to effectuate the braking. The truck was at no time stalled on the track, but was moving all of the time and was unloaded; and it is a fair inference that, with knowledge of the train's approach, if the driver attempted the crossing, as he did, he would be able to negotiate the passage in safety. It was probable that even then he could have accelerated his pace and gotten safely over. Young v. Southern Pacific, 182 Cal. 380, 190 P. 36.

[4] We have a four-car train moving 45 miles per hour on its own right of way. The motorman is confronted with a situation which requires his action to avoid striking an object within 150 feet. The situation calling for immediate action is brought about through no fault of the motorman. Within 75 feet he has applied all of his brakes sufficient to cause the train to slide. This means that he has brought about the brake application within practically one second of time. Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine of last clear chance. It was not devised as a last resort to fasten liability on defendants. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. The law in many of its workings indicates great charity and solicitude for individual rights. It says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, willful, or avoidable harm. But, on the other hand, it penalizes no innocent person. We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance. The Supreme Court has not left us to speculate on the application of the doctrine. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Young v. Southern Pacific, 182 Cal. 369, 190 P. 36; Wallis v. Southern Pacific, 184 Cal. 662, 195 P. 408, 15 A. L. R. 117; Gainer v. United Railroads, 58 Cal. App. 459, 208 P. 1013.

The judgments are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 674

LESEM v. TERRY. (Civ. 5818.)★

District Court of Appeal, Second District, Division 1, California. March 5, 1928.

Hearing Denied by Supreme Court May 3, 1928.

1. Trusts 🔑89(2)—Finding that not all money paid for realty was plaintiff's held contrary to evidence, where defendant contributed nothing to joint bank account used therefor.

In action to recover property alleged to have been paid for by plaintiff's funds, title to which was taken in name of defendant, finding that not all of money paid for property belonged to plaintiff was contrary to evidence although part of funds used therefor was from a joint bank account of plaintiff and defendant, since establishment of such joint account to which defendant contributed nothing did not vest her with any ownership of funds therein, but merely authorized her to draw money therefrom for purposes appropriate to manner in which parties were living together.

2. Gifts 🔑49(4)—Evidence held sufficient to sustain finding that lot was conveyed to defendant as a gift from plaintiff.

In action to recover lot alleged to have been purchased with plaintiff's funds, title to which was taken in name of defendant, evidence *held* to sustain finding that lot was conveyed to defendant at instance of plaintiff and with intention of making a gift thereof to her.

3. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence that deed to lot was never delivered, supported by evidence, is conclusive.

In action to recover a lot alleged to have been paid for with plaintiff's funds, title to which was taken in name of defendant, where there was evidence that it was so conveyed to her as a gift from plaintiff, trial court's finding on conflicting evidence that defendant did not deliver deed of reconveyance, subsequently executed by her and once tendered to plaintiff and refused, is binding on appeal.

4. New trial 🔑99—New trial held properly refused where newly discovered evidence was either inadmissible, cumulative, or no diligence shown in obtaining testimony.

New trial on ground of newly discovered evidence was properly refused where supporting affidavits related to matters which were either inadmissible, merely cumulative, insufficient for lack of showing of due diligence to obtain testimony of witnesses at trial, or related to questions which might have been propounded to witnesses who testified at trial.

5. New trial 🔑108(1)—New trial for newly discovered evidence was properly refused where proposed evidence would not have changed findings.

New trial on ground of newly discovered evidence was properly refused where proposed evidence, even if admissible, would not have led trial court to make findings different in effect and result from those made.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Johanna Lesem against Edith Terry. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 265 P. 523.

Hearing denied by Supreme Court: PRESTON, J., voting for a transfer.

J. L. Murphey, of Los Angeles, for appellant.

Page, Nolan, Rohe & Hurt, of Los Angeles, (George W. Nilsson and Jerome O. Hughes, both of Los Angeles, of counsel), for respondent.

CONREY, P. J. The defendant, whose true name is Eva Sophia Lesem, is an unmarried woman and is a daughter of the plaintiff. "Edith Terry" is a name assumed by the defendant and is the name under which she acquired any interest she may have in the property involved in this action.

The briefs filed herein by counsel for appellant contain numerous expressions which can only be construed as disrespectful to the trial court and to the judge who tried the case. It would be laborious and time-consuming to segregate these expressions and strike them from the briefs. It would impose upon appellant, an aged woman, a burdensome expense in the filing of new briefs if those now here should be stricken from the files. The objectionable statements have no effect except to increase the difficulties of the court in its endeavor to consider the arguments presented.

The original complaint in this action was filed on the 14th day of April, 1923. In that complaint plaintiff sought to obtain a decree quieting title to lot 1 in block 11 in the city of Beverly Hills. Plaintiff alleged that in December, 1921, she purchased said lot at the price of $7,500, paying $5,000 in cash out of her own funds, and taking the property subject to an existing mortgage of $2,500, and thereafter took possession of the lot and of the house thereon, installed her furniture therein, and made it her place of residence. Plaintiff alleged that the defendant resided on said premises with the plaintiff until the 15th day of March, 1923, when the defendant, during the temporary absence of the plaintiff, bolted and barred the house against the plaintiff and thereafter excluded the plaintiff therefrom and claimed to be the sole owner thereof. Plaintiff alleged that at and prior to the time of purchase of said premises the defendant resided with the plaintiff and acted as plaintiff's secretary, and was given full charge of all business matters of the plaintiff, and was given authority to draw moneys on the plaintiff's bank account, and that the plaintiff put full confidence and trust in the defendant; that in the deed of conveyance of said real property the defendant caused her own name to be inserted therein as grantee, but promised and agreed that she would hold the property for plaintiff and convey it to her at any

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★Hearing denied by Supreme Court.

time; that plaintiff, believing in the integrity and loyalty of the defendant and in her promises, permitted the property to remain in the defendant's name as Edith Terry ever since said time; that the defendant paid nothing on account of the purchase price and gave no consideration therefor and was, in fact, without any property or income of her own; that prior to the commencement of the action plaintiff requested the defendant to convey said real property to the plaintiff in pursuance of the said trust, but the defendant failed and refused to make such conveyance. In addition to her prayer concerning the real property, plaintiff requested judgment that plaintiff is the owner of all the personal property in the house on said premises, with certain stated exceptions. By amendment to her complaint, the plaintiff included in her pleading an extensive statement of facts concerning the relations, which for many years past had existed between the plaintiff and the defendant, together with other members of the family, and the family history, particularly in relation to property and business, and with much detail of circumstances charged that at the time of the purchasing of said real property, and for some years prior thereto, the defendant had planned and schemed to obtain all the property of the plaintiff prior to the death of the plaintiff, and that the conduct of the defendant whereby she obtained a conveyance of said real property to her own name as grantee was in pursuance of said plan and scheme, and that the consummation thereof was obtained by taking advantage of the bodily and mental weakness and suffering of the plaintiff; that the plaintiff being at that time very ill and in a suffering condition was unable to and did not prevent the placing of her funds in a joint account with the defendant, and that under like circumstances not only the said lot 1 in block 11, but other described real property, was purchased with funds of the plaintiff and title taken in the name of the defendant. Concerning said lot 1 in block 11 and other property described in the action, the complaint as amended further alleged a conspiracy between the defendant and one Parker, pursuant to which the plaintiff was excluded from said premises and steps were taken to have the plaintiff declared insane and incompetent. It was not alleged, however, that any formal insanity proceeding was actually commenced.

The defendant, by answer and by cross-complaint, raised issues fully covering the merits of the action, and among other things contended that the conveyance of said lot 1, block 11, to the defendant was by the plaintiff intended and declared to be and was a gift to the defendant. The defendant further sought to quiet her own title to said real property and to establish her ownership of sundry articles of personal property.

It is at once apparent that these pleadings, which alone extend to more than 100 typewritten pages, furnished material for an extensive trial; that they did so is evidenced by a reporter's transcript of more than 2,000 pages. At the conclusion of the court's findings of fact, which were in 46 paragraphs covering multitudinous issues of both major and minor significance, the court determined therefrom that the defendant is the owner of the described real property in her own right and not subject to any trust for the plaintiff, and that the defendant is the owner of certain described personal property. Judgment was entered accordingly, and from this judgment the plaintiff appeals.

There are numerous assignments of error, but the briefs are wanting in any orderly statement of the points on which appellant relies, and so are hard to follow through. In general terms, it may be said that appellant claims that the evidence is insufficient to justify some of the findings of fact, and also claims that the court erred in denying her motion for a new trial.

Finding VII reads as follows:

> "That it is true that plaintiff and not defendant caused the premises described in the complaint to be conveyed by deed to defendant in defendant's name for the purpose and with the intention of making a gift of said premises to the defendant, and that defendant was actually given said property by plaintiff in consideration of love and affection, and ever since the date of said conveyance has been and now is the owner thereof."

In paragraph XXII the court found:

> "That it is true that defendant never delivered any transfer or conveyance of said premises to the plaintiff. That it is also true that defendant and plaintiff had many quarrels and controversies, and that in the course of one of said quarrels and controversies defendant offered a conveyance of said home property to plaintiff, but that plaintiff refused to accept the same."

Concerning these findings counsel for appellant contends, first, that the evidence is insufficient to prove that any gift of said real property was made to the defendant; and, second, that if any gift was made in the first instance, then the evidence is insufficient to sustain the finding that the defendant did not thereafter reconvey the property to the plaintiff. While the complaint did not allege that the defendant ever made such reconveyance much evidence was taken on that assumed issue, and the plaintiff attempted to prove that the reconveyance was in fact made. The questions thus presented in reality cover the principal issues of the case.

[1] The court found that it was not true that all of the money paid for said property was the money of the plaintiff. We think that this finding is contrary to the evidence. The only evidence under which it could have been contended that any of said money was

property of the defendant is the evidence that funds of the plaintiff had been deposited in bank in the joint names of the plaintiff and the defendant, and that a part of those funds was used in paying for said real property. But such establishment of such a joint account to which the defendant contributed nothing did not vest in the defendant any ownership of said funds. It did authorize and permit her to draw money from that account for purposes appropriate to the manner in which the parties were living together, but this did not make defendant an owner of the funds. Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 P. 389; Mutual Ben. Life Ins. Co. v. Clark (Cal. App.) 254 P. 306.

[2] Assuming, therefore, that the court had found, as it should have found, that the consideration for the real property was paid wholly by the plaintiff, we are brought to the simple question whether or not the conveyance as made was a gift to the defendant. The plaintiff testified that she did not learn that the deed was in her daughter's name until 5 or 6 weeks after it was made, and then the defendant told her it had been thus made; that the defendant at that time promised that she would at any time deed all of her property back to her whenever the plaintiff wanted it. On the other hand, Mr. Beasley, the bank officer in whose presence the plaintiff and the defendant had some conversations while the transaction was pending about the time when the deed was placed in escrow in his bank, stated (transcript, p. 210) that in December, 1921, or January, 1922 (which was the time when the transaction of purchase of lot 1, block 11, was pending), he was present at a conversation in which the plaintiff and the defendant were discussing the matter of "just how they would take title"; that they asked him questions (page 221) concerning what would happen in the case of death if the property was deeded to one or the other or both of them, etc.; that after some discussion (page 225) Mrs. Lesem said:

> "She would take—or have the property taken in Miss Terry's name and Miss Terry would sign the escrow instructions."

Myer Newberger, an acquaintance of plaintiff and defendant and an occasional visitor at their home, testified that Mrs. Lesem, on a stated occasion while talking about another piece of property which she was buying, said to him that:

> "This belongs to Eva—this and the things that are in it. I will go over there and live over there."

This was in response to his question asking Mrs. Lesem what she was going to do with *this* property. The context shows that he was referring to said lot 1 in block 11. Testimony substantially to the same effect was given by Mrs. Newberger and by Lottie Frankenthal. The defendant herself gave testimony which may be summarized as in substance showing that at the time when the purchase was determined upon of said lot 1, block 11, the plaintiff "said that she was glad to give it to me as a gift as she had intended."

Without following the evidence in further detail, we are satisfied that the evidence is sufficient to sustain the court's finding to the effect that the lot when conveyed to the defendant was so conveyed at the instance of the plaintiff and with the intention of making a gift thereof to the defendant.

[3] We come now to the question of the reconveyance. Upon cross-examination of the defendant she testified, in substance, that in August, 1922, a controversy arose between herself and the plaintiff, wherein the plaintiff told defendant that defendant was a thief and a swindler, "and she hadn't come from New York to be done out of her property"; that thereupon defendant said she did not want anything that was begrudged her, and immediately she called up certain persons and arranged for the preparation of several deeds. Two of these deeds conveyed to plaintiff other real property which had been taken in the defendant's name. The third deed was a conveyance of the property which is the subject of the present action. The fourth was an assignment of mortgage. The witness stated that she "delivered" these instruments all at the same time to her mother. With respect to the deed in question here, she said, "I gave it to my mother and she refused it." She further said, "I saw it lying with the other deeds afterwards where she put them on the table;" that she destroyed this deed "after mother again refused it." The time of this second "refusal" was stated to have been in February shortly before the plaintiff left the house. The witness stated that the plaintiff said:

> "'I don't want the house. I told you that before. I meant you to have the house, and I want you to have the house.' And I said, 'All right, if you feel that way about that, I will keep it, and if you want, when I sell it I will give you the $5,000 that you originally invested in it.' And she said, 'You may do as you like about that, but I don't want that, either.'"

At that time this deed, together with the other deeds, was lying on the table in the defendant's room. The witness further testified:

> "Q. Well, the parcel that—the deed that you say you destroyed after giving it to your mother — A. I didn't say I gave it to her. I said I offered it to her and she refused it."

Concerning the asserted refusal of plaintiff to accept the deed to this property, the plaintiff was examined in reference to the defendant's testimony:

> "Q. * * * She states that after she gave them to you that you told her you wouldn't take

the deed to the home place, or words to that effect; that you didn't want it. What about that? Did you so state to her? A. I never said such a thing; no, no."

The plaintiff further testified that at the time of the interview, when it claimed the deeds were delivered, "I didn't touch them"; that she did not look at the deeds at that time. "I left them there." Again:

> "When I wanted to put my hand to it my daughter said, 'You can't take them yet. They are not right.'"

Other evidence in the record indicated that there were in fact at that time some errors in the instruments which required correction. The plaintiff testified that she did not see these deeds again until February, when she found them in that same room, but that the deed to the lot in controversy here was not there. In connection with the offer of plaintiff's evidence on this subject attention was called to the fact that the witness, in a deposition, had stated "that there was never four deeds delivered." Counsel for defendant admitted that the witness had so testified, and stated that he was expecting to have the witness now explain that because when she went to get the deeds she found only three, she thought that the deed had not been delivered. It is not necessary to more extensively quote or state the evidence on this question. It has become very clear that the evidence is conflicting. This being so, and there being substantial evidence in support of the finding by the trial court that the defendant did not deliver any deed of conveyance of said premises to the plaintiff, we are of the opinion that the finding should stand as made.

[4] It is contended by appellant that the court erred in denying her motion for a new trial. In so far as the motion rested upon the claim that the evidence was insufficient to sustain the findings, no more need be said. But it is further contended that a new trial should have been granted upon the ground of newly discovered evidence. To sustain this last claim, several affidavits were introduced. In many particulars the contents of these affidavits may be eliminated from consideration because they relate to matters not admissible in evidence. Others are merely cumulative upon points concerning which evidence was produced. Others are insufficient because there is no showing of due diligence to obtain the testimony of the witnesses at the trial of the case. Others relate to questions which might have been but were not propounded to witnesses who testified at the trial. After these items have been excluded, very little remains to be considered. To set forth these items and discuss them in relation to the case would add many pages to this decision. This is not necessary. We have read the affidavits, and have endeavored to give them due consideration.

[5] We are of the opinion that the proposed new evidence, even if the admissible part of it had been given at the trial, would not have led the court to make findings different in their effect and result from those that were made. This is particularly true in reference to the witness Mrs. Dazian, whose testimony is one of the principal subjects of these affidavits. We are satisfied that the court did not err in refusing to grant a new trial for the purpose of hearing the proposed additional testimony.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

89 Cal. App. 682

TERRY v. LESEM et al. (Civ. 5819.)★

District Court of Appeal, Second District, Division 1, California. March 5, 1928.

Hearing Denied by Supreme Court May 3, 1928.

1. Gifts 🔑49(4)—Evidence held to sustain finding that property paid for by defendant was conveyed to plaintiff with intention to make gift.

In action to quiet title to land paid for out of defendant's funds, title to which was taken in plaintiff's name, evidence *held* to sustain finding that title to land was taken in plaintiff's name to carry out defendant's intention of making a gift to her.

2. Appeal and error 🔑1010(1)—Finding that deed was not delivered, sustained by sufficient evidence, is binding.

Where plaintiff alleged that her deed for lot to defendant was never delivered, but that defendant took possession of it and caused it to be recorded, finding that deed was not delivered sustained by sufficient evidence is binding on appeal.

3. New trial 🔑153—Affidavits not filed within 30 days after notice of intention to move for new trial held properly stricken, notwithstanding ineffectual attempt to grant additional time (Code Civ. Proc. § 659).

Where notice of intention to move for new trial was served on March 18, affidavits served on April 24 were properly stricken from files, though court on March 23 made order extending time to serve and file affidavits for 30 days in addition to time given by law, since excess beyond 20 days additional, as permitted by Code Civ. Proc. § 659, was beyond court's authority to grant.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Edith Terry against Johanna Lesem and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., voting for a hearing.

J. L. Murphey, of Los Angeles, for appellant.

★Hearing denied by Supreme Court.

Page, Nolan, Rohe & Hurt, of Los Angeles (Jerome O. Hughes and George W. Nilsson, both of Los Angeles, of counsel), for respondent.

CONREY, P. J. The plaintiff, whose true name is Eva Sophia Lesem, is an unmarried woman and is a daughter of the defendant. "Edith Terry" is a name assumed by the plaintiff and is the name under which she acquired any interest she may have in the property involved in this action.

In her complaint plaintiff alleged that she is, and ever since January 8, 1923, has been the owner of lot 9 of block 11, in the Beverly Tract, in the county of Los Angeles, and that the defendants, without right, claim an interest or estate therein adversely to the plaintiff. As defendant Short disclaimed any interest adverse to plaintiff, we shall treat the case as if Mrs. Lesem were sole defendant. A second cause of action alleged that plaintiff made, but did not deliver, a deed of conveyance of said lot to the defendant; that the defendant, without plaintiff's knowledge or consent, took possession of said deed and caused the same to be recorded; that said deed, so wrongfully obtained, is a cloud upon plaintiff's title.

Upon issues presented by said complaint and appellant's answer thereto, and after an extended trial, the court made findings and entered its decree in favor of the plaintiff. The defendant Lesem appeals.

In the case of Lesem v. Terry (Civil No. 5818) 81 Cal. App. —, 265 P. 520, we have this day filed our decision. This present case (Civil No. 5819) is between the same parties, and relates to a different parcel of land. The case now before us was tried some time later than the case of Lesem v. Terry. While there were separate trials, a large part of the evidence in each case covered the same series of transactions and the same relations between the parties. Much of the testimony given at the earlier trial was read into the record in this case. The appeals were presented in a single oral argument, although the records and briefs are separate. Counsel for appellant in his brief herein says:

> "The only real difference between the facts of that case and this one is that Mrs. Lesem in this case placed the deed that was made to her by her daughter on record, and that the daughter in the other case destroyed the deed to the other lot and said other deed was not recorded, although it was delivered."

In the other case (Civil No. 5818) the trial court found that the deed in question there was not delivered, and this court has affirmed that judgment. In each case the daughter, Miss Terry, claimed the land as a gift acquired from her mother. In each case the mother denied the gift and asserted ownership by reason of the alleged facts that she had purchased the land with her own money and that the daughter had wrongfully caused the title to be taken in her own name—that is, as Edith Terry. In each case the mother further claimed that after the title had been acquired in the name of Edith Terry, that grantee duly conveyed the property to her mother, Mrs. Lesem.

[1] Since it is conceded, and no doubt is true, that the evidence is substantially alike in the two cases, in relation to the question of gift to Miss Terry, we think it sufficient to say here that, for the same reasons given in the other case, the evidence is sufficient to sustain the court's finding that the property in question here, when conveyed to Miss Terry, was so conveyed at the instance of her mother and with the intention of making a gift thereof to the grantee.

On the subject of the alleged conveyances by Miss Terry to Mrs. Lesem, there is likewise a great deal of testimony given in the first case that was brought into the record in the second case. This circumstance grew out of the fact that the deeds were drawn at one and the same time, and that Mrs. Lesem claimed that they were also delivered together, as part of one transaction. Some of the testimony quoted in our decision in the other case relates solely to the deed in question there, but some of it relates to both deeds. The interview between the parties, when Mrs. Lesem claims that the deeds were delivered to her, occurred on the 26th day of August, 1922. It is true that Miss Terry, in the course of her testimony, said that at that time she "delivered" the deeds to her mother. Afterward she testified that she did not "deliver" them, and that there was no manual tradition of them from herself to her mother; that she, the witness, put them on the piano.

> "I told her I had been told that the deeds were not properly executed, not in due form. I had written mother's name as well as my own on the same line, and that either Miss Burza [the notary] had called it to my attention or I to hers, I didn't know just who had told me, and she said she would O. K. them, but on looking them over I had found she had written the initials 'O. K.' only in one"—which was another lot.

Witness said that she told her mother that:

> "She could take the deed to the Foothill Drive lot which had been properly executed, owing to Miss Burza having written O. K. on it, and she did so.
>
> "Q. And did she take the deed which was before you, the instrument? A. I threw it under the shelf in the table in her room."

At that time, and until the following February, the papers thrown under the table appear to have remained there, and during all of that time both parties continued living together in the same house. Then they were found by Mrs. Lesem, and she took them away, and caused the deed (the one in question here) to be recorded. At about the same time Mrs. Lesem moved to another house. The testimony of Miss Terry concerning the delivery of the deeds is contradicted by Mrs. Lesem in some particulars, but corroborated in others. Referring to the deeds, Mrs. Lesem said, "I didn't touch them," that she did not look at the deeds at that time. "I left them there." Again:

> "When I wanted to put my hand to it, my daughter said, 'You can't take them yet. They are not right.' "

[2] There are sundry inconsistencies and contradictions in the testimony of both of these witnesses. The trial court heard them, observed them, and weighed the evidence. The findings, which determine that the deed in question was not delivered, are sustained by amply sufficient, though not uncontradicted, evidence. This being so, the findings must be confirmed as made.

[3] Prior to hearing on the motion for new trial, the court struck from the files the affidavits which had been served and filed by appellant. This order was based upon the ground that the affdavits had not been filed within the time allowed by law. Such affidavits must be filed and served within 10 days after serving the notice of intention, or such further time as the court may allow, but not to exceed 20 days' additional time. Code Civ. Proc. § 659; W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 194, 191 P. 1027. In this case the notice of intention to move for new trial was served on March 18, 1925. The affidavits were not served until April 24, 1925. On March 23, 1925, the court made an order extending the time of appellant, to serve and file the affidavits, for "30 days in addition to the time given by law." The excess time beyond 20 days' additional time was beyond the court's authority to grant. Since the affidavits were not served or filed until the lawful time therefor had expired, the court did not err in striking them from the files.

In rendering the decision of this court on appeal in Lesem v. Terry, supra, we were compelled to criticize the briefs of counsel for appellant, on account of language disrespectful to the trial court and to the judge who tried the case. The present action was tried by another judge, but he has not escaped an equally severe attack from the same pen. There are many sentences and phrases in appellant's briefs which are disrespectful and scandalous. It would be a tedious task to segregate them all.

Such phrases as: "The court aided the ingrate daughter;" "the court, though biased in favor of the daughter;" "if there is any excuse to be made for the judge below it might be this; * * * " "Was this smothered and kept out of the findings?" "the bias of the judge;" "a wish to destroy the case of the mother"—these and others of like character run through these briefs. Charitable consideration for appellant, and that alone, prevents the court from striking these briefs from the files. The facts of the record and the fair and courteous conduct of the judge leave counsel without excuse.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

90 Cal. App. 186

PEOPLE v. KIMMERLE. (Cr. 1573.)★

District Court of Appeal, Second District, Division 2, California. March 16, 1928.

Hearing Denied by Supreme Court May 14, 1928.

1. Criminal law 🔑878(3)—Acquittal of mayhem count held not acquittal of count for assault to produce great bodily injury.

In prosecution under information charging in first count assault by means or force likely to produce great bodily injury and in second count charging mayhem, acquittal of mayhem, under evidence, *held* not acquittal of charge on first count.

2. Criminal law 🔑878(3)—Unless verdicts are necessarily inconsistent, acquittal on one count is not, in effect, acquittal on other.

In criminal prosecution, unless two verdicts on different counts of same information are necessarily inconsistent, acquittal on one count is not in effect acquittal on other.

3. Criminal law 🔑878(3)—Acquittal of mayhem held not acquittal of every element of assault to produce great bodily injury except simple assault and battery (Pen. Code, § 245).

Since there is element present in offense of mayhem which is not necessarily involved in assault by means or force likely to produce great bodily injury denounced by Pen. Code, § 245, acquittal of mayhem is not acquittal of every offense involved in such assault except that of simple assault and battery.

4. Assault and battery 🔑55—Use of hands and possibly knee in assault may constitute use of force likely to produce great bodily injury (Pen. Code, § 245).

Use of hands and possibly knee on person assaulted may constitute violation of Pen. Code, § 245, denouncing assault by means or force likely to produce great bodily injury.

5. Criminal law 🔑1173(3)—Defendant may not complain of refusal of instructions relating to offense of which he was acquitted (Pen. Code, § 245).

Where defendant was prosecuted under information charging mayhem and assault by means or force likely to produce great bodily injury, under Pen. Code, § 245, refusal of instructions as to mayhem, of which defendant was acquitted, is not ground of complaint by him on appeal.

6. Criminal law 🔑829(1)—Refusing instructions covered by those given held not error.

In criminal prosecution, refusal of instructions sufficiently covered by those given is not error.

★Hearing denied by Supreme Court.

7. Assault and battery ⚷100—Two-year jail sentence for assault by means or force likely to produce great bodily injury held not excessive (Pen. Code, § 245).

Two-year jail sentence on conviction, under Pen. Code, § 245, for assault by means or force likely to produce great bodily injury, committed by striking person with fists, fracturing bone and injuring sight of eye, for which punishment could be imprisonment in penitentiary or jail not exceeding ten years and fine not exceeding $5,000, or both, is not excessive.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

H. J. Kimmerle was convicted of assault to produce great bodily harm, and he appeals. Affirmed.

Howell Richardson and S. W. Odell, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and Warner I. Praul, Deputy Attys. Gen., for the People.

THOMPSON, J. The defendant was charged in an information filed by the district attorney with two offenses, the first count alleging the crime of assault by means or force likely to produce great bodily injury, and the second count charging the offense of mayhem. The jury returned a verdict of not guilty of mayhem and found the defendant guilty of the offense first charged. This appeal is prosecuted by defendant from the judgment pronounced upon the verdict and from the order denying his motion for a new trial.

The first count details that:

> The defendant "did willfully, unlawfully, and feloniously and forcibly strike, beat, and bruise one Arthur M. Loeb, about and upon the eye and head of him, the said Arthur M. Loeb, with the fists and hand of him, the said H. J. Kimmerle, with all the force and violence that he, the said defendant, was then and there able to exercise, and which said striking and beating and bruising did then and there cause a fracture of the left cheek bone of the said Arthur M. Loeb, together with other grievous bodily injuries, and which said striking, beating, and bruising was by means likely to and did produce great bodily injury to the said Arthur M. Loeb."

Count 2 charges that the defendant committed the crime of mayhem by putting out the eye of Arthur M. Loeb.

[1] The appellant first assails the judgment upon the ground that the verdict of not guilty of the offense of mayhem was an acquittal of every element of the crime charged in the first count except simple assault and battery. The evidence established the fracture of the left malar bone at or near its juncture with the frontal bone, and that the sight of the left eye was so impaired that with its sole use Loeb could faintly discern light, and the physicians advised its removal. There was testimony that in his effort to get out of the office in which the assault was committed Loeb ran into the jam of the door. From this counsel argue that the jury must have found that the fracture and the injury to the eye was occasioned by collision with the door and not by being forcibly and violently beaten with the fists of appellant. They also add to this by the argument that, inasmuch as Loeb was seated at a desk with his right side toward the appellant as appellant approached him from another room, appellant could not have struck him on the left side of the face (the side on which the fracture occurred). However, there was substantial testimony by nonparticipants in the altercation to the following effect: That Loeb came from what may be called the private office and seated himself at a desk in the outer office, almost immediately followed by the appellant, to whom Loeb was saying, "I don't know who you are and I won't take orders from you." That the appellant then stated to Loeb, "I will show you who I am," and struck him in the face with his fist several times. That he then picked Loeb up and threw him six or seven feet over a railing which divided this outer office. That when Loeb was getting up from where he was thrown blood was streaming from the left side of his face. That Loeb ran out of the door with appellant after him, telling him "to get the hell out of the building and stay out."

There is much apparent force in appellant's argument arising from the fact that it is difficult to understand why the appellant was acquitted of the offense of mayhem except that the jury believed that he had collided with the door and thus injured the eye. However, that is not the only basis upon which they may have acquitted him. They may, for example, have entertained a reasonable doubt concerning the total loss of the use of the eye, even though the physicians had advised its removal. It may conceivably have arisen from the testimony of the physicians that "he saw light," and from the testimony of one of them as follows:

> "I would hold my finger in front of his eye, and he could not tell whether it was one or two or three fingers."

[2] It may also have arisen from the fact that he was still under treatment or from the jury's own observation of the eye, from which during the course of the trial the covering was removed in order that the jury might inspect it. They may have believed the testimony that Loeb was thrown six or seven feet over a railing and marveled that he was not more seriously injured or may have drawn other justifiable deductions. These are recited for the purpose of illustrating the fact that the two verdicts are not necessarily inconsistent with each other. The one involves the loss of the eye, the other involves

the use of force or means likely to produce great bodily injury, or, to phrase it differently, great danger to the eye or other portions of the body. Unless the two verdicts are necessarily inconsistent, and they were not in this instance, it cannot be said that the acquittal on the one count is an acquittal on the other. People v. Day, 199 Cal. 78, 248 P. 250; People v. Vanderbilt, 199 Cal. 465, 249 P. 867.

[3] We may also say under these authorities that, there being an element present in the offense of mayhem which is not necessarily involved in the offense charged in the first count, acquittal of mayhem is not an acquittal of every offense except simple assault and battery.

With respect to the argument that Loeb was seated at a desk with his right toward the appellant, it must be said that it relates to the weight of the testimony and therefore falls within the exclusive province of the jury. In this connection, however, we might be thought lacking in perception if we did not call attention to the testimony of appellant as follows:

> "I grabbed him this way and pulled him in toward me and struck him with my right back of the left ear."

[4] Counsel also advance the proposition of law as a part of the groundwork for the first argument that, inasmuch as appellant used nothing except his hands and possibly his knee upon the person of Loeb, he could not be guilty of assault by means or force likely to produce great bodily injury. This same contention was before the Supreme Court on objection to an information almost identical in words to the one in question here in the case of People v. Hinshaw, 194 Cal. 1, 227 P. 156. Counsel in that case relied upon the same authorities as appellant here. The language there is so apt that we quote:

> "The pleading here, by way of describing the means employed and the force used and where the force was directed, alleges that the assault was made with the fists and hands upon the head and face and that the result was a fractured jaw and other grievous injuries. Such allegations under the circumstances of this case describe both the means employed and the force used which we think meet the language of the statute—'by any means or force likely to produce great bodily injury,' and are 'not the details of probative matter or particulars of evidence by which these material elements are to be established.' Pomeroy's Code Remedies (4th Ed.) p. 555."

The second ground assigned by appellant as a reason for a reversal of the judgment and order, to wit, "The two counts of the information state precisely the same offense, and the acquittal on either count must necessarily be deemed an acquittal on the other count," approximates so nearly a restatement of the first question discussed in this opinion that it is unnecessary to elaborate thereon other than to say that the information was drawn, as will be readily observed by reference to the part already quoted, with particular care to differentiate the two offenses as they are differentiated by statute.

[5, 6] Complaint is made of the action of the court in refusing to give several instructions requested by the defendant. It is sufficient to say that we have examined each one of them, and of all it may be said that they were either pertinent to the offense of mayhem of which appellant was acquitted, and of which he may not therefore complain, or were sufficiently covered by instructions given.

[7] The appellant complains that he was sentenced to two years in the county jail, saying that such punishment is unreasonable and excessive. This argument is based upon the theory which runs through all of the argument of appellant, that he was only guilty of assault and battery. However, having been properly convicted under section 245 of the Penal Code of an assault by means or force likely to produce great bodily injury, the punishment for which is "imprisonment in the state prison, or in a county jail, not exceeding ten years, or by fine not exceeding $5,000, or by both," it is self-evident that appellant may not complain of the penalty imposed by the court.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 75

WINTER et ux. v. KNAPP et al. (Civ. 6154.)★

District Court of Appeal, First District, Division 2, California. March 12, 1928.

Hearing Denied by Supreme Court May 10, 1928.

1. Evidence ⚷441(3)—Testimony of owner's oral agreement to release original lessees after assignment of lease held inadmissible without showing consideration for release.

In action for rent, admission of testimony that owners during negotiations leading up to assignment of lease orally agreed to release original lessees from any further obligations under the lease and to look solely to assignee for future payments of rental *held* erroneous, without showing consideration for such release.

2. Landlord and tenant ⚷208(1)—Original lessee of assigned lease is liable on lease unless excused by legal acquittance of owner.

Original lessee of an assigned lease is liable on lease executed by him unless excused by some legal binding acquittance on part of owner.

★Hearing denied by Supreme Court.

3. Evidence ⚷441(3)—Conversation relative to releasing original lessees from obligations must be presumed merged in subsequent written assignment of lease.

Essential elements of conversations previous to making of assignment of lease relative to releasing original lessees from obligation under lease must be presumed to have been merged in written agreement evidenced by assignment.

4. Landlord and tenant ⚷184(1)—Pledge of furniture as security for rent without delivery of possession held ineffectual (Civ. Code, § 2988).

Pledge of furniture in hotel as security for rent without possession of pledgee *held* ineffectual and abortive as an attempt to create a pledge on personal property in violation of Civ. Code, § 2988, providing that delivery is essential to validity of pledge.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Max Winter and wife against W. M. Knapp and others. Judgment for defendants, and plaintiffs appeal. Reversed.

J. Wiseman Macdonald, of Los Angeles, for appellants.

Dryer, Castle & Hartke, of Los Angeles, for respondents W. M. Knapp, McNaughton, and M. L. Knapp.

MURPHEY, Justice pro tem. This is an action to recover the rent due under the terms of a written lease which was executed on the 3d day of January, 1921, by H. S. Laughlin, who was the lessor, and defendants W. M. Knapp, M. L. Knapp and Matthew McNaughton, as lessees. The term was for a period of three years. The original lessees went into possession on the date of the lease and occupied the premises up to and including November 30, when they assigned their interest in the lease to D. J. Miller and Florence M. Miller, his wife, who went into possession of the leased premises and occupied them for a short period of time, when they assigned them to other persons. The lessor H. S. Laughlin assigned his interest in the lease to the plaintiffs, who at the same time purchased the title to the property that was subject to the lease. Judgment went for the defendants, and the plaintiffs appealed.

The defendants Knapp and McNaughton contended successfully in the trial court that, by reason of an oral agreement between themselves and the then owner of the property, who is the plaintiff in this action, at the time the assignment herein set out was made by them to the Millers, they were released from paying any further rental under the lease after the assignment thereof to the Millers. The assignment to the lessees Millers is in words and figures following:

"Nov. 30, 1921.

"H. S. Laughlin, 235–40 Title Insurance Bldg., Los Angeles, Cal.: For a good and valuable consideration to us in hand paid, the receipt of which is hereby acknowledged, we hereby sell, assign, transfer and set over unto D. J. Miller and Forence M. Miller, his wife, all our right, title and interest in and to the within lease.

"W. M. Knapp.
"Matthew McNaughton.
"M. L. Knapp.

"Approved: Max Winter."

[1, 2] The trial court, over the objections of the plaintiffs, permitted the defendants, the original lessees, to testify that during the negotiations leading up to the assignment plaintiffs orally agreed to release said defendants from any further obligations under the lease and to look solely to the assignee for future payments of rental. We are of the opinion that this was error, fatal to the verdict and judgment rendered thereon in favor of the defendants. Had this evidence been excluded there would have been no defense whatever to the plaintiffs' cause of action. It is the settled principle of law in this state that the original lessee of an assigned lease is liable on the lease executed by him unless excused from so doing by some legal, binding acquittance on the part of the owner. In the case of Brosnan v. Kramer, 135 Cal. 36, 66 P. 979, the court said:

> "The contract of lease, being in writing, could only be altered by a contract in writing or an executed oral agreement, and nothing of the kind is pretended here, nor is it averred or shown that she released the defendants from any of the covenants contained in the lease. The mere accepting rent from one in possession under the lease would not have that effect. The lessee cannot by assigning his lease rid himself of liability under the covenants. 'The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants.'"

Many other cases might be cited to the same effect. Cross v. Thiele, 51 Cal. App. 780, 197 P. 974; Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann. Cas. 1916E, 830; Schehr v. Berkey, 166 Cal. 157, 135 P. 41; Jordan v. Scott, 38 Cal. App. 740, 177 P. 504; Gordon v. Green, 51 Cal. App. 768, 197 P. 955.

[3] It must be borne in mind that all the conversations relied upon by the defendants to relieve themselves from their obligations under the lease antedated the making of the assignment above set out. The essential elements of these conversations must therefore be presumed to have been merged in the written agreement evidenced by the assignment. In the case of Eddie v. Gage Manufacturing Co., 33 Cal. App. 338, 164 P. 1133:

> "The instrument whereby the transfer was effected was a naked assignment and did not purport to impose any obligation upon the assignee to pay the rent reserved in the lease. Indorsed thereon and signed by plaintiff, was an instrument in writing as follows: 'I hereby consent to

the transfer of a certain lease on 683 Antonio St., from Jay Gage, C. E. McClay, O. E. Freeman, and C. T. Lloyd to Union Car Co., a corporation, provided that said Union Car Co. complies with all the legal formalities through its board of directors. * * *' Under these circumstances, the court properly found this consent to the transfer of the leasehold estate did not release the defendants from their obligation upon the covenant to pay the rent. Indeed, had the consent been unconditional, or had the assignee complied with the conditions so exacted, the finding would not have been subject to attack upon the record here presented. Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; Brosnan v. Kramer, 135 Cal. 36, 66 P. 979; 24 Cyc. p. 1177.

"Neither, since it would have violated a fundamental rule of evidence, did the court err in refusing to permit defendants to introduce evidence tending to show that plaintiff orally agreed to release appellant and his co-lessees from any and all liability upon their covenant to pay the rent reserved in the lease."

This language is significantly applicable to the facts of the instant case where we have a mere naked assignment. The assignees agreed to do nothing, and the owner simply approved the assignment and said nothing as the future obligations of the original lessees. Here, too the fundamental rules of evidence were violated when the defendants were permitted to testify that prior to the making of the assignment the owner agreed to release them from the covenant to pay rent.

In the case of Jordan v. Scott, 38 Cal. App. 739, 177 P. 504, a case that bears a very marked resemblance in many respects to the one here under discussion, the court said:

> "This testimony was corroborated by another witness and denied by Marsh; but it was, of course, amply sufficient to support the finding, if such a parol agreement under those circumstances could have the legal effect of a valid release. Section 1541 of the Civil Code provides: 'An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.'
>
> "Here there was no release in writing, and it remains only to consider whether there was 'a new consideration.' Consideration is defined by Civil Code, § 1605, as follows: 'Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, and other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.'
>
> "As was well said by the Supreme Court of New Jersey in Conover v. Stillwell, 34 N. J. Law, 54, at page 57: 'It must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he could not otherwise have had. * * *
>
> "It is apparent that Marsh acquired no right thereby which he did not already possess. The written assignment conferred upon him no right of action as against either Gaudreau or Scott. His right to recover the rents from Gaudreau grew out of the latter's occupancy of the premises by reason of privity of estate. * * * No privity of contract between Marsh and Gaudreau could be created by the act of Scott. As this court said, with respect to a somewhat similar situation, in Lutton v. Rau, 37 Cal. App. 429 [173 P. 1111]: 'We do not think that * * * the production of such an assignment would aid the plaintiff in making out his claim against the defendant for rent which accrued subsequent to the date of the transfer of possession of the premises from respondent to the last holder.'
>
> "We conclude that the release in question, being neither in writing nor upon a new consideration, was of no legal effect, and that the finding of the trial court upon this point is, therefore, contrary to the evidence."

In the present case, as is clearly shown by the record, there is no consideration for the alleged promise of the lessor to relieve the lessees from their obligations under the lease. In a special issue submitted to the jury it found that plaintiffs received "an approved or satisfactory tenant" as consideration for the release of the defendants Knapp and McNaughton from the terms of the lease. At most this was the mere conclusion of the jury, and there is no evidence in the record whatever having any bearing or allusion to the question of consideration. The plaintiffs obtained nothing from the assignment that they did not theretofore have. So far as the record shows, they had a satisfactory tenant before and up to the time of the assignment. This was all that they had after the assignment. Nothing was demanded by plaintiffs for their consent to the assignment and nothing was paid by defendants for procuring the consent and approval of the plaintiffs to the assignment.

In Gordon v. Green, 51 Cal. App. 768, 197 P. 956, the court said:

> "Neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise made to the person upon whom the legal liability rests, either to induce him to perform what he is bound to do or to make a promise so to do. Accordingly it has been held in this state that neither a promise to perform a duty nor its performance constitutes a consideration for a contract. [Citing authorities.] The modified agreement as found by the court to have been made between the parties was, therefore, a mere nudum pactum, which did not relieve defendant from the obligations under his lease."

The assignment in this case was drawn up by the original owner, who was an attorney. The wisdom of the rule against the character of evidence here relied upon by the defendants is well exemplified by the record in this case. The attorney, who was the owner and lessor, testified in a vague and unsatisfactory way that he understood that the lessees were to be released from the payment of rent, yet when he drew up the assignment he did not so state in the writing. The defendants testified that the plaintiff said he would release them for a satisfactory tenant and that they brought the owner and the new lessees together, and after discussing the matter the owner said he would release them and told them to have the necessary papers prepared and presented to him, which papers were to be a release and assignment. Notwithstanding this statement, nothing but the assignment was presented for his signature. Opposed to this testimony was that of the owner that he had never seen the new lessee Miller until long after the assignment had been made and approved by him and the new lessee Miller said that he had never seen or talked to the owner until after he had taken over the leased premises.

No case is called to our attention by the respondents that casts a shadow of doubt upon the rule pronounced by the cases above cited. Counsel cites Dugan v. Phillips, 77 Cal. App. 268, 246 P. 566. That was a case in which a mutual agreement to arbitrate became executed upon the making of the award and validated the verbal submission. In Pearsall v. Henry, 153 Cal. 315, 95 P. 154, 159, the Supreme Court states that this is not an offer to perform an executory oral agreement but an oral agreement that had been fully executed by substitution. This in effect was an offer to prove a novation. There are many cases that hold that a written instrument may be abrogated or canceled by mutual consent. The respondents' answer to the cases cited by appellant is that they are pure dictum.

[4] There is some contention that the furniture in the leased hotel building was pledged as security for the rent. There is no doubt but that a formal writing to that effect was executed by the original lessees to the original lessor. In view of the fact that the furniture was conveyed to the lessees under a conditional sale contract containing the following provision, "It is further agreed that the parties of the second part have no right in said property or interest therein that can dispose of by sale or otherwise, or at all, or upon which it can create any lien," there can be little doubt that the so-called pledge was of no substantial value. When the plaintiffs in this action took over the title to the leased property, the then owner assigned this so-called pledge to them. The evidence is clear that this pledgee, the present plaintiff, never had possession of the pledged property and never had the same under his personal control or in his possession. The only act performed to vest any interest in him as pledgee was the act of assigning the original pledge agreement to him by the former owner of the property. This is ineffectual and abortive as an attempt to create a pledge on personal property. Section 2988 of the Civil Code provides:

> "*Delivery Essential to Validity of Pledge.*—The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder, as hereafter prescribed."

In George v. Pierce, 123 Cal. 175, 55 P. 777, the Supreme Court says:

> "No writings pertaining to a transfer of personal property, regardless of their number or character, can create an actual and continued change of possession as to creditors of the pledgor. Acts only can do it. A visible, actual, continued change of possession must be had, and the law will be satisfied with nothing else. Writings can never accomplish these results."

It would be futile to discuss this question in view of the argument presented by the respondents in their brief which is based upon the principle of confession and avoidance, confessing the error of the trial court in admitting the assignment of the alleged pledge, but contending that the error was not such as to warrant reversal of the judgment. This evidence should not be admitted in the event that another trial of this case should be considered as a remote possibility.

Many assignments of error are predicated upon the rulings of the trial court as to the admissibility of the testimony and to the giving and refusal of instructions to the jury that are unquestionably good, as they are in direct contravention of the matter hereinabove discussed. In our judgment the question first discussed in this opinion is determinative of the appeal adversely to the respondent, and we feel that no useful purpose would be subserved by specially commenting on the several rulings of the trial court.

The judgment is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

89 Cal. App. 649

YOAKUM v. HOGAN. (Civ. 6229.)

District Court of Appeal, First District, Division 1, California. March 3, 1928.

1. Exchange of property 🔑8(3)—Complaint embodying contract representing part of transaction held not demurrable because not limiting allegations to such contract.

In action for breach of agreement for exchange of properties where complaint alleged purchase of certain properties by plaintiff from defendant, in part consideration for which defendant executed written contract that he would, within 60 days, make certain repairs, alterations, and improvements in buildings, and defendant contended that complaint was not good because contract, being silent as to delivery no breach could be predicated upon failure to deliver, *held*, that since contract represented but part of transaction between parties complaint was good as against demurrer.

2. Appeal and error 🔑882(5)—Defendant who throughout trial claimed performance may not assert that complaint on appeal failed to allege that defendant's failure to complete contract was without consent.

Defendant in action for breach of agreement to exchange properties, who throughout trial and by pleadings claimed full performance, could not complain on appeal that complaint was fatally defective in that it failed to allege that defendant's failure to complete contract was without consent or approval of plaintiff.

3. Exchange of property 🔑8(3)—Damages for breach of agreement to exchange properties held sufficiently alleged in complaint which alleged loss of use of premises and rental value.

In action for breach of agreement to exchange properties, where defendant contended that damages for failure to deliver premises should have been specially pleaded, and complaint alleged loss of use of premises with rental value thereof during period of delay, *held*, that damages were sufficiently pleaded.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Action by Jennie M. Yoakum, administratrix of the estate of Jaspar A. Yoakum, deceased, against Walter L. Hogan for damages for the breach of a contract for the exchange of properties. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant.

James F. Brennan, of San Francisco, and John J. McMahon, of Los Angeles, for respondent.

PARKER, Justice pro tem. This is an action to recover damages for breach of contract relating to an exchange of properties. The case was tried by the court sitting with a jury, and judgment was entered in favor of plaintiff pursuant to the verdict of the jury. From the judgment defendant appeals.

Without a detail of the facts a brief history of the litigation may be given.

After the trial in the court below defendant made a motion for a new trial. This motion was granted, and from the order granting a new trial plaintiff appealed. The order appealed from was reversed. The facts of the case therefore fully appear in the reported case of Yoakam v. Hogan, 198 Cal. 16, 243 P. 21. As indicated in the opinion on that appeal the Supreme Court did not consider the question of the sufficiency of the evidence save to determine that the same was not insufficient in law and was not without substantial conflict on any material point. Likewise, the question of the insufficiency of the pleadings was not considered.

On the present appeal from the judgment appellant contends that the complaint stated no cause of action and that his demurrer thereto should have been sustained.

[1] The complaint alleged the purchase of certain properties by plaintiff from defendant, including both real and personal property. It then alleged that, as a part of the consideration for the purchase, defendant agreed that he would, within 60 days, make certain repairs, alterations, and improvements in said buildings, and install therein certain household and hotel furnishings, and deliver possession of the buildings with the improvements completed and personal property installed within 60 days. The complaint then set up the execution of a written contract, which is set out in full therein, and which is alleged to be a part of the price and consideration of the purchase. The terms of this written contract are as follows:

"I, W. L. Hogan, hereby covenant and agree with Jasper H. Yoakum that within 60 days from date (August 12, 1921) I will do the following alterations and painting and tinting and furnish the following furnishings free of any expense to said Yoakum." (Then follow a specification of work to be done and description of property to be furnished.)

Appellant argues that the contract itself as pleaded is the measure of plaintiff's rights, and, as the contract is silent as to delivery, no breach can be predicated upon such failure to deliver. No authority is cited by appellant in support of his contention.

We think the complaint sufficient in this respect. There is a direct allegation of the transaction of purchase and sale, together with the allegation of the contract to deliver. A contract is pleaded as a part of the transaction, and inasmuch as the contract pleaded contains no reference to the exchange of properties, it is obviously not the entire contract or agreement between the parties. It is a mere quibble over words to attempt to separate the idea of delivery from an agreement to furnish specified personal property to and at a specified place within a limited time. The whole theory of the pleadings and of the issue as joined by defendant's answer was that this contract with reference to repairs and furnishings was, as stated, a part of an entire transaction, rather than a separate agreement.

[2] Appellant, still without citation, contends that the complaint is further fatally defective in that it fails to allege that defendant's failure to complete his contract was without the consent or approval of plaintiff.

Defendant throughout the trial and by his pleadings has claimed a full performance, and the trial was on that issue.

[3] Appellant next contends that the damages for failure to deliver the premises should have been especially pleaded. In the case of Yoakam v. Hogan, supra (the instant case), the court says:

> "But it appears that plaintiff sufficiently pleaded the damages sustained by him. * * * The complaint alleged the loss of the use of the premises with the rental value thereof during the period of delay; and while a claim for damages based upon a loss of rents should be specially pleaded, * * * such loss is a proper element of damages when caused by delay in performance by a contractor. * * * The trial proceeded on the theory that the question whether the premises could have been leased * * * was an issue in the case, and appellant testified upon this subject without objection."

Other grounds of attack upon the complaint, totaling 11 in number, are set forth by appellant. However, these contentions are all general and without citation of authority. The allegations attacked are not set forth, nor is reference made to the record. See Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290. We have carefully noted all of the allegations of the complaint, and find that as a whole the complaint sets forth a cause of action. Upon the cause as set forth, issue was joined, and defendant, in addition to traversing the allegations of the complaint, pleaded his version of the whole transaction, alleging a breach by plaintiff. A full and fair trial was had, free from error as indicated by the opinion of the Supreme Court on the former appeal. It may be that the complaint could have been more definite in its terms and that greater detail might have been set forth. Yet, as it is, no one could be misled thereby, and most assuredly this defendant was in no doubt concerning the purpose of the action. Conceding this would not be the sole test of its sufficiency, yet to some extent it aids in determining the effect of allegations that might appear somewhat weak. We conclude that the complaint as a whole is sufficient to uphold the judgment entered pursuant to the verdict rendered.

The appellant, in a somewhat general way, attacks the sufficiency of the evidence to support the verdict and judgment. The evidence is not presented for our consideration, and we are left to go through the transcript to determine the merit of this point. We have assumed this burden, irrespective of the law which places it elsewhere. From this examination of the record we find abundant evidence supporting the verdict.

The remaining grounds of appeal have been disposed of in the hearing of the appeal from the order granting a new trial. Yoakam v. Hogan, supra.

We have throughout used the term "plaintiff" as referring to the original plaintiff, Jaspar A. Yoakum, for the reason that the present plaintiff came into the record subsequent to the trial, and then only as administratrix, and had no connection with the trial.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

ANDREWS et al. v. WALDO. (Civ. 6132.)★

District Court of Appeal, First District, Division 2, California. March 9, 1928.

Hearing Granted by Supreme Court May 7, 1928.

1. Appeal and error ⚷927(3)—Evidence is taken most favorable to plaintiffs on appeal from nonsuit.

In absence of findings of fact on appeal from nonsuit, reviewing court must take evidence most favorable to plaintiffs.

2. Brokers ⚷63(1)—Owner, preventing broker's performance within time of employment, cannot defend action for commissions on ground of nonperformance (Civ. Code, §§ 1511, 1512).

Where owner prevented performance by refusing to state objections to acceptance, so that broker could negotiate with buyer within time of his employment, such owner cannot defend action for broker's commission on ground of nonperformance, under Civ. Code, §§ 1511, 1512.

3. Brokers ⚷63(1)—Owner, having listed property with broker, cannot arbitrarily claim tender insufficient or insist on unauthorized conditions (Civ. Code, § 1501; Code Civ. Proc. § 2076).

Owner of property, after placing it in hands of broker for procuring purchaser, may not arbitrarily claim that tender is insufficient and refuse to give reasons and cannot insist on conditions which he is not authorized to demand under Civ. Code, § 1501, and Code Civ. Proc. § 2076.

4. Customs and usages ⚷10—Every commercial contract is entered into with understanding that usage becomes part of transaction.

Every commercial contract is entered into with understanding that usage in regard to par-

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★Superseded by opinion of Supreme Court, 272 P. 1052.

ticular matter of contract becomes part of transaction itself.

5. Evidence 🔑21—It is common knowledge that, under sale of realty free of incumbrances, purchase price is not paid till clear title is shown; payment pending search of title being "deposit."

It is matter of common knowledge that, when sales of realty are made free of all incumbrances, payment of purchase price is not made till clear title is shown, and that, if any payment is made pending search of title, it is termed "deposit," to be applied on purchase price or returned to buyer, depending on result of title search.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deposit (noun).]

6. Vendor and purchaser 🔑76—Where land contract does not require deposit, it is assumed that payment is due on delivery of deed.

Where contract for sale of realty does not call for deposit, it will be assumed that payment is due on delivery of deed.

7. Vendor and purchaser 🔑76—Where vendor is required to furnish guaranty of title, payment is not due till guaranty is given.

Where contract for sale of realty calls on owner to furnish guaranty of title, payment is not due till such guaranty is given.

8. Brokers 🔑49(3)—Acceptance of offer to sell realty, providing insurance should be prorated to close of escrow, held not to require escrow so as to constitute acceptance departure from offer.

Stipulation in acceptance, secured by broker, of owner's offer to sell realty that "insurance (and rents) to be prorated to close of escrow," does not require escrow to be made so as to constitute acceptance departure from offer.

9. Brokers 🔑49(3)—Acceptance of offer to sell realty which followed custom of requiring escrow would not be departure from offer not requiring escrow.

Where custom and usage in sales of realty was to stipulate that insurance and rents should be prorated to close of escrow, such provision in acceptance, even if requiring escrow, would not constitute departure from terms of offer which did not require escrow.

10. Brokers 🔑14—Where offer to sell realty merely required note and mortgage, broker securing acceptance held authorized to provide for three-year note and mortgage.

Where offer to sell realty merely called for note secured by mortgage, broker securing acceptance *held* authorized to make such indefinite offer clear by providing for three-year note and mortgage.

11. Brokers 🔑49(3)—Conditions in acceptance of offer to sell realty requiring proration of insurance and rents held not variance from offer.

Conditions in acceptance of offer to sell realty under which insurance and rents were to be prorated to close of escrow *held* not variance from offer.

12. Brokers 🔑49(3)—Provision in acceptance of offer to sell realty for forfeiture of deposit for failure to complete purchase within certain period held not variance from offer for cash payment.

Broker, securing acceptance of owner's offer to sell realty, cannot be deprived of commission because of provision in acceptance for forfeiture of deposit for purchaser's failure to complete purchase within 30 days after notice of owner's ability and readiness to convey, as against contention that acceptance called for payment within 30 days after such notice instead of cash payment as offer required.

13. Brokers 🔑54—Purchaser need not execute binding contract to entitle broker to commissions under contract to produce purchaser ready, able, and willing to purchase.

Under broker's contract to produce purchaser ready, able, and willing to purchase on terms proposed and to notify owner in writing within time fixed that he had secured such purchaser, it is not necessary that binding contract be executed by purchaser to entitle broker to commission.

14. Brokers 🔑63(1)—As respects broker's right to commission, vendor must act in good faith, doing no intentional act to prevent completion of purchase.

As respects broker's right to commission for finding purchaser for realty, law requires of vendor good faith and doing of no intentional act to discourage, embarrass, or prevent completion of purchase.

15. Brokers 🔑63(1)—Broker has earned commission when he has fully performed contract of employment and full performance is prevented by owner's arbitrary acts.

Broker has earned commission for finding purchaser ready, able, and willing to purchase defendant's realty when he has done what he is required to do under contract of employment and when full performance is prevented by arbitrary or wanton act of owner.

16. Appeal and error 🔑1178(1)—Where necessary findings were not made by trial court, such court will be instructed to prepare them (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Where no findings were made in trial court and findings are necessary to support judgment, judgment will be reversed, with instructions to trial court to prepare findings, notwithstanding appellate court's power under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, to make findings contrary to or in addition to those made by trial court.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by Charles G. Andrews and others, copartners doing business under the fictitious firm name of Charles G. Andrews Company, against C. L. Waldo, to recover broker's commission on sale of real property. From judgment of nonsuit, plaintiffs appeal. Reversed, with instructions.

S. T. Hankey and Wood, Janeway & Pratt, all of Los Angeles, for appellants.

William B. Brown, of Los Angeles, for respondent.

NOURSE, J. [1] Plaintiffs sued as real estate brokers upon a written contract to procure a purchaser for real property. Defendant's motion for a nonsuit was granted after the entire cause had been heard and plaintiffs appeal on a bill of exceptions. No findings of fact were made and, accordingly, on this appeal we must take the evidence most favorable to the plaintiffs.

The contract of employment authorized plaintiffs to negotiate the sale of and to sell the property described for $60,000, payable "$30,000 secured by a first mortgage, interest at 7 per cent. per annum, payable quarterly." The seller agreed to furnish guaranty of title free and clear except as to 1923–1924 taxes and promised to pay the agent a commission of $2,000 "in the event the agent procures a purchaser as above provided and written notice thereof be given to C. L. Waldo personally, or be addressed and mailed to him on or before said May 17, 1923."

It was further provided that—

> "Said agent is hereby appointed the attorney in fact of the undersigned owner, with full power to execute, in the name and on behalf of the undersigned, an agreement of sale of said property with any purchaser obtained within the time, for the price and upon the terms aforesaid."

Within the time specified the agents notified the owner, both personally and by letter, that they had obtained a purchaser ready, willing, and able to purchase the property upon the terms specified, and at the same time exhibited to the owner a check of the prospective purchaser in the sum of $500 and a written sales contract executed by the prospective purchaser and the agent. In this writing the prospective purchaser agreed to purchase the property for the price specified, payable $30,000 cash upon execution of a good deed with a guaranty of clear title except as to 1923–1924 taxes; "balance of the purchase price to be evidenced by a note in the sum of $30,000, payable on or before three years from its date, with interest thereon at 7 per cent. per annum, payable quarterly, secured by a first mortgage on the above-described property." Provision was made for the search of title and the owner was given 30 days from the discovery of any defect to clear his title. It was then provided that, if the purchaser did not complete the purchase within 30 days after notice from the owner of his ability to convey, the deposit of $500 should be forfeited at the election of the owner, but that this forfeiture "shall not release the purchaser from his obligation to complete the purchase." Provision was then made for the prorating of insurance and rents "to close of escrow."

[2] When this sales contract with the deposit was exhibited to the owner by the agent the owner displayed the utmost bad faith in the endeavor to prevent the agent from effecting a consummation of the sale. He informed his agent that the written acceptance signed by the buyer did not seem to meet the requirements, "but I would want to study it over a little and I will be back in a couple of days." He refused, however, to inform his agent in what respect the acceptance was defective, refused to permit his agent to make further negotiations with the buyer, refused to meet or negotiate with the buyer, and falsely informed his agent that he was called immediately to Imperial county and would not return for a couple of days. This conversation having occurred on the last day on which the agent could procure under his contract a buyer ready, able, and willing to purchase, the refusal of the owner to meet the buyer and his refusal to state his objections to the acceptance as that the agent could make further negotiations with the buyer within the time of his employment were both acts preventing performance which foreclosed the owner from defending on the ground of nonperformance. Civ. Code, §§ 1511, 1512.

[3] But the owner did not stop there. He demanded two conditions to the acceptance of his offer which his contract did not permit him to make—he demanded that the first payment of $30,000 be "laid in his lap then and there," or, as he put it when a witness in his own behalf: "I did suggest to him that afternoon (May 17, 1923) that I wanted $30,000 paid over to me forthwith." He also demanded that the buyer put up a cash deposit of $5,000 to bind the contract. The contract did not call for a cash payment upon *acceptance*, but it did call for such payment on delivery. And the contract did not call for a cash or any deposit to bind the contract. In insisting upon these conditions the owner again brought upon himself the responsibility for nonperformance on the part of his agent. The rule applicable is similar to that in a case of tender. A party may not arbitrarily claim that a tender is insufficient and refuse to give reasons, and he cannot insist upon conditions which he is not authorized to demand. Civ. Code, § 1501; Code Civ. Proc. § 2076.

[4-7] We have said that the contract did not call for a cash payment on acceptance. The terms of sale specified by the owner were "$30,000 cash; balance evidenced by a note for $30,000 secured by a first mortgage." The owner also agreed "to furnish guaranty or continuation of guaranty of title." The buyer agreed to pay $30,000 cash upon delivery of deed and guaranty of title. It is said in Luckehe v. First Nat. Bank of Marysville, 193 Cal. 184, 189, 223 P. 547, 549:

"Every commercial contract is entered into with the understanding that usage in regard to the particular matter of the contract becomes a part of the transaction itself."

It is a matter of common knowledge that, when sales of realty are made free of all incumbrances payment of the purchase price is not made until clear title is shown, but that, if any payment is made pending search of title, such payment is termed a deposit to be applied on the purchase price or returned to the buyer depending upon the result of the title search. Where the contract does not call for a deposit it will be assumed that payment is due upon delivery of deed, and, when it calls upon the owner to furnish guaranty of title, payment is not due until such guaranty is given.

[8-11] After the owner had prevented performance by his agent, as heretofore indicated, he raised other objections to the form of the acceptance which may be considered briefly. He argues that the acceptance departed from the offer, in that it called for an escrow. It does not. It was written on a printed form prepared by the owner's agent and which contained the usual stipulations in print: "Insurance (and rents) to be prorated to close of escrow." Though this does not require an escrow to be made, the undisputed evidence was that such was the custom and usage in sales of this kind, and it would not therefore be a departure from the terms of the offer if an escrow were demanded. It is argued that as the offer called merely for a note secured by mortgage the acceptance added a new condition when it provided for a three-year note and mortgage. The offer was indefinite in this respect and the agent had ample authority to make it clear. Smith v. Keeler, 151 Ill. 518, 38 N. E. 250, 251. It is argued that in providing for a proration of the insurance and rents new terms were added. The proration of the insurance was distinctly to the benefit of the owner while the proration of the rents may have been to his benefit or not, depending whether rents were paid or unpaid at the time of the transfer. These conditions could have been waived by the owner, but, in any event, they were in harmony with the prevailing custom and usage and were minor details which the agent had authority to insert.

[12] Finally it is argued that the acceptance called for payment of the $30,000 "within thirty days after notice from owner of his ability and readiness to convey." The argument is based upon the following language in the printed form of the acceptance:

> "If the purchaser does not complete the purchase as hereinbefore provided within thirty days after notice from the owner of his ability and readiness to convey said property as herein provided, then the said deposit at the election of said owner shall be forfeited, and it shall thereupon be paid, less the commission of the undersigned agents, to the owner. The forfeiture, however, shall not release the purchaser from his obligation to complete the purchase."

The language quoted followed a provision in this printed form giving the owner 30 days to perfect title if he discovered any defect in the search. It was all inserted by the agent for the sole benefit of the owner. It was expressly provided that the buyer was not relieved from his obligation to complete the purchase according to the terms specified —a cash payment of $30,000 upon delivery of deed and guaranty of title, and a note and mortgage covering the balance. The language quoted has no reference or application to the time or manner of payment, but relates solely to the forfeiture of a deposit which was not required by the offer.

[13-15] The contract of employment required the agent to produce a purchaser ready, able, and willing to purchase upon the terms proposed, and to notify the owner in writing within the time fixed that he had secured such a purchaser. "It is not necessary that a binding contract be executed by the purchaser. It is only necessary that he be ready, able, willing, and offer to purchase." Coulter v. Howard (Cal. Sup.) 262 P. 751, 754; Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542. Within time the agent procured such a purchaser and gave the owner the required notice. After the time had expired the purchaser made a definite offer to the owner to purchase upon the terms fixed and was prevented from making such an offer within the time fixed solely by the act of the owner. "The law requires of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase." Coulter v. Howard, supra. The broker has earned his commission when he has done what he is required to do under the contract of employment and also when full performaance by the broker is prevented by the arbitrary or wanton act of the owner. Merriman v. Wickersham, 141 Cal. 567, 570, 75 P. 180; Purcell v. Firth, 175 Cal. 746, 750, 167 P. 379.

The undisputed evidence proves the allegations of the amended complaint and the conflicts which appear in the evidence go to minor details not affecting appellants' right to recover. The cause was fully tried and should not be tried again, but findings are necessary to support the judgment.

[16] Though the power to make findings of fact "contrary to, or in addition to, those made by the trial court" rests in the appellate court by reason of section 956a, Code of Civil Procedure (St. 1927, p. 583), we have not found any rule on the precise point involved here—the power to make findings when none were made in the trial court. In the absence of a ruling we deem it the better practice to have the findings and judgment prepared by the trial court and filed there so

that the judgment roll may make a complete record. The judgment is reversed, with instructions to the trial court to prepare findings in accordance with the views expressed herein and to enter judgment thereon in favor of plaintiffs for the sum prayed for, with interest at the legal rate from May 17, 1923, and costs.

We concur: KOFORD, P. J.; STURTEVANT, J.

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90 Cal. App. 18

STEINBERG v. WALDO. (Civ. 6132.)★

District Court of Appeal, First District, Division 2, California. March 9, 1928.

1. Appeal and error ⇐1012(2)—Findings supported by some evidence are conclusive on appeal, though contrary to weight of evidence.

Findings *held* conclusive on appeal, even though they were contrary to weight of evidence, where there was some evidence to support them.

2. Vendor and purchaser ⇐350—Purchaser's delivery to vendor's agent of check which was not delivered to vendor and was not cashed held not to show damage for breach of agreement to convey (Civ. Code, § 3306).

Purchaser of realty *held* not to have proved any damage, under Civ. Code, § 3306, for vendor's breach of agreement to convey, where he gave vendor's agent his check for $500 as deposit to be applied on first payment, but check was not delivered to vendor and was not cashed.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by Jacob Steinberg against C. L. Waldo for damages for breach of agreement to convey real property. Judgment for defendant, and plaintiff appeals. Affirmed.

S. T. Hankey and Wood, Janeway & Pratt, all of Los Angeles, for appellant.

William B. Brown, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued for damages for breach of an agreement to convey real property. Defendant had judgment, and the plaintiff appeals on a bill of exceptions.

[1, 2] The cause was tried at the same time and on the same evidence as Andrews v. Waldo (Cal. App.) 265 P. 532, this day decided, the plaintiff in this case being the purchaser obtained by the agents. It will not be necessary to restate any of the evidence because the case is to be determined upon the single ground that the trial court found that the value of the property was the price agreed to be paid and that, in so far as his dealings with Steinberg were concerned, the defendant was not guilty of bad faith in refusing to consummate the sale. Though these findings are contrary to the weight of the evidence, there is some evidence to support them and they are conclusive upon this appeal. The plaintiff gave the agent his check for $500 as a deposit to be applied on the first payment, but this check was not delivered to defendant and was not cashed. No other payment of purchase price or other expenses recoverable under section 3306 of the Civil Code was made and plaintiff has failed to prove any damage.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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89 Cal. App. 710

ROSANDER v. MARKET ST. RY. CO. et al.★★ (Civ. 6222.)

District Court of Appeal, First District, Division 1, California. March 6, 1928.

Hearing Denied by Supreme Court May 3, 1928.

1. Appeal and error ⇐1064(1)—Instruction that expressions "slow," "fast," "speeding," etc., standing alone cannot support finding on speed of street car held not to require new trial.

In action against street railway for injuries from collision, defendant's liability being based on excessive speed of street car in violation of city ordinance, instruction that expressions such as "slow," "very slow," "fast," "very fast," "speeding," and "crawling" are merely relative and, standing alone, are entirely too uncertain to serve as basis for finding as to speed of street car, though not expressly approved, *held* not to require new trial, especially since court cannot assume that jury did not hear certain part of instruction when read such as words "standing alone."

2. Appeal and error ⇐1064(2)—Instruction on weight to be given experts' opinions held not prejudicial, in view of unimportance of expert testimony.

Instruction that opinions of experts are not conclusive and are not to be substituted for judgment of jury, and that the purpose of the introduction of such evidence is to supplement jury's general knowledge and experience, was not prejudicial, especially where only one expert testified and his testimony became unimportant because of subsequent experiment testing expert's opinion.

3. Appeal and error ⇐1068(1)—Instruction that truck driver was not required to use skill of an expert held not prejudicial to street railway, where both were found negligent.

In action against street railway and truck owners for injuries to person by truck which ran her down in her yard after colliding with street car, instruction that truck driver cannot be held to use of skill which might have been used by an expert, but that all he was required to do was to exercise ordinary skill, though inapt and confusing, *held* not prejudicial to street

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★Superseded by opinion of Supreme Court, 272 P. 1052. ★★Hearing denied by Supreme Court.

railway, in view of jury's finding that both street railway and truck driver were negligent.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Myrtle Rosander against the Market Street Railway Company and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

See, also, 265 P. 541.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco, for appellant Market St. Ry. Co.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for respondent.

PARKER, Justice pro tem. This is an action for damages in which the verdict of the jury was in favor of plaintiff and against the appellant and its codefendants. A new trial was denied. The codefendants of appellant are Golden Gate Building Materials Company (a corporation), McDaniel & Barrymore (a copartnership), and F. D. McDaniel and O. C. Barrymore. While all of the defendants have appealed from the judgment entered, in view of the fact that separate appeals were taken and presented separately, we deem it better that the appeals should be separately decided. We have before us, therefore, at this time for consideration the appeal of defendant Market Street Railway Company.

A brief statement of the facts will suffice. The entire controversy arises out of a collision between a street car and a gravel truck. It is conceded that plaintiff was wholly blameless and no suggestion of contributory negligence enters into the case. It was and is the claim of plaintiff that both the railway company and the owners of the truck were negligent, and that the accident was the result of such joint negligence. The railway company denies negligence and seeks to fasten all blame upon the driver of the truck, while the defendants liable for the control of the truck lay the entire blame upon the railway company with no degree of negligence attributable to themselves. For all general purposes it may be said that the issue of negligence was between the defendants. It might be also noted that on this appeal no question is raised as to the injuries sustained by plaintiff, nor does the appellant here urge any point on the amount of damages allowed by the verdict; namely, $35,000. Appellant here concedes the sufficiency of the evidence to sustain the verdict, and admits that in the rulings of the trial court on the reception and rejection of evidence no error was committed.

While, as noted, appellant concedes the sufficiency of the evidence, this concession, nevertheless, is predicated solely upon the admission that such sufficiency exists by reason of a sharp conflict. In other words, appellant does not yield in its stand that it was free from negligence and admit its default as a matter of fact, but, rather, yielding to the rule of law and practice of appellate courts, concedes that there is sufficient in the record to preclude our holding as a matter of law that the verdict is unsupported. The appellant contends that, by reason of a sharp conflict in the testimony, its rights were prejudiced and justice withheld from it by reason of certain instructions of the court.

[1] The negligence of which appellant here, railway company, was specifically charged is that the said company, by and through its agents, motorman and conductor, operated a street car in the city and county of San Francisco at and approaching an intersection at a rate of speed greater than 12 miles per hour and in violation of a city ordinance. The controversy therefore narrowed down to that of speed of the street car at the time and place in question, referring, of course, as far as appellant is concerned. The testimony of witnesses for the plaintiff was that the street car was being operated at a speed of 35 miles per hour. The witnesses for defendant truck company testified to the same effect. It might be noted that one witness placed the speed as high as 50 miles per hour. There was testimony also to the effect that the street car was behind in its schedule and trying to gain time, and that it was not stopping at usual places to take on passengers and ignoring all signals of expectant passengers awaiting the usual service. To rebut this the defendant street car company offered testimony of many witnesses. But two of these witnesses, of a total of six, attempted to give the speed of the street car in terms of miles per hour. The testimony of these witnesses of appellant not reducing the speed to miles per hour was in such phrases as follow, namely:

> "Car going slowly;" "nothing unusual about the speed;" "very slowly;" "going rather slow;" "slowly crawling."

The witnesses so testifying were passengers on the car, and in most instances were people who frequently, if not daily, traveled over the route in question and at the same time of day. Witnesses using the phrases quoted disclaimed any ability to approximate the speed in miles per hour.

In this state of the case the court instructed the jury as follows:

> "You are instructed that in considering the weight to be given to testimony of witnesses as to the speed of vehicles involved in the collision, such expressions as 'slow,' 'very slow,' 'fast,' 'very fast,' 'speeding,' 'crawling,' and the like are merely relative, and their meaning and effect must depend upon the unknown factor of the witnesses' personal views regarding standards of speed, and such expressions, *standing alone*, are entirely too uncertain to serve as a basis for any finding that the speed of the vehicle was in

excess of or within the rate which would be dictated by the demands of ordinary prudence."

This instruction was given at the request of the codefendant of the appellant and was not offered by plaintiff.

Appellant vigorously assails this instruction, claiming that it took from the jury the entire case of appellant and negatived and rendered impotent all of its evidence on the vital question in the case. Appellant further urges that the giving of the instruction was violative of the constitutional provision forbidding the courts charging juries with respect to matters of fact. To catalog all of the special criticisms directed to this instruction and minutely detail each claim of error predicated thereon would involve a needless task in that the purpose hereof is to indicate the opinion of this court rather than the views of appellant.

At the outset we may state that we do not give unqualified approval to this form of instruction. Ordinarily, it is well to leave the jury weigh all of the evidence unhampered by any suggestions as to the weight to be given any portion thereof. Instructions such as this usually serve the purpose of prolonging litigation and offer fertile ground of argument. The instruction as given adopts the language of the Supreme Court in the case of Diamond v. Weyerhaeuser, 178 Cal. at p. 543, 174 P. 39. In that case the trial court directed a verdict against the plaintiff. The negligence attributed to defendant consisted in part of operating an automobile at a rate of speed in excess of 20 miles per hour, and the existence of any substantial evidence in support of this charge would have rendered erroneous the action of the trial court. The plaintiff testified that the machine was coming "very fast"; another witness that its speed was decreasing before it reached plaintiff, but that it was still going "at a good speed"; and the one other witness testified that it looked to him as if the automobile "was going pretty fast." The court in affirming the judgment of the lower court, used this language:

> "These statements are entirely too uncertain to serve as a basis for a finding that the speed was over 20 miles an hour, or that it was in excess of the maximum rate which would be dictated by the demands of ordinary prudence. Such expressions as 'very fast,' 'pretty fast,' and the like, are merely relative, and their meaning and effect must depend upon the unknown factor of the witness' personal views regarding standards of speed."

In the case of Lindgren v. Omaha St. R. Co., 73 Neb. 628, 103 N. W. 307, it was held that the testimony of a witness that a car was moving "rapidly and at a high rate of speed" was properly excluded on account of its indefiniteness and uncertainty.

In Keiser v. Lehigh Valley R. Co., 212 Pa. 409, 61 A. 903, 108 Am. St. Rep. 872, the court says:

> "One witness testified that the train was running very fast; but inasmuch as he did not say how fast, nor fix any standard by which the speed of the train could be ascertained, his testimony is without value in this respect."

In Watson v. Erie R. Co., 10 Ohio Dec. 454, speaking of testimony that a train was running "fast," the court said:

> "One man considers a thing rapid; another man considers it slow. It furnishes no criterion or data by which the judgment of the jury can be applied and the rate of speed determined."

In Foley v. Boston R. Co., 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076, we find the following apt language:

> "Mere expletive or declamatory words or phrases as descriptive of speed or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if, indeed, they are of any, assistance in determining the real * * * fact."

We need not cite further authority. Sufficient appears to indicate that the language of our own court in Diamond v. Weyerhaeuser was not the expression of a strange doctrine, nor was it an attempt to set up any new rule in this jurisdiction. Everyday experience demonstrates the lack of definite meaning in such general phrases as are under discussion. One person going at 30 miles an hour would describe his speed as a snail's pace "crawling along"; another would describe the same speed as "lightening fast." From the mere descriptive words any clear conception of the speed would be unobtainable, nor would such terms even serve as the basis for intelligent speculation.

The court in the instruction attacked simply said that the terms used, "standing alone," were subject to the weakness and uncertainty stated. It would hardly be doubted that if a witness gave his statement that a car was going "very fast" and stopped there without further explanation or comment, and without cross-examination of any sort, and that was the entire evidence on the question of speed, no finding could be based thereon, in view of the authorities cited. Appellant replies to this by insisting that the testimony of the witnesses called by it did not stop at this, but went further and showed by other facts what the speed was. If this is conceded, then the query presents itself as to just how the instruction could have harmed appellant's case. Its reply to this anticipated question is that the jury would be misled thereby, and that the jury would not single out or perhaps not hear read the words "standing alone," and would ignore all of the testimony of appellant's witnesses, believing that if the terms used by them were of such uncertainty, and were practically the words used by appellant's witnesses, then the court intended to advise the jury that the testimony of these witnesses was not entitled to weight.

The commendable anxiety of all counsel to prevent the jury from ever being misled invokes just praise. But we cannot reason that a jury might be misled on the theory that possibly a juror did not hear a certain part of the instruction when read. Without going further into the question of what the jury might have understood by the instruction, it will be enough to quote from the language of the Supreme Court in the case of Douglas v. Southern Pacific Co., 264 P. 237, decided February 13, 1928, and yet [officially] unreported:

> "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it."

Again, appellant argues that nonexpert witnesses are competent to form an opinion as to the speed of a car or automobile and are permitted to give that opinion in any case involving that issue. Abundant authority is cited in support of this contention, and we may concede the point without reviewing the cases. Conceding that a nonexpert witness may express his opinion on the question of speed, we still must require that he so express that opinion in language sufficiently intelligible and certain to disclose what his idea is. The reasoning behind this class of opinion testimony seems to be one of necessity. Courts adopt a liberal rule in this respect because the exigencies of the case compel. In almost every case some comment is made upon the weakness of evidence of this character; and even where accepted apparently without reserve, nevertheless some explanation is always forthcoming. Testimony of this character is accepted as highly speculative; but a majority of the courts, conceding this, hold that the inherent weakness is a matter of commonplace knowledge and goes to the weight rather than the admissibility. Thus premised, it is easy to conclude that building one speculation upon another is not within the spirit of the rule nor conducive to the ends sought. Courts have gone far enough in subjecting life, liberty, and property to mere speculative opinions, and we are not disposed to extend the rule so far that the courts or juries will speculate upon what a speculative opinion might be. If an intelligent witness or any witness is prepared to state his conclusions on speed, he can readily make comparisons or estimates or give reasons for his opinion, and thus give facts illustrative of the issues and furnish some basis for examination and comparison; and further, he can subject his testimony to definite tests and be forced to a stand definite enough to subject himself to the law's demands relative to the crime of perjury. Almost the entire case of appellant hangs on this one instruction, and the oral argument was directed exclusively to it. Therefore before leaving this subject we will go further.

Much respectable authority is presented which would compel a holding that the instruction was error, but, as generally found, each case rests more or less upon its particular facts. It might well be that, in a case where motion or lack of motion in itself was material to the inquiry, general phrases would throw light on the question. But where there is a definite rate of speed involved, as in cases where the fact to be determined is whether the rate of speed did or did not exceed 12 miles per hour, we think the language of Diamond v. Weyerhaeuser, supra, covers the principle. Summarizing the evidence in this case in a way that the same is not disputed, the record discloses: Plaintiff is leaving her doorway and hears a crash. Looking up, she sees the collision between the truck and the street car, and in the instant sees the truck catapulting towards her. She attempts retreat, but the truck overtakes her and runs her down at her own door. She is injured to an extent almost equal to a living death. The truck in question is a 5-ton truck loaded with sand, the total weight of truck and load being around 23,000 pounds. With reference to the street car, it is admitted by appellant that on the morning in question the car was behind in its schedule time and was endeavoring to make up this time. Appellant explains that the method employed in making up the lost time was not an increase of speed, but the saving of time by failing to stop to take on passengers at the intersections. To overcome any charge or inference of negligence in not sounding a warning, appellant proved almost to demonstration that, while the car was traveling along, the motorman was violently clanging the bell even while some 200 feet from the intersecting streets where the accident occurred and likewise to the point of collision. Thus we have a street car going down hill, passing up passenger stops, violently clanging a bell for the right of way, and at an intersection striking a loaded truck of a weight of some 23,000 pounds and knocking the said truck off the street and on to the property line. With these facts conceded, it is easy to believe the disputed testimony of eyewitnesses that the car was going at 35 miles an hour and was not crawling along.

While we go to the extent of withholding express approval of the given instruction, we cannot condemn it to the extent of requiring a retrial of the case by reason thereof. As indicated, the law of the instruction is supported by our own Supreme Court and by much other authority. And while much may be said on the other side, we do not feel that we should go into a hypercritical analysis tested by philosophical standards in an attempt to find some reason or ground of argument to demonstrate that an injustice resulted to appellant.

In concluding this subject we call attention again that it is a dangerous practice, and one not to be followed, to take excerpts from opinions of the courts of last resort and indiscriminately change them into instructions to juries. The reasons are too obvious to require further comment.

[2] Appellant next objects to an instruction given by the court of its own motion as follows:

> "The opinions of experts are not conclusive. Their opinions are not to be substituted for the common sense and judgment of the jury. The purpose of the introductions of such evidence is to supplement the general knowledge and experience of the jury in relation to the matters before the jury, and thereby to aid the jury in the exercise of its own judgment to the end that a more just and accurate conclusion may be drawn from the evidence."

After carefully noting the objections of appellant and the authorities offered in support thereof, we do not think that any sufficient reason is shown which justifies interference with the judgment. The scope of expert testimony and the effect of instructions thereon are covered in the following cases: McLean v. Crow, 88 Cal. 644, 26 P. 596; Ehlers v. Wannack Bros., 118 Cal. 310, 50 P. 433; Haight v. Vallet, 89 Cal. 245, 26 P. 897, 23 Am. St. Rep. 465; Hirshfield v. Dana, 193 Cal. 142, 223 P. 451. The first two cases approve practically the identical instruction, and the last cases announce the general rule. This point does not need further inquiry for the reason that it is unimportant in the present case. There was only one expert, and his testimony was concerning the operation of a truck of similar character and similar in load to the truck involved in the accident. After he had testified fully, the court and jurors and counsel adjourned to the scene of the accident and a demonstration was had. Surely the jury no longer were greatly interested in what the expert might have thought or what his opinion was after the experiment was made and the expert's opinion tested.

[3] Appellant brings to us another instruction given by the court at the request of its codefendants as follows:

> "You are instructed that you cannot hold Ray Palamountain [the driver of the truck] to the use of that skill which might have been used by an expert in the operation of the truck. In other words, there is no evidence of negligence to fail to do what an expert truck driver may or could have done or to do that which an expert truck driver would not have done under similar circumstances. All Palamountain was required to do was to exercise ordinary skill and use that amount of care which an ordinary prudent person would have used under similar circumstances."

Without going into the claims of appellant regarding the error of giving such an instruction, we fail to see where appellant is affected thereby. If the jury had absolved the truck driver from all blame, or by the verdict absolved the codefendants from any liability, appellant might be heard to complain. The instruction in no wise bore upon the question of appellant's negligence, and an erroneous instruction as to the measure of care required on the part of the truck driver could not damage appellant. Irrespective of this instruction, the jury found the truck driver negligent as well as appellant; and if the instruction had been closely followed by them the verdict shows that the jury found that the truck driver had failed to use ordinary care or that amount of care which an ordinarily prudent person would have used under the circumstances.

Appellant cites no authority in his attack upon this instruction, and fails to point out even by way of argument wherein the error claimed could have damaged it. However, we may conceive of a theory being advanced to the effect that the jury might have inferred that some one must have been negligent, and if it was not the truck driver it must have been the appellant. Building this theory for ourselves, we can as readily destroy it. First, the jury were plainly told that no presumption of negligence arose from the fact that an accident had happened. Second, the jury did not absolve the truck driver, but held him jointly negligent.

We do not wish to be understood as approving this instruction. We deem it inapt and confusing. The same thought and better law would be expressed by the usual instruction on ordinary care. It is confusing because the term "expert" has no settled meaning. It may be said that any man possessing ordinary skill in a certain line is expert therein, and it is difficult to state at once just what an expert driver could or would do that a truck driver possessing ordinary skill could or would not do, unless, perhaps, we go into questions of trick or stunt driving, which questions are not met with in the usual commerce of the day.

In the appeal from the judgment is included the trial court's order denying appellant's motion for a new trial. We find no error in this order.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 721

ROSANDER v. MARKET ST. RY. CO. et al.

(Civ. 6223.)

District Court of Appeal, First District, Division 1, California. March 6, 1928.

1. Appeal and error 🔑1004(3)—Damages 🔑96—Amount of damages is within sound discretion of jury and trial judge whose decision will not be disturbed unless passion and prejudice is shown.

Amount of damages is committed, first, to sound discretion of jury, and next to discretion of trial court, and their decision on the subject cannot be set aside on appeal unless verdict is so plainly and outrageously excessive as to suggest passion or prejudice or corruption on part of jury.

2. Damages 🔑132(5)—$35,000 for serious and permanent injuries to young married woman, completely unsexing her and destroying capacity to bear children, held not excessive.

Award of $35,000 for injuries to young married woman for serious and permanent injuries rendering her an invalid, completely unsexing her and destroying her capacity to bear children, *held* not excessive.

3. Trial 🔑296(3)—Instruction as to paramount right of street railway held not prejudicial to truck owners, in view of other instructions and convincing evidence of negligence.

In action against street railway and truck owners for damages from collision at street intersection, instruction as to paramount right of way of street cars as to space between rails *held* not prejudicial as to truck owners, in view of other instructions and of the substantial and convincing evidence of negligence of both street railway and driver of truck.

4. Automobiles 🔑147—Provisions of Motor Vehicle Act regulating speed of solid tired trucks held not solely for protection of roadbed.

Provisions of Motor Vehicle Act (St. 1923, p. 517, as amended) rendering it unlawful for driver of vehicle equipped with other than pneumatic tires to drive it at speed greater than 10 miles an hour, where gross weight of vehicle and load is over 22,000 pounds, was not solely for protection of roadbed, but was a part of general scheme to promote safety of public, including other traffic as well as protection of roadbed.

5. Automobiles 🔑246(39)—Instruction as to truck driver's duty to operate vehicle at right-hand side of street held not objectionable.

In action for injuries to person run down in her yard by truck after it collided with street car at intersection, instruction as to truck driver's duty to operate vehicle upon right-hand side of street at speed prescribed was not objectionable as being upon matters not in issue.

6. Trial 🔑296(3)—Instruction as to burden on plaintiff to show negligence held not erroneous, in view of further instruction.

Instruction that before plaintiff can recover for injuries it must appear by preponderance of evidence that defendants or their servants were guilty of negligence contributing proximately to accident *held* not erroneous, in view of further instruction requiring plaintiff to prove by preponderance of evidence all material allegations of complaint with reference to alleged conduct of defendants.

7. Trial 🔑260(1)—Jury being fully instructed, fact that court declined unnecessary repetition affords no ground for complaint.

Where jury were fully and correctly instructed, mere fact that trial judge declined unnecessary repetition affords no ground for reasonable complaint.

8. Trial 🔑267(1)—Parties cannot demand that instructions be phrased in language chosen by themselves, regardless of how otherwise given.

Parties litigant cannot demand that the law as given to a jury be phrased in language chosen by themselves, regardless of how otherwise given.

9. Trial 🔑205—Refusal to instruct as to presumption that person is innocent of wrong and that law has been obeyed held not error.

Refusal of instruction in action for injuries as to presumption that person is innocent of wrong and that law has been obeyed *held* not erroneous, where ample facts appeared to render unnecessary a recourse to presumption and instructions given fully insured against any harm from refusal to instruct as requested.

10. Appeal and error 🔑1067—Refusal to instruct on question of right of way held harmless, where main issue was speed of street car and truck which collided.

In action against street railway and truck owners for injury to person run down in her yard by truck after it collided with street car, where main issue was speed of street car and of truck and there was evidence of negligence of both parties relative to excessive speed, refusal of instruction on question of right of way was harmless.

11. Trial 🔑260(8)—Requested instruction as to truck driver's right to presume that others using streets would obey the law held sufficiently covered by given instructions.

Requested instruction that truck driver had right to presume that all other persons and vehicles using streets would obey law was sufficiently covered by instruction that it was not negligence to fail to expect violation of law by another, and that operators of vehicles have right to expect that those in charge of street cars will operate them with ordinary care.

12. Appeal and error 🔑1058(1)—Exclusion of evidence elsewhere covered and admission of evidence to a great extent nonessential held not error.

Court did not err in excluding evidence which was elsewhere covered and admitting evidence which was to a great extent nonessential and, where essential, embraced largely testimony of a photographic expert and result of his experiment, as to which testimony court has much discretion.

13. Master and servant 🔑1—Relationship of general employer and special employer as to one employee may exist at one time.

There may exist at one time the relationship of general employer and a special employer as to one employee.

14. Master and servant 🔑301(1)—Evidence held to warrant finding that general and special employment existed subjecting both copartnership and corporation to liability for negligence of truck driver.

Evidence that copartnership purchased trucks from corporation under conditional sale contract giving corporation option to repurchase trucks, that one of partners was sales manager of corporation, that trucks were used exclusively in business of corporation, and that copartnership and corporation occupied same office *held* to warrant finding that both a general and special employment existed, subjecting both copartnership and corporation to liability for negligent acts of truck driver.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Myrtle Rosander against the Market Street Railway Company, the Golden Gate Building Materials Company, and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Cooley & Gallagher, of San Francisco, for appellants.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for respondent.

PARKER, Justice pro tem. This is the same action under consideration in Rosander v. Market Street Railway Co. et al., 265 P. 536, this day decided. As disclosed in the opinion rendered, the judgment was against all of the defendants, and separate appeals were taken. This is the appeal of all of the defendants other than Market Street Railway Company, a corporation.

The trial of the action was a three-party controversy. The plaintiff, admittedly without negligence, charged her injuries to the joint and concurring negligence of all of the defendants. The defendants comprised two alleged wrongdoers, the railway company and the remaining defendants, commonly referred to as the truck people. These appellants are the truck people.

The appeal presents two general claims. The first contention involves the liability of any of the defendants; the second contention, admitting the liability of the truck owners, is that defendant Golden Gate Building Materials Company (a corporation) was not the owner of the truck nor the employer of the driver, and that there was no privity of contract or other relationship sufficiently shown to fasten any liabilty on said corporation.

As the facts are few they may be repeated here. Plaintiff, on the morning of the day in interest, was leaving her home near Scott and Page streets, in the city of San Francisco, at about 8:30 a. m. Almost immediately upon reaching the sidewalk, she heard a crash and saw in the street a collision between a street car and a large truck, and almost in the instant she saw the truck moving toward her. She fled for safety to the house, and the truck overtook her, knocking her down right at the threshold and inflicting her injuries. It was a large five-ton truck heavily loaded and being driven by one Palamountain.

The case was tried upon the theory that the street car in question was traveling at a high and excessive rate of speed down Page street, and that the truck, at an excessive and unlawful rate of speed, was coming along on Scott street; that, due to the unlawful speed of both the street car and the truck, a collision occurred at the intersection.

We deem this statement of facts will serve the present discussion.

Appellants raise two points that may be disposed of at the outset. First, it is contended that the evidence is insufficient to support the verdict and judgment against these appellants. This is the language of appellants' brief:

> "We will set forth the material portions of each witness' testimony, with the exception of the witnesses offered by the railroad company. If the jury accepted the railroad's witnesses it could not have rendered a verdict against the railroad. If the respondent relies on the testimony of the railroad company's witnesses, of course she must concede that they were truthful, and if so, no verdict should have been rendered against the railroad company. She cannot adopt the position that their testimony about the operation of the car was untrue, but that on the other hand the testimony about the operation of the truck was true."

This is about all that need be said on the subject of the sufficiency of the evidence. The argument is not strong enough to call forth a reply thereto. We have, however, examined the entire record and find sufficient evidence to support the verdict.

[1] Appellants also argue that the damages allowed were excessive to the extent of appearing to have been given under the influence of passion and prejudice.

In Mohn v. Tingley, 191 Cal. 471, 217 P. 733, the court again approves the rule as laid down in Hale v. San Bernardino Co., 156 Cal. 713, 106 P. 83, as follows:

> "The amount of damages * * * is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly

and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'"

[2] From a review of the record before us we do not feel that the damages are so grossly excessive as to warrant the conclusion that passion or prejudice entered as an element in the jury's determination. The plaintiff, a young married woman, was run down by a loaded truck of a total weight of 23,000 pounds. The resultant injuries were what would be expected save that she was not killed outright. We deem it unnecessary to catalog in detail all of the injuries sustained by her. That she was most seriously injured admits of no question. The injuries are of a permanent character to the extent that, whatever slight improvement may follow, she will remain an invalid. As the result of the accident she has been completely unsexed, and the capacity to bear children has been destroyed. All of her main organs now function without nerve supply and in an inefficient manner. It would be and is a delicate question, and to here enumerate each separate disarrangement would be to inflict needless pain upon plaintiff and embarrassment to the record, with no cause sufficiently or at all warranting such course. The injury involved all of the sex organs and the organs co-ordinating therewith. Natural elimination is impossible, and even purgative treatment is inefficient, resulting in the necessity of artificial aids not wholly effective to prevent systemic poisoning with its usual discomforts.

[3] Appellants' other grounds of appeal are alleged errors in the court's action in giving and refusing certain instructions to the jury and in the admission and rejection of evidence.

On the question of the right of way, the court instructed the jury as follows:

> "As said by our Supreme Court, the street car cannot go upon the street except upon its rails, and hence it has the better right to that space, to which others must yield when necessary. It is the settled law of this state that the street car has, and from the necessity of the case must have, a right of way upon that portion of the street upon which alone it can travel and which it cannot leave paramount to that of persons and ordinary vehicles. This superior right is not exclusive, and does not prevent others from driving on or passing along or across its tracks at any time or place when by so doing it will not materially interfere with the progress of its cars."

Appellants concede the correctness of the instruction as far as travel between blocks may be involved. It is urged, however, that at intersections the rule has no application. Much authority is cited in support of this contention. We do not feel the necessity of analyzing and distinguishing all of the cases upon the subject. The street car has no opportunity of leaving the tracks while passing through an intersection, and at least to that extent the reason for the general rule holds good at crossings. We decline to go further into the question for the reason that whatever conclusion we might reach on the alleged error in the instruction, it could have no bearing on the determination of this appeal. It has no relation to the negligence of the truck driver, and, as the facts of the case show and the finding of the jury is that the truck in question was driving to and through the said intersection at a speed prohibited and in itself negligent, the fact that the railway company may have been likewise negligent in no way excuses the truck driver. In the face of substantial and convincing evidence of the negligence of both the street car company and the driver of the truck, it becomes unimportant to determine which of the two was the more negligent. If we were to hold the instruction erroneous, and go further and hold that the right of way at the intersection here being considered was with the truck, there would still be left in the case the negligence of the driver of the truck sufficient to sustain the verdict.

Appellants content themselves with pointing out the alleged unsoundness of the instruction, but make no reference to any harm or prejudice resulting to them therefrom. The jury were further instructed upon the same subject, and were told that neither the street car nor the truck had any exclusive right to the use of any part of the street, but that the rights of each were and are reciprocal to the extent in the questioned instruction stated; and the jury were further instructed that, in operating the street car along the street in question at the time and place of the accident, it was the duty of the motorman on the street car to use ordinary care not to collide with any automobile upon the highway. Taking the instructions together, we think the jury was fully and fairly instructed. Bailey v. Market St. R. R. Co., 110 Cal. 320, 42 P. 914; Arnold v. San Francisco, etc., R. R., 175 Cal. 1, 164 P. 798; Armock v. U. R. R. of San Francisco, 56 Cal. App. 160, 204 P. 856; Haber v. Pacific Electric, 78 Cal. App. 617, 248 P. 741.

In 23 Cal. Jur. 881, it is stated:

> "The duties of a motorman on approaching an intersecting street and of a pedestrian or driver of a vehicle about to cross the tracks are reciprocal, except in the particular that, because the car is confined to its tracks, vehicles and foot passengers must give way to its clear passage."

[4] The court instructed the jury as follows:

> "I further charge you that said Motor Vehicle Act also provided, at the time of the happening of the accident, that it was unlawful for the driver of a vehicle equipped with other than pneumatic tires to drive such vehicle upon a public highway at a speed greater than or in ex-

cess of 10 miles an hour where the gross weight of the vehicle and its load was over 22,000 pounds.

"Any violation of these provisions of the state Motor Vehicle Act is prima facie evidence of negligence unless excused by the circumstances shown, and you have a right to take into consideration these provisions of that act in determining whether or not the driver of the truck and the defendants [naming the truck people] were guilty of negligence."

The contention of appellants is that, conceding the provisions of the Motor Vehicle Act (St. 1923, p. 517, as amended), to be as stated, these provisions were enacted for the protection of the roadbed itself and for no other purpose.

Adopting appellants' language, the contention is thus given:

> "The provisions of the Motor Vehicle Act with respect of speed at which vehicles equipped with solid tires may be operated were not enacted with the idea of protecting other traffic, either vehicular or pedestrian. These provisions are solely for the protection of the roadbed."

Appellants then cite sufficient authority to the proposition that where a violation of statute is not a violation of any duty owed plaintiff she cannot recover. Corbett v. Spanos, 37 Cal. App. 204, 173 P. 769; Figone v. Guisti, 43 Cal. App. 609, 185 P. 694. There is nothing in the Motor Vehicle Act to suggest that these regulations of speed according to weight and tire equipment were intended solely for the protection of the roadbed. We cannot take judicial knowledge of the fact, if it be a fact, that a truck with solid tire wheels and loaded to 22,000 pounds will be more harmful to the roadbed than a truck of equal load with pneumatic tires. We have no evidence on the subject. If we are to hold that these so-called "weight and equipment" speed limits were enacted solely as a protection to the roadbed, we would then be left with no regulation governing speed of heavy-loaded trucks as applicable to general traffic except such regulations as govern the ordinary touring car. Obviously this can hardly be the intent of the lawmakers. At the time of the accident in question here, the speed limits for all cars appeared under title 9 of the Motor Vehicle Act, §§ 112–145, inclusive. Title 8, §§ 83 to 111, inclusive, deals with the use of the highway and gross weights of trucks and size and character of tires. When the language of a statute is plain and unambiguous, courts are not called upon to determine the wisdom of the enactment. It seems to us beyond question that there is a very material difference, aside from roadbed protection, in the management and control of a touring automobile and a cushion tired truck of a gross weight of 22,000 ponds. We know it to be true that a truck weighing with load 23,000 pounds is, when control is lost, an instrumentality of far greater danger than an ordinary automobile weighing four or five thousand pounds. Laws are framed and enacted on the theory of protection against possible emergency as well as for other general purposes. When the Legislature declared that trucks with solid tires loaded to a gross of 22,000 pounds should not travel in excess of 10 miles per hour, it is not improbable that it might have intended to render impossible just such an accident as this. If this truck had been traveling 10 miles per hour and had been struck as it was by a street car, it is less likely that it would have done the damage which we have here. We know, as a matter of general knowledge, that speed plus weight equal momentum, and as the factors increase the result is proportionately greater. The Legislature may be presumed to have foreseen the inevitable result of permitting large loaded trucks of a gross weight exceeding 22,000 pounds to run along the streets and highways with no regulation as to speed other than those applying to the general traffic. These trucks, aside from being heavy, are likewise usually of large dimensions, difficult of control, and occupy a great portion of the highway. If they were permitted the general speed rate nothing but congestion would follow, in as much as passing around them would entail great difficulty and danger. Legislation affecting automobile transportation is no longer in an experimental stage, and if it was the intention of the lawmakers to regulate speed of heavy vehicles simply as a matter of protecting the roadbed it would have been a simple thing for them to so indicate. The speed of heavy loaded trucks is further regulated according to the wheel equipment, that is to say, one rate of speed is permitted for those equipped with pneumatic tires and another for those equipped with solid tires. Appellants assume it to be a well-known fact that the heavier the car the greater the damage resulting to the highway. While this may be granted, it does not negative the idea that there is a greater danger to the general traffic in the operation of these heavy trucks. We conclude that the purpose of these enactments was not solely for the protection of the roadbed. The state has taken to itself the matter of regulating the operation of automobiles on the public highways. By its mandate the speed of every kind of motor vehicle is fixed or regulated. The Motor Vehicle Act is primarily enacted for public safety, and its many provisions looking toward that end so indicate. To leave trucks of solid tire equipment and of a gross weight exceeding 22,000 pounds with the same speed regulations as a touring car would frustrate the attainment of the end sought. And therefore when the speed of such vehicles has been regulated it is not for the courts, in the absence of evidence thereon, to arbitrarily hold the regulation unreasonable as a speed limit but valid only as a road measure. We are of the opinion that the particular provision under consideration is a part of the general scheme to promote the saftey of the public, although it may include some notion of the necessities of the roadbed.

[5] The court instructed the jury with reference to the duty of the driver of the truck to operate his vehicle upon the right-hand side of Scott street and at the speed prescribed. Appellants complain that these instructions were upon matters not in issue in as much as the negligence charged was limited to the intersection, and the conduct of the driver before reaching that portion of the streets was immaterial and could in no way have contributed to the accident. We find no merit in the contention.

[6] The court instructed the jury as follows:

> "Before the plaintiff can recover in this action it must first appear by a preponderance of the evidence that the defendants, or their servants, were guilty of some act of negligence which contributed proximately to the accident."

Appellants complain that this instruction permitted the jury to return a verdict for plaintiff if any act of negligence on the part of the truck driver was proved, without regard to the scope of the complaint. However, a further instruction was given that plaintiff could not recover unless she proved by a preponderance of the evidence all the material allegations of her complaint with reference to the alleged conduct of defendants. We see no serious error in the instruction. Obviously it was intended as a general preliminary instruction and was a correct statement in the abstract. A similar contention has been passed upon adversely to appellants' claims in the case of Kelley v. Transportation Co., 197 Cal. 598, 242 P. 76. The case here was fully and carefully tried, and the theories and defenses of all parties fully presented and argued, and, as said in the Kelley Case, supra, the jury could not have been led into the realm of surmise as to other acts of negligence.

This covers appellants' claims of error on instructions given. There are other specifications of error predicted on instructions given that we deem do not deserve discussion. We find these last to be without merit of any kind, exclusive perhaps of novelty.

[7, 8] The appellants complain that the trial court erred to their prejudice in refusing to give certain instructions requested by them. The court refused to instruct the jury that the mere fact that the truck and the street car collided did not afford the slightest evidence that the collision was caused by negligence on the part of the truck driver. Likewise, the court refused to tell the jury that the mere fact that the truck ran upon or was forced upon the sidewalk and struck and injured plaintiff did not furnish the slightest evidence of the truck driver's negligence.

As hereinbefore noted, the court did instruct the jury as to the burden of proof, and further instructed the jury as follows:

> "It is not sufficient for plaintiff to establish that she received injuries and that she received them through being struck by defendants, but plaintiff must further prove that the accident and resulting injuries were proximately due to the negligence of the defendants."

The jury were also told that there was no legal presumption of negligence, and that plaintiff must prove by a preponderance of evidence that the accident was proximately due to negligence of defendants.

The jury were fully and correctly instructed, and the mere fact that the trial judge declined unnecessary repetition affords appellants no ground for reasonable complaint. Without citation of authority it may be almost dogmatically stated that parties litigant cannot demand that the law, as given to a jury, be phrased in language chosen by themselves, regardless of how otherwise given. Further, it seems that the mere presence of a five-ton truck on the sidewalk and moving into a doorway, running down people in its progress, would in itself measure up to "the slightest evidence" of negligence.

[9] The court refused an instruction based upon the presumption of law that a person is innocent of wrong and that the law has been obeyed. Under the case of Olsen v. Standard Oil Co., 188 Cal. 24, 204 P. 393, the instruction might properly have been given. However, ample facts appeared to render unnecessary a recourse to presumption and we think the instructions given by the court were ample to insure against any imagined harm from the refusal to instruct as requested on these matters.

[10, 11] The appellants complain of the court's refusal to instruct the jury, as requested by them, on the question of right of way. This point has been sufficiently covered hereinbefore in discussing the instructions given.

We repeat that, even if there was merit in appellants' contention, no harm results to them in the face of their own negligence. The main issue here was the speed of the street car and of the truck. If both were violating the law in this respect, plaintiff is not forced to determine which should have yielded, but is entitled to her recovery against both.

Appellants next urge error in the trial court's refusal to instruct as to the truck driver's right to presume that all other persons, street cars, etc., using the streets would obey the law. The court did instruct the jury that it was not negligence to fail to anticipate the violation of law by any person, and at these appellants' request instructed the jury that operators of vehicles have a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and use at least ordinary care to avoid injury to others. See Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Truitner v. Knight (Cal. App.) 257 P. 447.

Appellants complain of the court's action in the modification of a requested instruction. The point raised has been elsewhere disposed of herein.

[12] The foregoing disposes of the instructions. Appellants urge further that the court erred in its rulings on the admission and rejection of testimony.

We have gone carefully through every specification of error based on this claim, and find no merit in any. The evidence excluded was elsewhere covered, and the evidence admitted was to a great extent nonessential, and where essential it embraced largely the testimony of a photographic expert and the result of his experiment. On the class of testimony last mentioned the court has much discretion. Sonoma County v. Stofen, 125 Cal. 32, 57 P. 681; Western Co. v. O'Brien, 49 Cal. App. 707, 194 P. 72; People v. Spencer, 58 Cal. App. 197, 228, 208 P. 380.

[13, 14] Lastly, the appellant Golden Gate Building Materials Company, a corporation, attacks the verdict and judgment as unsupported on the issue of its connection with the truck or the driver thereof.

The truck in question was owned by McDaniel & Barrymore, a copartnership. At the time of the accident it was being operated by one Ray Palamountain, and was loaded with gravel which was being hauled for Golden Gate Building Materials Corporation. In order that we may better view the exact relationship between the copartnership and the corporation, with reference to the question, we will outline the facts:

Barrymore and McDaniel were copartners. These gentlemen were men of little means and unable to fully finance their operations. They purchased, upon contract of conditional sale, a number of trucks and entered into a contract with the corporation for the hauling of materials. When they took the hauling contract they entered into a contract with the corporation whereby it was agreed that within a period of three years the corporation could buy the trucks from them. In other words, the corporation had an option to take the trucks if they wanted them, and incidentally this option was exercised after the date of the accident. At the time of the accident, Barrymore, one of the partners, was the sales manager for the corporation, and after the transfer of the trucks he remained as vice president of the corporation. The office of the copartnership was at the same address as the office of the corporation, and the directing foreman of the corporation was one Jones. The driver, Palamountain, reported to Jones daily and from him received his orders for the day. The truck here involved had painted upon it in large letters the name of the corporation and was used exclusively by the corporation. The driver, Palamountain, was carried on the books of the corporation as an employee, and each week his wages were paid by the corporation. In this connection it may be noted that the hauling contract was on the tonnage basis, and the payments were made thereunder but once a month. The wages paid by the corporation weekly were charged against the amount due the partnership at the end of the month. The driver, Palamountain, received his orders from Jones of the corporation, though the testimony of appellants restricts the authority of Jones to routing the trucks and giving orders simply as to places to and from which loads should be carried, with no absolute power of hiring or discharging drivers, although, if a driver did not appear for work, he did employ other drivers, the partners claiming, however, that the men thus employed by Jones were subject to their approval or discharge.

From these facts—which were the facts presented by appellants themselves—certain prominent features appear. There was some privity of relationship between the partnership and the corporation evidenced by the contract as to the purchase of the trucks by the corporation. Speaking generally, it is unlawful for one holding personal property under a conditional sale to transfer or sell the same. To the extent that the corporation did hold an option to purchase the trucks of the copartnership, it is apparent that it had some interest therein, unlawful perhaps, but nevertheless enforceable as between the parties themselves. This relationship between the appellants is further manifest in the fact that one of the partners, Barrymore, was sales manager for the corporation, and that the corporation and copartnership occupied the same office. The truck being used exclusively in the business of the corporation, and the corporation having this option to purchase from the copartnership, it may readily be inferred that the original purchase by the copartners was solely for the purpose of doing the corporation hauling. The fact that when the corporation took over the trucks under its option of purchase, or thereabouts, the copartnership was dissolved and the former sales manager became vice president of the corporation likewise has probative effect upon the issues involved. Courts have recognized the difficulty one meets in attempting to prove the exact relationship existing between parties in cases such as this. The true facts are peculiarly within the knowledge of the appellants here. The law at no time requires demonstration, and the rule of evidence has its widest scope in these cases.

It is now well settled in this state that there may exist at one time the relationship of general employer and a special employer as to one employee. There is nothing in our decisions which would prevent our following the rule that in some cases where, at the time of an accident, both the general and special employer exerted some measure of control over the employé through their respective foremen, both should be held liable. Famous Players Co. v. Accident Commission, 194 Cal. 134, 228 P. 5, 34 A. L. R. 765; Pruitt v. Accident Commission, 189 Cal. 459, 209 P. 31; Diamond Drill Co. v. Ind. Acc. Com., 199 Cal. 694, 250 P. 862. In all cases the question to a great extent becomes one of fact for the jury. From the facts as outlined here and the inferences that could logically be drawn therefrom, the jury here might have found either that the corporation itself was the real employer, or was so far interested as to make the employment of the truck driver a joint employment. The jury, from the facts, might have concluded that there did exist both a general and special employment, subjecting both the copartnership and the corporation to a liability for the negligent acts of the truck driver. We cannot say as a matter of law that the finding of the jury has no support in the evidence. From the admitted facts, all of the testimony coming from the appellants, the finding of the jury finds ample support and it was not compulsory that the jury accept as true the explanation offered by appellants to alter the effect thereof.

Appellants' motion for a new trial was properly denied.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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90 Cal. App. 176

IMMANUEL PRESBYTERIAN CHURCH v. PAYNE, County Auditor, et al.★

(Civ. 5080.)

District Court of Appeal, Second District, Division 1, California. March 16, 1928.

Hearing Denied by Supreme Court May 14, 1928.

Taxation ⚷244—Church lot in congested district used for free parking of automobiles, and affording light and air for church, held exempt from taxation (Const. art. 13, § 1½; Pol. Code, § 3611).

Portion of church lot located in congested city district, and used by members of congregation, without charge, for parking automobiles during services, and which also afforded light and air for church building, *held* to come within provision of Const. art. 13, § 1½, and Pol. Code, § 3611, exempting from taxation so much of the real property on which buildings used solely and exclusively for religious worship are situated as may be required "for the convenient use and occupation of said buildings."

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition by the Immanuel Presbyterian Church, a corporation, for writ of mandate prayed to be directed to H. A. Payne, as County Auditor of the County of Los Angeles, and another, to audit and refund certain taxes paid. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., and TYLER, Justice pro tem., voting for a transfer.

Edward T. Bishop, County Counsel, J. H. O'Connor, Asst. County Counsel, and J. A. Tucker, Deputy County Counsel, all of Los Angeles, for apellants.

Edgar C. Smith and Thomas C. Ridgway, both of Los Angeles, for respondent.

YORK, J. This is an appeal from a judgment which determined that a certain portion of plaintiff's property, which was used by the members of its congregation for the parking of their automobiles without any charge being made therefor when they were attending church services, was entitled to exemption from taxation by virtue of section 1½ of article 13 of the Constitution of the state of California.

In the instant case, under the agreed statement of facts admitting certain portions of the facts stated in plaintiff's petition to be true, which stipulation is set out in the engrossed bill of exceptions herein, it is apparent that all of the land in question was "required for the convenient use and occupation of the church building."

The condition of the pleadings in this case and the evidence so introduced clearly show the fact that a very considerable portion of the congregation attending church services in the church in question comes from some little distance, by reason of the fact that the residential portion of the city of Los Angeles has been removed from the vicinity of the church, as the church building is built in what is now known as the business section of Los Angeles. The evidence further shows that the streets in the vicinity of said church during the hour when services are held therein are badly congested; that it is impossible for one-half of said persons attending said church using their own private automobiles for conveyance to and from said church to park upon the said property in question and the other one-half of such persons have to park as best they can in the proximate vicinity of said church on such badly congested streets. The evidence further shows that no charge of any kind is made, either directly or indirectly, for the parking of said automobiles. Therefore, the finding of the trial court that the property on which the parking space is established and maintained, which is immediately adjacent to the said church, was

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★Hearing denied by Supreme Court.

necessary and required for the convenient use and occupation of the said building, is the only finding the trial court could have made. In other words, as stated in respondent's brief, a portion of a church lot located in a congested city district, which is used by the members of the congregation for the parking of their automobiles when attending church services, and which also affords light and air for the church building located thereon, comes within the constitutional provision which exempts from taxation so much of the real property, on which buildings used solely and exclusively for religious worship are situated, as may be required "for the convenient use and occupation of said buildings," and this is the only logical conclusion that could be reached from such stipulation of facts.

The plaintiff filed with the county assessor, under section 3611 of the Political Code, its claim for exemption from taxes for the year 1923 for all of the lot on which the church is located. This claim for exemption was recognized in part only, and was denied as to the southwest 90 feet; whereupon plaintiff paid $2,268.64 as the general property tax for 1923 on said southwest 90 feet, and then filed, under section 3804 of the Political Code, its verified claim and petition for refund of taxes of the board of supervisors. This board granted the petition, and ordered said sum of $2,268.64 to be refunded to the plaintiff. The defendants, the county auditor and county treasurer, refused to audit and pay said claim, whereupon the plaintiff church filed its petition for a writ of mandate to compel the said county auditor and said county treasurer to audit and pay said claim for refund of said taxes in the sum of $2,268.64.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 96

MOAKLEY et al. v. BLOG et al. (Civ. 6151.)★

District Court of Appeal, First District, Division 2, California. March 13, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Deeds ⇨99—One deed may refer to another with same effect as if deed referred to was set forth in full.

One deed may refer to another in such manner as to have same effect as if the deed referred to was set forth in full.

2. Deeds ⇨93—Deed is to be interpreted in accordance with intention, considering document as a whole.

A deed is to be interpreted in accordance with manifest intention of parties, considering the document as a whole.

3. Deeds ⇨140—Reversionary interest in railway right of way strip held to pass under deed excepting right of way, with appurtenances and reversions (Civ. Code, §§ 1046, 1106).

Where strip of land, described by metes and bounds, was deeded to railway for right of way, on condition that, if it ceased to be used as such, it was to revert without conveyance in grantor, his heirs and assigns, and thereafter original grantor conveyed all his property to W., *held* that subsequent deed of W., granting described property, "except right of way," previously granted to railway under the original deed, together with appurtenances and reversions, remainders, issues, and profits, conveyed the reversionary interest in strip granted railway, under Civ. Code, §§ 1046, 1106.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Emily Moakley and another against Solomon Blog and others. From a judgment for the defendants, plaintiffs appeal. Affirmed.

John F. Poole, of Los Angeles, for appellants.

M. J. Finkenstein, of Los Angeles, for respondents.

KOFORD, P. J. The defendants recovered judgment in a quiet title suit, and plaintiffs appeal. The points argued upon this appeal involve the construction of two conveyances, each of which contained exceptions, reservations, or conditions. The first one of these two conveyances was executed by George P. Lyman and others, who for purposes of this case may be considered the original owners. By it said Lyman and others conveyed out of their holdings on October 21, 1899, a strip of land to the Los Angeles Pacific Railway Company. This conveyance "granted, bargained, sold, conveyed, and confirmed" to the railway company "all that certain lot, piece, or parcel of land" "bounded and particularly described as follows, to wit: [Here follows a metes and bounds description of a strip of land 35 feet wide running diagonally through the property of the grantors, Lyman, and others.]" The conveyance then contained the following paragraph:

> "This conveyance is given and accepted upon the express understanding and condition that said strip of land is to be used for a right of way for constructing and maintaining a railroad over and along the same by the grantee herein, or its successors or assigns and for no other purpose, and that if at any time it shall cease to be used for that purpose it shall immediately thereupon revert and revest in the grantors herein, their heirs or assigns without any further or other conveyance from said grantee or its successors or assigns."

We will refer to this deed as the Lyman-Railway deed.

★Hearing denied by Supreme Court.

The parcel of land which is the subject-matter of this action is included in this strip which was thus granted to the railway company.

Later in October, 1903, said Lyman and others granted all their property to J. C. Willmon. Said Willmon is the common predecessor of the parties litigant here.

Then, in November, 1903, said Willmon conveyed to Charles M. Stimson. We will refer to this deed as the Willmon-Stimson deed. This is the second conveyance to be construed. Stimson conveyed to others, and they in turn conveyed to defendants and respondents Blog, so that it is under this deed that respondents claim title. These conveyances were: Stimson to Hamell, November 11, 1915; Hamell to Cazauraug, November 4, 1915; Cazauraug to respondents Blog, February, 1922. Respondents paid $6,000 for the deed conveying to them the 35-foot strip in question. The railway company also quitclaimed to respondents Blog in 1922 presumably on account of Civil Code, § 1109, although the Lyman-Railway deed expressly provided for reverting without conveyance. The Willmon-Stimson deed granted, bargained, sold, conveyed, and confirmed all that certain real property described as follows: [Description of 10 acres of land which lies around, across, and over that portion of the railroad strip in dispute in this action.] Then follows immediately after the description of the 10 acres: "Except right of way of the Los Angeles Pacific Railway Company over strip thirty-five feet wide as granted by deed recorded in Book 1371, p. 95, Deeds." (This refers to the Lyman-Railway deed.) Then follows the clause, "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof."

The Pacific Electric Railway Company, successor to Los Angeles Pacific Railway Company, abandoned its railway over this strip, and, on September 1, 1915, the Railroad Commission of the state of California duly made its order permitting the railway company to remove its tracks therefrom.

On August 7, 1923, J. C. Willmon, who had previously conveyed to Stimson (from whom respondents Blog took title), conveyed or quitclaimed the strip of land in dispute to the appellants for $10.

The question to be decided upon this appeal therefore is this: When Willmon conveyed to Stimson in 1903, did he pass title to the land in the railway strip, or the reversion therein, so that, upon the subsequent abandonment of the railway, respondents Blog (Stimson's successors in interest) became the owners thereof? If not, then Willmon retained the title to this strip at that time, or the reversionary interest therein, and passed it to the plaintiffs and appellants by his deed of August 7, 1923.

On the part of respondents it is claimed that the Willmon-Stimson deed conveyed all the land within the exterior boundaries of the deed's description, and excepted only a right of way for the railway. On the part of the appellants it is claimed that the said deed by the exception therein contained excepted from the land conveyed the whole fee of the strip occupied by the railway tracks, and that the deed, therefore, is to be construed the same as though it described two triangular pieces of land each bounded on its hypotenuse by the railway strip. The important distinction between an exception of a right of way and an exception of the land upon which the right of way is situated is pointed out in Hall v. Railway Company, 133 Iowa, 716, 110 N. W. 1040, cited by appellant. There the exception in the deed was "excepting the part occupied by the right of way of the * * * railroad company." The court said:

> "It was the soil itself that was in terms accepted from the grant, and not merely the right of way."

Again, in Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989, 1 L. R. A. (N. S.) 565, 110 Am. St. Rep. 873, the exception in the grant was "a strip of land two rods in width off the north side thereof, to be used as a right of way." The decision reads:

> "The deed to Lewis in plain terms excepts and reserves the two rods for a right of way, not a right of way over the two rods, * * * which quite plainly imports that the fee was intended to be reserved."

In claiming the exception clause in the Willmon-Stimson deed to be a reservation of the fee, and not merely of a right of way, appellants read softly the first part of the exception "except right of way of the Los Angeles Railway Company over a strip 35 feet wide," and emphasize the remainder of the exception, "as granted by deed recorded in Book 1371, p. 95, of Deeds." (This refers to the Lyman-Railway deed.)

[1, 2] It is contended that the deed thus referred to conveys, not merely a right of way to the railway company, but a fee with a condition subsequent. Hannah v. S. P. Ry. Co., 48 Cal. App. 517, 192 P. 304, and cases therein cited. It is further contended that, by the reference in the exception to that deed, the clause as a whole excepts the fee, because the deed referred to granted the fee. It is true that one deed may refer to another in such a manner as to have the same effect as if the deed referred to was set forth in full. Jacobs v. All Persons, 12 Cal. App. 163, 166, 167, 106 P. 896, and cases therein cited. The same authorities, however, follow the rule that a deed is to be interpreted in accordance with the

manifest intention of the parties considering the document as a whole. While the Willmon-Stimson deed refers to the Lyman-Railway deed, and the latter grants a fee, nevertheless the latter also reserves a reversionary interest upon a condition subsequent. This interest could be conveyed before the happening of the condition subsequent upon which it was predicated. Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047. It is not true, therefore, that Willmon could convey nothing to Stimson because he had nothing. He had a conveyable reversionary interest which afterwards ripened into a fee. The reference to the Lyman-Railway deed called attention to the said reversion as well as to the nature of the title that had been therein conveyed.

[3] We conclude that the reference to the Lyman-Railway deed was for the purpose of a description of the location and boundaries of the right of way and to indicate that the right of way was for the railway company and not for Willmon. It is hard to believe that Willmon would have executed the deed to Stimson in the form and language used if he had intended to keep for himself the reversionary interest which has now become the subject of this action. He would be more likely to say in that case, "except the land granted or described by the Lyman-Railway Company deed." In all the authorities relied on by appellants, the exceptions except land itself by such expressions as "reserving a strip of land," "excepting from the effect and operation of the conveyance four square miles, etc.," and "excepting the part occupied by the right of way," etc. Where, on the other hand, the exception is "saving and preserving the road," it has been held that the fee was not reserved in the part, Bolio v. Marvin, 130 Mich. 82, 89 N. W. 563, and cases cited therein. We therefore hold that in 1915, when the railway abandoned the right of way, the fee reverted, not to Willmon, but to respondents Blog, the successors in interest of Willmon's grantee Stimson, because the grant deed of 1903 from Willmon to Stimson conveyed the reversionary interest. Civ. Code, §§ 1046 and 1106; Johnston v. City of Los Angeles, supra. The deed of Willmon to appellants in 1923, eight years after the abandonment of the right of way, conveyed nothing, since Willmon at that time had nothing to convey.

Some technical objections are urged to the chain of title traced by respondents Blog from Stimson. If these objections were good, the effect would be to leave the title in Stimson and not in appellants nor Willmon, and appellants could not prevail, since they must recover, if at all, on the strength of their own title. The objections, aside from this, however, are without merit.

The court found that neither appellants nor their predecessors were seized nor possessed of the property within five years before the commencement of the action, and that their cause of action was barred by Code of Civil Procedure, §§ 318, 319, and 320. These findings were made in response to respondents' defense. Appellants do not claim by adverse possession, not to have been in actual possession. In view of the conclusion we have arrived at on the main point in this case, it is not necessary to pass upon appellants' attack upon these additional findings.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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90 Cal. App. 183

LA BONTE & RANSOME CO., Inc., v. SCELLERS. (Civ. 4958.)

District Court of Appeal, Second District, Division 2, California. March 16, 1928.

1. Appeal and error ⚷757(1)—Court may examine transcript to determine whether there be merit in appeal, though portions of record to which appellant desires to call attention have not been printed in brief (Code Civ. Proc. §§ 953a, 953b, 953c).

In an appeal pursuant to the alternative method provided for in Code Civ. Proc. §§ 953a, 953b, 953c, reviewing court may examine transcript to determine whether there be merit in appeal, even though portions of the record to which the appellant desires to call the court's attention have not been printed in the brief as required by section 953c.

2. Appeal and error ⚷901—Presumptions are in favor of regularity of judgment and basic proceedings.

All presumptions indulged in are in favor of the regularity of judgment and proceedings upon which it is based, so that it devolves upon an appellant to show affirmatively the existence of error upon which he asks for reversal.

3. Appeal and error ⚷1011(1)—On appeal from order made on affidavits involving fact questions, conflict must be resolved in favor of prevailing party.

On an appeal from an order made on affidavits involving questions of fact, conflict must be resolved in favor of party prevailing in trial court.

4. Judgment ⚷161—Defendant's failure to file with motion for relief from default judgment a copy of answer or pleading as required held to necessitate affirmation of order denying relief (Code Civ. Proc. § 473).

Failure of defendant seeking to set aside a default judgment to file with his motion for relief from such judgment a copy of his answer or other pleading, as required by Code Civ. Proc. § 473, *held* to necessitate an affirmation of trial court's order denying relief.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Action by the La Bonte & Ransome Company, Inc., against L. W. Scellers. Default judgment for plaintiff, and from an order refusing his motion to set aside such default, defendant appeals. Affirmed.

J. M. Bowen, of Los Angeles, for appellant.
Harry W. McNutt, of Los Angeles, for respondent.

HAZLETT, Justice pro tem. In this case defendant failed to answer within the time allowed by law after service of the summons and complaint, his default was taken and judgment was entered against him pursuant thereto. He moved to have the default judgment set aside under the provisions of section 473, Code of Civil Procedure, on the ground of mistake, inadvertence, or excusable neglect, which motion was denied, and he appeals.

[1] The appeal was made pursuant to the alternative method provided for in sections 953a, 953b, and 953c of the Code of Civil Procedure, but appellant did not print in his brief or in a supplement thereto any part of the record. He mentions in his brief his notice of motion to be relieved from the default, the affidavits made in support of and in resistance to the motion, and the order of the court denying the motion. Respondent printed in his brief an affidavit made in resistance to the motion. The provision of section 953c, requiring appellant to so print such portions of the record as he desired to call to the attention of the court, was not complied with, and the affidavit presented by respondent does not aid appellant in this appeal.

[2] Therefore the record properly before us fails to show error on the part of the trial court in refusing to set aside the default, and we are unable to say that any error was committed. "All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based; hence it devolves upon * * * appellant to affirmatively show the existence of the error upon which he asks for a reversal." Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290, and cases cited. However, in cases where the typewritten transcripts were not voluminous, and, in considering the appeals the court was not caused much extra labor or unusual inconvenience, the transcripts have been examined to determine whether there was merit in the appeals. Hille v. Johnston (Cal. App.) 259 P. 341, and cases cited, and Furlong v. Alexander, 76 Cal. App. 137, 243 P. 887.

[3, 4] In this case the typewritten transcript is not extensive, we have examined it, and it appears that there is a conflict of material facts shown by the affidavits of the parties. This being true, the facts stated in the affidavit presented by respondent must be taken as true and is conclusive on this appeal. Corgiat v. Realty Mortgage Corporation of California (Cal. App.) 260 P. 573. Defendant did not accompany his motion to be relieved from the default with a copy of his answer or other pleading, nor did he propose to file with his motion or at all any answer or other pleading as required by the second subdivision of section 473 of the Code of Civil Procedure. This omission, in itself, is sufficient to require an affirmance of the order of the trial court. Bailiff v. Hildebrandt, 47 Cal. App. 564, 567, 191 P. 42.

The order is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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89 Cal. App. 551

BELL v. CENTRAL BANK OF IMPERIAL VALLEY. (Civ. 5037.)

District Court of Appeal, Second District, Division 2, California. Feb. 29, 1928.

1. Appeal and error ⚷173(6)—Objection that signatures were invalid because in Hindu characters must be made at time of trial.

In action involving chattel mortgages and assignments, objection to effect that signatures are invalid because in Hindu characters must be made at time of trial, in order that opportunity can be afforded to meet objection, and will not be considered when made for first time on appeal.

2. Chattel mortgages ⚷63—Crop mortgage held not invalid because affidavit of good faith was signed only by person recognized as sole tenant (Civ. Code, § 2957).

Where findings of trial court recognized one of persons occupying premises as sole tenant thereof, chattel mortgage on crops was not invalid because affidavit of good faith, under Civ. Code, § 2957, was not signed by occupant other than one recognized as sole tenant.

3. Chattel mortgages ⚷63—Crop mortgage signed by sole tenant held not invalidated because signature of other occupant by mark was witnessed by only one witness.

Where chattel mortgage on crops was signed by sole tenant by one of occupants by mark and witnessed by only one witness, it was not invalid for such reason, where such person signing by mark was not a party to the lease and had no marketable interest therein; name and mark being superfluous.

4. Chattel mortgages ⚷157(2) — Conversation between banker and crop mortgagee's son-in-law relative to advancing cotton picking money may be considered in determining bank's notice of intention to preserve lien.

Where son-in-law of crop mortgagee conversed with banker relative to advancing picking money on cotton warehouse receipts, such conversations can properly be considered by court in determining whether bank had notice that mortgagee intended to preserve her mortgage liens, whether or not there was a strict agency.

5. Chattel mortgages ⊂⇒138(1)—Bank having affirmative notice that cotton would be ginned while under crop mortgages was estopped to subsequently deny effectiveness of mortgage.

Where bank advancing money to gin cotton had notice that cotton would be ginned while under crop mortgages, bank was subsequently estopped from denying that mortgages were effective at time it took warehouse receipts from tenant in whose name cotton was registered at the compress.

6. Chattel mortgages ⊂⇒229(1)—Crop mortgagee suing bank disposing of cotton under warehouse receipts may recover only amount due under mortgages (Civ. Code, § 3054).

Where complaint by crop mortgagee alleged that bank had disposed of cotton under warehouse receipts and asked relief and damages, amount of recovery will be limited to amount due under mortgages, since bank, under Civ. Code, § 3054, had right to apply any balance to extinguish debt of mortgagor.

7. Landlord and tenant ⊂⇒184(1)—Surrender of lease by mutual consent cancels mortgage securing rental except for accrued payments.

Surrender of lease by mutual consent cancels crop mortgage given to secure rental, except for rental payments accrued at date of surrender.

8. Trover and conversion ⊂⇒49—Measure of damages for conversion of property of fluctuating value is highest market value within reasonable time.

Correct meaure of damages for conversion of property of fluctuating value is highest market value within a reasonable time after property was taken, with interest computed from time such value was estimated.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Belle F. Bell against the Central Bank of Imperial Valley. Judgment for plaintiff, and defendant appeals. Reversed.

Ault & Anderson, of Calexico, for appellant.

Hickcox, Crenshaw & Trude, of El Centro, for respondent.

STEPHENS, Justice pro tem. This is an appeal from a judgment for plaintiff in an action for damages for conversion. It is here on a bill of exceptions.

On January 13, 1920, a written lease to a farm in Imperial county for a period of two years from February 1, 1920, was signed by L. L. Sidwell, lessor, and Sucha Singh, lessee, by the terms whereof rental was to be paid as follows: $1,600 down, which was paid; $1,600 on November 15, 1920, December 1, 1920, February 1, 1921, November 15, 1921, and December 1, 1921. The lease provided that a crop mortgage on 50 per cent. of the produce should be given to secure the rental. This instrument was assigned on July 20, 1920, to Belle F. Bell, plaintiff and respondent herein. Pursuant to its terms, a crop mortgage was executed upon 50 per cent. of the crop to secure the rent. The written lease, mortgage, and necessary affidavit of good faith required by section 2957 of the Civil Code contain the name of Harman Singh as one of the lessees, but he did not sign any of these instruments. The notary's jurat, however, states that both Sucha and Harman Singh appeared before him, etc. The mortgage was recorded March 25, 1920, was assigned to plaintiff on July 31, 1920, and recorded on September 23, 1920. On May 21, 1920, the lessees above named executed a mortgage on the growing crop to E. S. Judson in the sum of $1,000. This instrument was signed by both Singhs; that is, Harman made a mark which was witnessed by one person only. The necessary affidavit of good faith, etc., was signed in the same way, and the notary's affidavit merely states that both persons "whose names are subscribed" appeared, etc. It appears by the testimony that this mortgage was assigned to plaintiff, although there is nothing in the record before us as to the date of such assignment.

[1] All of the instruments signed by Sucha Singh are in Hindu characters, and, as to the chattel mortgages and assignments, appellant contends that they are not signatures as required by law. This objection, however, need not be considered here, as the only objection made in the trial court was as to competency, relevancy and materiality.

> "When offered in evidence, * * * the sole contention [was] * * * that the instrument was incompetent, irrelevant, and immaterial. If defendant had desired the exclusion of the instrument upon the ground now for the first time urged [unauthorized signature], it should have made its objection based upon such ground at the time of the trial, when opportunity would have been afforded plaintiff to meet the same." French v. Atlas Milling Co., 17 Cal. App. 226, 119 P. 203.

[2] Appellant also claims that the affidavit of good faith, etc., under section 2957 of the Civil Code, not being signed by Harman Singh, the mortgage of January 13, 1920, is invalid as to the creditor bank; but the lease requiring this mortgage also is not signed by Harman. The findings of the trial court recognize Sucha Singh as the sole tenant of the premises, and as the question resolves itself into one of fact on evidence which is at least conflicting, we shall consider herein that Harman Singh is not a party thereto. The same logically follows as to the first mortgage. In taking this position we are cognizant of those cases which hold that the lessee need not actually sign, and that if he

takes possession and acts under the lease he is bound. Castro v. Gaffey, 96 Cal. 421, 31 P. 363; Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094; Allan v. Guaranty Oil Co., 176 Cal. 421, 168 P. 884; Watkins v. McCartney, 57 Cal. App. 643, 207 P. 909.

[3] Appellant also claims that the mortgage of May 21, 1920, is void because it is signed by Harman Singh by a mark and witnessed by but one witness instead of two, as required by the Code. But Harman was not a party to the lease and had no mortgageable interest therein or in the crop, so that his name and mark are superfluous. Just what relation he bore to the transaction is not very clear. Sucha and Harman were brothers, and were Hindus, and their business transactions, as well as their expressions in testifying, indicate an ignorance of the English language and American business methods. Harman's name appears in connection with that of Sucha, but when formal signing is required, Sucha, except in the instances mentioned, acted alone. We shall therefore consider Sucha as the tenant of the premises.

The cotton crop was harvested by the tenant, and, without objection from respondent, was taken by him from the ground it was raised on and ginned. The compressor receipts acknowledge receipt of the cotton from Sucha Singh, and the bales were identified by the mark "S. H." Sucha testified that these letters meant the initials of himself and brother, but at the same time he treated the bales as his own. The gin operator advanced the picking money. Thereafter Sucha, together with the gin operator, went to the appellant bank, where, upon the tenant's indorsing the compressor receipts and signing a note, the receipts were delivered over to the bank and the gin operator was repaid his advances by the bank. This procedure was repeated three or four different times, until the whole crop of 49 bales had been so treated. The tenant Sucha Singh also owed the bank for advances made the year before on a crop raised on other land.

During February of 1921 respondent offered to pay the picking money with interest to the bank, and demanded delivery to her of the warehouse receipts, claiming a right thereto by virtue of the crop mortgages. The bank refused to comply with the demand, and on August 11, 1921, sold the cotton to the highest bidder and applied the proceeds upon both the old and the new loan. Plaintiff brought suit against the bank in conversion, basing her claim on the crop mortgages. Defendant's principal defense was based upon section 2972 of the Civil Code, its contention being that the removal of the cotton from the leasehold ground released the crop mortgages. Section 2972 reads as follows:

> "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor."

[4, 5] There is sufficient evidence to support a conclusion that the mortgagee or her agent had talked with the banker about advancing the picking money shortly before picking time; that he told her that he would advance the money upon the cotton compressor or warehouse receipts and that he would like to apply any funds so received from the crop, after payment of picking advances and crop mortgages, to the old bill owing by Sucha Singh. Appellant contends that these conversations were with a Mr. Judson, and that there is not sufficient proof to establish his agency. The banker was personally acquainted with Judson, knew he was the son-in-law of plaintiff, knew the wife of Mr. Judson and talked with both of them on subjects connected with the place on which the cotton grew. Whether or not this constituted a strict agency, we think these conversations can properly be taken into consideration by the court when considering the question as to whether or not the bank was put upon notice by them and that it was the intention of the mortgagee to preserve her mortgage liens. Thereafter the tenant came into the bank with the gin operator, a Mr. Goodwin, and made the arrangement hereinabove recited. Certainly, the conversations with the mortgagee did inform the banker that the crop would be ginned and warehoused, as he was to advance the money on the warehouse receipts. The mortgagee, respondent, did not authorize the ginning or warehousing in the tenant's name. We take it that these circumstances could not have misled the banker. In fact, he was affirmatively, though not formally, notified that the cotton would be ginned while yet under the mortgages. The crop mortgagee in this case, as well as in others found reported in the books, had the right to protect the crop. This she did by arranging credit for picking money and seeing to it that the tenant harvested and hauled the cotton to the gin—a process proper and necessary. If through her carelessness the registration at the compress by the tenant had misled an innocent purchaser or lender, other legal principles might apply. We conclude that the bank is estopped from denying that the mortgages were effective at the time it took the receipts and ever since. Crosby v. Fresno Fruit, etc., Co., 30 Cal. App. 308, 158 P. 1070, and cases cited therein; Moosios v. Rusconi, 37 Cal. App. 471, 174 P. 92; Campodonico v. Santa Maria Bean & Grain Co. (Cal. App.) 260 P. 830. Without specifically reviewing the cases cited by appellant, we note that in every one the crop had been removed in such a way as to result to the prejudice of one entitled to act upon the condition as he found it, and who was not estopped therefrom by

knowledge of circumstances excusing the removal.

[6] If the cotton had never been sold, then plaintiff would have been entitled to receive the compressor receipts for the purpose of selling them to pay her mortgages according to their terms; but the cotton was sold before this action was started, and the money was received and retained by the bank. The latter, under the terms of section 3054 of the Civil Code, and as agreed to by both parties in their briefs, could apply money in its hands to extinguish a debt owing it by the owner of the money. If, then, after the mortgage interest is awarded to plaintiff and there is anything left, the bank has legal possession thereof. This is entirely overlooked by the trial court in its findings and judgment. Instead, the whole sum found over and above the picking advances is awarded respondent as damages. The complaint alleges that the cotton has been disposed of and asks relief in damages. It is obvious that in no case in which punitive damages are not asked should the amount of the judgment exceed the full amount which the plaintiff is entitled to receive under the mortgages.

[7, 8] The lease was surrendered by mutual consent at the conclusion of the first year. This would cancel the mortgage given to secure the rental, except for rental payments accrued at the date of surrender, which amounted to $3,200, from which must be deducted $417, credits on some minor transactions. Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510; Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077. $3,200 minus $417 equals $2,783, which added to the amount of the second mortgage, $1,000, makes a total of $3,783, plus interest. One-half of the money received from the crop was applicable to the payment of the sum due and owing on the first mortgage and the balance, after this, applicable on the sum owing on the second. The highest value of the cotton between the date of conversion and the date of the trial was $7,772.21. The trial court took this sum as a basis from which to ascertain the damages, deducting therefrom $2,033.35, the sum due the bank for picking advances as of the date of conversion, when respondent tendered that sum to the bank. This was erroneous. The correct rule is laid down in Page v. Fowler, 39 Cal. 412, 426, 427 (2 Am. Rep. 462), wherein it is said:

> "In other words, the rule deducible from the authorities is that, in cases affecting property of a fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated. * * * The object of allowing this range at all * * * is because the owner might, and perhaps would, have obtained the price, if he had been allowed to retain the property, and the object will control in fixing the limit allowed for estimating the value. * * * As to the annual products of the soil, which are raised for annual consumption, they are almost universally disposed of by the producers within a few months after they are harvested, and, I may say, invariably consumed, or otherwise disposed of before the next harvest; and, in my judgment, a longer period than that ought never to be allowed within which to estimate the damages as to such property, at least without some proof that the property would have been retained."

That part of the above quotation beginning, "As to the annual products," should not be considered as a part of the rule. Circumstances may often vary this, but it is nevertheless very persuasive. The evidence shows cotton of the grade here considered valued at 14.94 cents per pound on the date of the conversion, February 10, 1921. On February 14 of the same year it was worth 14.45 cents, and on March 17, 1923, 32.11 cents. This shows great fluctuation, and could not sustain a finding that the cotton was worth 32.11 cents per pound within a reasonable period after conversion. It would be a monstrous doctrine if a plaintiff in a case like this could delay her action for years and then bring it after she had arrived at the conclusion that the commodity in question had reached its highest market peak, and therefore nothing could be gained by waiting longer. The damages in this case were assessed through the application of an erroneous rule or method, and since the judgment must be reversed and, after respondent's damages have been cared for, the appellant bank be allowed to retain, in addition to its picking advances, a sum not to exceed the old debt of Sucha Singh, her damages should be estimated by the correct rule.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 169

CONNIFF et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (Civ. 6363.)

District Court of Appeal, First District, Division 2, California. March 16, 1928.

1. Appeal and error 🔑459—"Appeal is perfected" when stay bond or undertaking has been properly executed or dispensed with (Code Civ. Proc. § 946).

Whenever stay bond or undertaking has been properly executed and sureties have justified, if excepted to, or lower court shall have dispensed with security in case where it has power so to do, "appeal is perfected" within meaning of Code Civ. Proc. § 946, providing that whenever appeal is perfected it stays all proceedings on judgment or order appealed from.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Perfect.]

2. Appeal and error 🔑459—Stay of proceedings involving possession of real property does not become effective until appeal has been perfected in manner prescribed by law (Code Civ. Proc. § 945).

Until appeal has been perfected in cases covered by Code Civ. Proc. § 945, requiring undertaking as to judgment or orders directing sale or delivery of possession of real property, the stay of proceedings on judgment or order appealed from or on matters embraced therein does not become effective.

3. Appeal and error 🔑477—Order fixing amount of stay bond on appeal from judgment involving possession of real property held within jurisdiction of superior court (Code Civ. Proc. § 946).

Order fixing amount of stay bond on appeal from judgment staying execution of judgment and restoring possession of real property for purpose of maintaining status quo pending appeal *held* within jurisdiction of superior court as not being an order embraced in judgment appealed from and constituting in effect a stay of execution of judgment declaring forfeiture of lease and awarding lessor possession of premises, within Code Civ. Proc. § 946, providing that appeal stays all proceedings in lower court.

4. Landlord and tenant 🔑291(17)—Full execution of writ of restitution requires removal of defendant and personal property.

Writ of restitution is not fully executed unless defendant and his personal property are removed from the premises.

5. Appeal and error 🔑459—Perfection of appeal worked stay of judgment restoring lessors to possession of real property, and prevented further execution of writ of restitution (Code Civ. Proc. §§ 945, 946).

Perfection of appeal under Code Civ. Proc. §§ 945, 946, operated as a stay of judgment restoring possession of real property to lessors, and prevented sheriff from making further execution of writ of execution by removal of personal property of lessees from premises.

6. Appeal and error 🔑436—Lower court had jurisdiction to maintain status quo pending appeal from judgment restoring lessors to possession, though order was made after judgment.

Lower court has jurisdiction to maintain status quo pending appeal from judgment restoring lessors to possession of real property, though order was made after entry of judgment but before appeal was perfected rather than concurrently with judgment.

Original application by James C. Conniff and another for a writ of prohibition against the Superior Court of Alameda County, James G. Quinn, Judge, to restrain the enforcement of an order fixing the amount of a stay bond. Writ denied.

Collins & Roan, of Oakland, for petitioners.

Gilman & Harnden, of Oakland, for respondents.

NOURSE, J. This is an original application for a writ of prohibition to restrain the respondent superior court from enforcing an order made in that court January 30, 1928, in the action entitled Calhoma Oil Corporation et al. v. James E. Conniff et al. The order complained of was an order made after final judgment fixing the amount of stay bond on the appeal from the judgment staying execution of the judgment and restoring the plaintiffs therein to the possession of the real property in suit for the purpose of maintaining the status quo as it existed at the time of the entry of the judgment.

The petitioners herein were the owners of certain real property situated in Alameda county, which they leased to the Calhoma Oil Corporation by written lease dated March 19, 1925, for the period of five years, for the purpose of mining and drilling for oil and gas. The lease contained the usual stipulations requiring diligent prosecution of drilling operations, but provided that where such operations were delayed a fixed rental might be paid by the lessee during the period of delay. It did not contain any specific provision reserving to the lessors the right to claim a forfeiture or the right of re-entry because of any breach on the part of the lessee. An assignment had been made by the corporation to one Gridley, who continued the drilling operations for a period of time, but this assignment had not been in accordance with the terms of the lease, and accordingly both Gridley and the corporation have been joined as parties jointly interested in the litigation. We will therefore, refer to them as the "lessees."

On September 29, 1926, the lessors notified the lessees that the lease was forfeited, and on the day following they instituted a suit to quiet title against them in the superior court of Alameda county. This action was not brought to issue, but on November 9, 1926, the corporation and Gridley commenced an action against the lessors for a permanent injunction restraining the lessors from interfering with the plaintiffs in their operations under the lease. At this time a temporary restraining order was issued under which the plaintiffs in the action obtained undisputed possession of the premises. The lessors answered that action, and filed what they termed a separate and distinct defense containing allegations of the failure on the part of the plaintiffs to prosecute drilling operations in accordance with the terms of the lease, and praying judgment that the lease be forfeited and that they have a writ of restitution. The cause was tried on these pleadings, and resulted in a judgment in favor of the defendants denying the plaintiffs any injunctive relief under their complaint, declaring the lease to be forfeited and to be null and void, and ordering that a writ of restitution be issued requiring the sheriff to deliver possession of the premises to the defendants, the lessors under the lease. Within time the plaintiffs in that action gave notice of their intention to move for a new trial, and upon application of the plaintiffs therein the trial court issued its order restraining the defendants from interfering with the plaintiffs' possession for the purpose of carrying on drilling operations upon the premises. On January 18, 1928, plaintiffs' motion for a new trial was denied. And on January 27, 1928, plaintiffs filed a notice of appeal from the judgment and also a notice of time set for hearing an application to the court for an order fixing the amount of the bond for a stay of execution pending the appeal. On January 26, the day prior to the filing of the notice of appeal, the sheriff of the county attempted to serve a writ of restitution which had been issued by the clerk of the court upon the judgment "by placing the therein named defendants in the quiet and peaceable possession of the lands and premises therein described." On January 30, 1928, the trial court made its order fixing the amount of the stay bond and staying execution upon the judgment, and decreeing that when the execution of the judgment should be stayed by the filing of the bond as specified, "the sheriff of the county of Alameda is hereby ordered * * * to deliver the possession of the real property involved herein to the plaintiffs, during the pendency of the appeal of this action, in order to maintain the status quo of said action as it existed at the time of the entry of the judgment herein."

The story of the litigation, in brief, is that the plaintiffs in the action below entered into peaceable possession of the premises under the lease and commenced the drilling for oil, which has been carried on intermittently over a long period of time, and which had resulted in the sinking of a well to the depth of only 605 feet. The lessors complained of the dilatory methods pursued by the lessees and gave them notice that the lease was canceled because of their failure to pursue these operations diligently. The lessors then sued to quiet title, but did not bring their action to trial. About this time three men were actually upon the premises, working at the well, but the lessors locked the gates leading to the well and prevented one of the lessees from entering. An action was then commenced by them to restrain the lessors from interfering with their occupation of the premises, and, acting under a temporary restraining order issued at the time, the plaintiffs in that action obtained full possession of the premises, which they retained until after entry of judgment, when the sheriff attempted to restore possession to the lessors. In this proceeding for prohibition both parties claimed that they were in actual possession at the time the action was commenced. We do not deem it necessary to take evidence to determine this dispute. The lessees were in possession at the time through their employees, though one of the lessees was forcibly restrained from entering by the wrongful act of the lessors, and they were in peaceable possession by reason of the temporary restraining orders during the course of the trial and until after their motion for a new trial was denied.

[1, 2] Respondents defend the order upon the ground that the appeal was not perfected at the time the order was made and that the superior court accordingly had jurisdiction of the cause, and upon the ground that the writ of restitution had not been executed when the appeal was perfected and was automatically stayed by the terms of sections 945 and 946 of the Code of Civil Procedure. Both grounds urged are so closely linked together that they may well be considered at the same time. Section 946 of the Code of Civil Procedure provides that whenever an appeal is perfected as provided in the preceding sections, it stays all proceedings in the court below upon the judgment or order appealed from. Section 945 of the Code of Civil Procedure provides that when the judgment or order directs the sale or delivery of possession of real property, the execution is not stayed unless an undertaking is filed in an amount fixed by the trial judge. "Whenever the stay bond or undertaking has been properly executed, (and the sureties have justified, if excepted to) or the court below shall have dispensed with security in cases where it has power so to do, 'the appeal is perfected' in the larger sense in which the words are used in section 946." Hill v. Finnigan, 54 Cal. 493, 494. It is clear that an appeal in a case covered by section 945 of the Code of Civil Procedure is not perfected until these conditions have been met; and it is equally clear that until the appeal has been perfected in the manner pre-

scribed by the code the stay of proceedings "upon the judgment or order appealed from, or upon the matters embraced therein" (section 946), does not become effective.

[3] In Eisenberg v. Superior Court, 193 Cal. 575, 579, 226 P. 617, 618, it was said that:

> "An order for an injunction to preserve the status quo pending an appeal from a judgment or order denying an injunction is not an order upon or embraced in the order appealed from. While it is in a sense appurtenant to and concurrent therewith, it is nevertheless separate and separable therefrom."

In Pierce v. City of L. A., 159 Cal. 516, 114 P. 818, the Supreme Court sustained the jurisdiction of the superior court to grant a restraining order pending determination of a motion for new trial in an action for an injunction wherein the final judgment had denied the relief sought. While the order here under consideration is not, strictly speaking, an order for an injunction to preserve the status quo pending the appeal, it was apparently drawn for that purpose. As such an order would not have been an order upon or embraced in the judgment appealed from, the superior court would have had jurisdiction to issue it under the well-settled rule discussed at length in City of Pasadena v. Superior Court, 157 Cal. 781, 109 P. 620. It is true that in the Pasadena Case the order for the injunction, pending the appeal, was included in the final judgment denying plaintiff's right to injunctive relief, but if, as stated in Eisenberg v. Superior Court, supra, such an order is not an order embraced in the judgment appealed from, it would seem to follow necessarily that the superior court would have jurisdiction to make it *before* the appeal is perfected, as was done here.

The real effect of the order complained of is to stay execution of the judgment, which declared a forfeiture of the lease and awarded the lessors complete possession of the premises. Looking at it in this light, the court did not give to the lessees any greater right than they were accorded by section 946 of the Code of Civil Procedure. As said in Eisenberg v. Superior Court, supra, p. 583 (226 P. 620):

> "When an appellant has so complied with these requirements, further proceedings in the court below are stayed, not by virtue of the action of the trial court in fixing the amount of the bond, but ipso facto by virtue of the provisions of the statute. In the Lee Chuck Case the appellant had no such absolute right to a stay, unless the trial court so directed, and the court there held that when such direction was given the Code sections last cited at once became operative, and upon compliance with the requirements thereof further proceedings upon the judgment were stayed thereby, precisely as in other cases, under the express terms of section 946."

[4, 5] In their answer to the petition the respondents pleaded that the writ of restitution had not been executed because the sheriff had failed to remove the personal property of the lessees from the premises, and this fact was conceded by petitioners. That a writ of restitution is not fully executed unless the defendant and his personal property are removed from the premises is settled law. Lee Chuck v. Quan W. Chong Co., 81 Cal. 222, 229, 22 P. 594, 15 Am. St. Rep. 50; 36 C. J. 671. Notwithstanding the order complained of, the perfection of the appeal under the Code sections cited worked a stay of the judgment appealed from and prevented the sheriff from making a further execution of the writ of restitution.

[6] Thus, though the order complained of was mandatory in character, as it restored the lessees to possession, it nevertheless, in effect, gave the lessees the injunctive relief which they sought pending the appeal, because disobedience of or interference with the operation of the order could be met by supplemental proceedings which would effect the same result as a temporary restraining order, and the perfection of the appeal would automatically restrain the lessors from asserting any claims under the judgment. The jurisdiction of the court to so maintain the status quo pending an appeal from the judgment is approved in Pasadena v. Superior Court, 157 Cal. 781, 787, 109 P. 620, 623, where it is said:

> "We think that while the order here in question enforcing or continuing the injunction cannot strictly be said to be part of the judgment, still it must be considered as intended to operate concurrently therewith, as the court declared, and if it could stand if embodied in the judgment, has equal force as an order made independent of but concurrent therewith."

We can see no difference, in so far as jurisdiction is concerned, between such an order made concurrently with the judgment and one made after entry of judgment but before the appeal is perfected.

The writ is denied, and the proceeding dismissed.

We concur: KOFORD, P. J.; STURTEVANT, J.

90 Cal. App. 144

STRAFIOTIS v. DANIELS. (Civ. 6246.)★

District Court of Appeal, First District, Division 1, California. March 15, 1928.

Hearing Denied by Supreme Court May 14, 1928.

1. Appeal and error 🔑930(1)—On appeal from judgment for plaintiff, court assumes as true facts supporting verdict.

On appeal from judgment for plaintiff suing for injuries, appellate court assumes as true facts in record supporting verdict, on principle that appellate courts should not disturb verdict where there is substantial conflict of evidence on material points and substantial evidence to support verdict.

2. Automobiles 🔑244(9)—Evidence held to support finding of negligence by driver of jitney bus striking person standing in safety zone, waiting for street car (Motor Vehicle Act, § 134).

In view of Motor Vehicle Act, § 134 (St. 1923, p. 560), in force in January, 1924, when accident occurred, and city ordinance requiring jitney bus drivers to sound bell or horn when about to cross highway, evidence that driver of jitney bus traveled 28 or 30 miles per hour in business district without warning and struck person standing in safety zone waiting for street car after 11 o'clock at night, although she saw markings of safety zone, *held* to support finding of negligence by defendant jitney bus driver.

3. Automobiles 🔑220(4)—Person standing in street car safety zone after 11 o'clock when struck by jitney bus held not contributorily negligent.

Plaintiff suing for personal injuries from being struck by jitney bus while standing in safety zone waiting for street car after 11 o'clock, although no street car was in sight, was not guilty of contributory negligence.

4. Automobiles 🔑220(4)—Person standing in street car safety zone held not to have same duties to avoid being struck by automobile as pedestrian crossing street.

Person standing in safety zone waiting for street car does not have same duties of care to avoid being struck by automobile as pedestrian crossing street.

5. Automobiles 🔑245(76)—Standing in street car safety zone after 11 o'clock at night, although no car was in sight, held not contributory negligence, as matter of law, where plaintiff was struck by automobile.

In action for personal injuries from being struck by jitney bus, fact that plaintiff was standing in safety zone waiting for street car after 11 o'clock at night, although no street car was in sight, did not make him guilty of contributory negligence as matter of law.

6. Trial 🔑260(1)—Refusing instructions covered by those given held not error.

Where court's instructions fully covered law applicable, refusal of instructions covering same ground was not error.

7. Trial 🔑194(16)—Instruction on contributory negligence held not erroneous as suggesting that contributory negligence had not been shown and could not be inferred from plaintiff's negligence.

Instruction that contributory negligence is affirmative defense and, if it was not shown by and could not be inferred from evidence supporting plaintiff's case, unless defendant proved by preponderance of evidence contributory negligence causing accident, verdict as to such defense should be for plaintiff, was not erroneous as suggesting that defense of contributory negligence had not been shown and could not be inferred from evidence supporting plaintiff's case.

8. Trial 🔑296(4, 5)—Error in instruction on contributory negligence held not cause for reversal, in view of other correct instructions on contributory negligence.

Instruction that, unless contributory negligence was shown by plaintiff's evidence, burden of proving it was on defendant, and unless defendant proved by preponderance of evidence that accident was caused through plaintiff's contributory negligence, plaintiff should prevail on such issue was defective in use of expression "was caused," but such defect was not cause for reversal, in view of further correct instructions on contributory negligence.

9. Negligence 🔑82—It is sufficient for defendant to show contributory negligence directly contributed to injury sued for.

It is enough for defendant to show that plaintiff's contributory negligence directly contributed to injury sued for, and requiring it to have caused injury in order to be defense is improper.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George Strafiotis against Marion P. Daniels. From a judgment for plaintiff, defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

Charles P. Knights and Edmund J. Holl, both of San Francisco, for respondent.

PARKER, Justice pro tem. This is an action for personal injuries alleged to have been suffered by plaintiff by reason of being struck and knocked down by an automobile driven by defendant. The case was tried by the court sitting with a jury, and a verdict returned in favor of plaintiff pursuant to which judgment was entered, and thereafter a new trial denied. From the said judgment defendant prosecutes this appeal, bringing here likewise for review the trial court's order denying her motion for a new trial.

The appeal is based upon the following assignments of error:

★Hearing denied by Supreme Court.

(1) The verdict is contrary to the evidence and contrary to law in this: (a) The proof discloses no negligence on the part of defendant; (b) the plaintiff himself was guilty of contributory negligence as a matter of law.

(2 and 3) The court erred in refusing to give certain instructions requested by appellant.

(4) The court erred in giving to the jury a certain instruction.

[1] On the question of the evidence it becomes necessary to detail to some extent the facts of the case. In this statement we are necessarily taking the case as the record discloses the same and are assuming as true the facts which support the verdict upon the well-recognized principle that appellate courts will not distrub the verdict of a jury where there is a substantial conflict of evidence on material points and when there is substantial evidence to support the verdict.

[2] The accident happened between 11 and 12 p. m. at night, near the corner of Valencia street and Twentieth street, in the city of San Francisco. The locality named is a business district. Valencia street runs in a northerly and southerly direction, and Twentieth street runs in an easterly and westerly direction. On Valencia street are two sets of street car tracks, one being for north-bound cars and the other for cars southbound. At the southeast corner of the intersection or thereabouts, as will more fully appear, there had been designated by the police department of San Francisco a safety zone for those desiring to board street cars going northerly. The easterly boundary of the safety zone is marked by a white line 12 inches wide extending northerly and southerly about 6 feet east from the east rail of the north-bound car tracks and parallel therewith. The zone begins at the property line of Twentieth street and extends southerly the length of a street car and about 3 feet beyond. This safety zone is plainly marked and was seen by the defendant. On the night referred to plaintiff, accompanied by another man, left the sidewalk and went over and stood in the safety zone, intending to board a north-bound car. He had been standing some two or three minutes in the safety zone and no street car was yet in sight. Then he heard the sound of automobiles coming from the south, and he turned his head around to observe them. Suddenly, approaching apparently from nowhere, a jitney bus Ford car at a speed of between 28 and 30 miles per hour sped out of the traffic and struck plaintiff, knocking him down and inflicting the injuries complained of. At the time he was struck he was still standing in the safety zone. The night was clear and dry, there being no rain. The atmospheric conditions can be best understood from the testimony of the defendant that she could see and did see plaintiff standing in the safety zone while she was still a block away. The testimony further shows that defendant gave no warning of her approach.

In these facts we find sufficient to support the verdict and to indicate the negligence of defendant. Summarizing, the record discloses the defendant traveling through a business district at an unlawful rate of speed, approaching an intersection at the same unlawful rate, failing to sound any warning of her approach, and running through a safety zone.

The Motor Vehicle Act of this state (St. 1923, p. 517) at the time of the accident, January, 1924, provided, among other things: That any person driving a vehicle on the public highways of this state shall drive the same in a careful and prudent speed, not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of another. Also, the speed of vehicles was specifically restricted to 15 miles per hour in a business district. Section 134 of the Motor Vehicle Act provided:

> "Where local authorities have plainly marked upon the surface of the highway safety zones for the protection of such passengers [referring to street car passengers], vehicles shall not, at any time, be operated or driven within such zones."

In addition thereto there was a local ordinance of the city and county of San Francisco regulating the operation of jitney busses within the city and county by the terms of which all jitney bus drivers were required to equip the jitney bus with a bell or horn of sufficient size to insure its being heard at a distance of 100 feet, and requiring that the bell or horn must be rung or sounded when such bus is about to cross a highway. This ordinance was offered and received in evidence at the trial. The defendant was familiar with the locality and had driven on the street at the place involved for some time. She testified that the markings indicating the safety zone were plain and distinct and could be seen and were seen by her.

As indicated, there is sufficient to support the finding of negligence on the part of defendant.

[3] Appellant then, conceding for this part of her contention negligence on her part, urges that plaintiff, too, was negligent, and that the latter negligence so far proximately contributed to the accident as to preclude plaintiff's recovery. In support of this contention appellant cites many authorities on the degree of care required of a pedestrian in crossing a street, and then urges the point that a pedestrian using a safety zone under the conditions here present is held to the same degree of care. The appellant's further argument is that plaintiff should have been constantly alert and watchful to look up and down the

street and keep himself apprised of approaching vehicles likely to endanger his safety.

[4] The duties of a pedestrian crossing a street and those of one standing in a safety zone are not the same, and the comparison is too remote to merit further consideration. The evidence here discloses that plaintiff was within the safety zone; and conceding that he still must exercise some degree of care for his own safety, we conclude that his acts and conduct did measure up to the degree required. Plaintiff, standing in the safety zone, did give attention to the approaching traffic upon his being aware that cars were coming and was in no wise delinquent. The testimony was that the approaching cars were following a course offering no suggestion of danger to plaintiff when the car of defendant came in and across the zone of safety.

[5] Appellant seems to predicate her claim upon the fact that plaintiff was in the safety zone at that hour of night, and the further fact that no car was in sight; and upon these facts alone claims plaintiff negligent as a matter of law. We cannot so hold. The area described as a safety zone is just what the name indicates. And when plainly marked, as in the case here, it is a place of refuge for those intending to board the street cars at that point. If we are to draw fine distinctions and attempt to regulate the use of safety zones according to time and traffic, it will be but one step toward taking from metropolitan traffic all security of life and limb. It may be that under some circumstances it would be the height of folly for one to stand in such a zone, but under the facts of this case this cannot be even intimated. It is a matter of common knowledge that during the later hours of the night street cars travel faster, and with fewer passengers being taken on, and therefore the operators of such cars do not maintain as vigilant an outlook for intending passengers as during the busier hours. The usual and ordinary mode of notifying the street car operator of an intent to become a passenger is not to stand upon the street corner, but to enter the zone provided. The existence of a well-marked safety zone is an invitation from constituted authority with an assurance of safety guaranteed by law. That is the common conception, and we see no reason to disturb it under the facts as here presented. A fact, important or unimportant, in the instant case is that no testimony was offered by defendant other than her own deposition, and she did not appear in person.

Appellant next claims that the trial court erred to her prejudice in refusing to give certain requested instructions.

[6] We have examined the offered instructions, and in the abstract no serious objection could be offered to them as generally stating the law. However, in refusing these instructions the trial court's specific notation was, "Refused, covered by other instructions." We find upon a careful reading of all of the instructions that this is true. The jury were fully instructed upon the matters set out in the instructions refused. This suffices and meets any objection based upon the court's refusal to repeat the law in the language chosen by a party to the action. It is needless, therefore, to quote the instructions refused, and then insert herein the charge as a whole, merely for purposes of comparison.

[7] Finally, appellant complains of the court's action in giving an instruction as follows:

> "In the answer of defendant it is claimed, among other things, that the accident in question was caused by plaintiff's contributory negligence. I charge you that the defense of contributory negligence is an affirmative defense, and under the law of this state the burden of proving such defense is upon the defendant unless such defense is shown or can be inferred from the evidence given in support of plaintiff's case. If, therefore, the defense of contributory negligence has not been shown by and cannot be inferred from the evidence given in support of plaintiff's case, then I instruct you that unless the defendant has proven by a preponderance of the evidence that the accident in question was caused by and through plaintiff's contributory negligence such defense has not been made out, and your verdict as to such defense must be in favor of plaintiff and against the defendant."

The first objection to this instruction is as follows:

> "This instruction suggests that 'the defense of contributory negligence has not been shown by and cannot be inferred from the evidence in support of plaintiff's case'; whereas, there is much evidence given in support of plaintiff's case plainly showing that he was guilty of contributory negligence."

This garbled quotation from the instruction is manifestly unfair. The words quoted were preceded by these words, "If, therefore." The point is frivolous.

[8] The next objection is that by the use of the words, "That unless defendant has proven by a preponderance of the evidence that the accident in question *was caused* by and through plaintiff's contributory negligence," the jury were told that then plaintiff should prevail on that issue.

[9] The words are unhappily chosen and import the existence of a doctrine unknown to the law of negligence. Appellant urges that the language seems to shift the burden of proof in the entire case. We do not so conclude, because the instruction was specifically restricted to the defense of contributory negligence, which under our law is an affirmative defense. But we refuse approval of the instruction, not on the ground urged by appellant, but on the ground that the theory of contributory negligence has never meant that the negligence of defendant must have *caused*

the injury. It is sufficient if it is shown that such negligence directly contributed to it. While the use of the language referred to in this particular was inaccurate, yet we do not feel that it is of sufficient moment to nullify the judgment rendered. As indicated hereinbefore, the jury were elsewhere fully and carefully instructed on the subject of contributory negligence and could not possibly have been misled by the instruction complained of.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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90 Cal. App. 132

Ex parte STANLEY. (Cr. 1628.)

District Court of Appeal, Second District, Division 2, California. March 14, 1928.

1. Habeas corpus 🔑44—District Court of Appeal has jurisdiction of habeas corpus proceeding to secure release from imprisonment, notwithstanding appeal from conviction is pending.

The District Court of Appeal has jurisdiction of habeas corpus proceeding to secure release of petitioner from sentence and imprisonment after conviction, notwithstanding that appeal from conviction had been taken and is pending.

2. Indictment and information 🔑171—Defendant, charged only with crime of grand theft, could not be convicted of receiving stolen property (Pen. Code, §§ 484, 487).

In prosecution under Pen. Code, §§ 484, 487, for grand theft of an automobile, verdict and judgment of conviction, apparently founded solely on evidence of defendant's having received stolen property, were void, since defendant was not charged with that offense.

3. Indictment and information 🔑171—Information charging taking of automobile in violation of California Vehicle Act did not support conviction of receiving stolen property (California Vehicle Act, § 146).

Defendant charged in information with violation of California Vehicle Act, § 146 (St. 1923, p. 564), in that he drove an automobile of another without the latter's consent and with intent to deprive him of use and possession thereof, could not be convicted of receiving stolen property, since section 146 is concerned only with the wrongful taking of motor vehicles.

Original application for a writ of habeas corpus by Carl J. Stanley, to be directed to the Superior Court of Los Angeles County, Charles S. Burnell, Judge, to secure a release from sentence and imprisonment after conviction of receiving stolen goods. Writ granted.

Roscoe O. Stotter, of Long Beach, for petitioner.

Asa Keyes, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for respondents.

CRAIG, J. The petitioner herein, together with two others, was charged by information with having committed grand theft in the county of Los Angeles, in that they "did unlawfully take away a certain Chevrolet automobile," and by a second count of said information they were charged with having violated section 146 of the California Vehicle Act (St. 1923, p. 564); it being alleged therein that they "did willfully, unlawfully, and feloniously drive a certain motor vehicle, to wit, a Chevrolet automobile, which was then and there the personal property of one E. R. Plummer, in the absence and without the consent of said owner, E. R. Plummer, and with intent then and there to deprive the said E. R. Plummer of his title to, and possession of, said motor vehicle." All three of the defendants pleaded not guilty, and as to petitioner the jury returned verdicts of guilty of receiving stolen property, and not guilty of either grand theft or violation of section 146 of the Motor Vehicle Act. Thereafter sentence was imposed upon the verdict rendered.

[1] On February 14, 1928, Stanley appealed, asserting, among other grounds for reversal, that the court had no jurisdiction to render the judgment. On February 24, 1928, this proceeding in habeas corpus was commenced by petitioner, alleging the foregoing facts as to criminal charges, acquittal thereof, and conviction of the crime of receiving stolen property. The petitioner relies upon the claim that the crime of receiving stolen property is not included within either of the offenses charged, and that the judgment is therefore void for want of jurisdiction. Respondents interpose a preliminary objection to consideration of the petition that, since an appeal has been taken and is pending, this court is without authority to discharge the petitioner on a writ of habeas corpus. France v. Superior Court (Cal. Sup.) 255 P. 815, is cited as sustaining this contention. In this they are quite in error. In a single sentence the opinion in that case leaves no room for doubt that its holding has no application to this court. Its language is:

> "We are holding simply that, under the power invested in the superior courts of this state to issue writs of habeas corpus, they are not given the authority to invade the jurisdiction of an appellate court, and to oust said appellate court of its jurisdiction in a criminal action pending before it on appeal by discharging on habeas corpus the appellant in said action on any ground appearing upon the face of the record on appeal, and which is raised or could be raised on said appeal."

[2] In the oral argument, In re Zany, 164 Cal. 724, 130 P. 710, was also strongly relied

upon by respondents in support of their denial of the right of the petitioner to the writ here asked, based upon the same grounds as are urged in the latter's appeal. We fail to find any language in this authority bearing upon the question.

Section 484 of the Penal Code defines "theft" as follows:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, * * * is guilty of theft."

And section 487 of the same Code provides that:

> "Grand theft is theft committed in either of the following cases: * * * 3. When the property taken is an automobile. * * *"

All available authorities with which we are familiar antedate the 1927 amendments to our Penal Code, and hence deal with the subject under the title of "larceny," but the distinction is here immaterial. In People v. Disperati, 11 Cal. App. 469, 105 P. 617, the action of the trial court in giving and refusing to give instructions to the jury as to their duty to find the defendant not guilty of larceny if they believed that he merely received stolen property was criticized upon the ground that "receiving or disposing of stolen property is not larceny." In an exhaustive review of the decisions of this and other states, the following apt language is used:

> "In People v. Ward, 105 Cal. 659, 39 P. 35, it is said that 'the crime of larceny is distinct from that of receiving stolen goods, and proof of the latter crime is insufficient to convict a person who is accused of the former,' and it was impliedly held that the following instruction given by the court was correct: 'Before you can convict defendant, you must believe beyond a reasonable doubt that he is guilty of, or in complicity with, the original fraudulent taking, and any subsequent connection after the taking would not be larceny in him, either in good or bad faith. * * *'"

And similar language is quoted from People v. Horton, 7 Cal. App. 34, 93 P. 382.

In the quoted case, and those therein cited, it was held that the crime of receiving stolen goods, as defined by section 496 of the Penal Code, is distinct from that of larceny as defined by sections 484 and 487 of that Code. Although the precise point here presented has not to our knowledge been decided in this state, it has been held in other jurisdictions that one charged under separate counts with larceny and with having received the same property after it was stolen cannot be convicted of both offenses. In Tobin v. People, 104 Ill. 565, the defendant was charged with robbery, larceny, and receiving stolen goods, and the jury found him "guilty, in manner and form as charged in the indictment." In reversing the judgments based upon such verdict, it was said:

> "It is an inconsistency that where there is but a single transaction involved, as the proof shows to have been here, the same person could have been guilty of both of the offenses of robbery and of having received goods obtained by robbery, knowing them to have been so obtained. The objection is not from the joinder of counts—they are well enough joined. Bennett v. People, 96 Ill. 602; Lyons v. People, 68 Ill. 271; Hiner v. People, 34 Ill. 297. The difficulty is brought into the case by the evidence. The three offenses charged in the indictment are not comprised in robbery. Larceny might be embraced in it, but it is otherwise with receiving property obtained by robbery. This imports a distinct and subsequent transaction, and involving another person, the receiver receiving the property from some other person who had previously obtained it by robbery."

To the same effect is Commonwealth v. Haskins, 128 Mass. 60, wherein the court said:

> "It is certain that the defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of a crime of receiving stolen goods which he himself had stolen."

We therefore hold in this instance that, as far as count 1 is concerned, since the petitioner was charged with the crime of grand theft, and was acquitted of that offense, the verdict and judgment which apparently were founded solely upon evidence of having received stolen property, were void, since the petitioner was not charged with the offense last mentioned.

[3] In the oral argument it was suggested by the district attorney that receiving stolen property might be regarded as an offense necessarily included within that charged in the second count of the information and defined by section 146 of the Motor Vehicle Act. This contention cannot be upheld for the same reason; that is, the first-named offense is not included in grand larceny or grand theft. The provision of the Motor Vehicle Act mentioned concerns only the wrongful "taking" of motor vehicles.

From the face of the record we conclude that the verdict was a nullity, and the court was plainly without jurisdiction to sentence the accused. Under such circumstances he should not be required to languish in jail pending an appeal, and, this court possessing, as it does, undoubted authority to release him upon a writ of habeas corpus, it is a proper case for the relief prayed.

The writ is granted, and the petitioner is discharged from custody.

We concur: WORKS, P. J.; THOMPSON, J.

90 Cal. App. 179

PINCUS et al. v. S. H. KRESS & CO.
(Civ. 4899.)

District Court of Appeal, Second District, Division 2, California. March 16, 1928.

1. Sales ⟹82(3)—In absence of contrary understanding, contract to deliver f. o. b. Los Angeles means price becomes due on delivery on board cars at Los Angeles.

In absence of any understanding between the parties to contrary, a contract to deliver goods f. o. b. Los Angeles means that the price is to be paid or becomes due when goods are delivered on board the cars at Los Angeles.

2. Sales ⟹365—Buyer held entitled to finding whether goods met requirements of oral agreement when delivered and as to place of delivery.

Where, in action by seller for prunes sold and delivered f. o. b. Los Angeles, court found that parties entered into oral agreement that seller was to deliver prunes which would be in good and merchantable condition and fit for retail sale in defendants' stores in Texas, *held*, that court should have made a direct finding as to whether or not prunes met requirements of such agreement when delivered and whether place of delivery was Los Angeles or Texas.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by M. Pincus and others, copartners doing business under the firm name and style of the Los Angeles Nut House, against S. H. Kress & Co., for goods sold and delivered. Judgment for plaintiffs, and defendant appeals. Reversed.

M. D. Andrews, of Los Angeles, for appellant.

E. F. Gerecht, and C. W. Hall, both of Los Angeles, for respondents.

VALENTINE, Justice pro tem. This was an action for $2,750 for 2,200 boxes of prunes which it is stipulated were sold and delivered by plaintiff to defendant. Judgment was rendered for plaintiff for the full amount and this appeal is from that judgment.

Appellant's contention is that plaintiff agreed to deliver to defendant, on board cars at Los Angeles, prunes which would be in good and merchantable condition on arrival and fit for retail sale in defendant's stores in Texas. Respondent contends that the order was f. o. b. Los Angeles, that it so delivered the prunes in good condition, and that thereupon its liability ceased. The court found for respondent.

At the opening of the trial it was stipulated as follows:

"Mr. Gerecht: Shall we stipulate to some facts, in order to save time?

"Mr. Andrews: I think that would be about the wisest thing to do.

"Mr. Gerecht: This is an action for prunes sold to the defendant in Los Angeles, amounting to the sum of $2,750, which the defendant has received and failed to pay for. The price was agreed upon. That is correct, is it not, Mr. Andrews? There is no question as to price?

"Mr. Andrews: There is no question as to the price.

"Mr. Gerecht: And there is no question as to the shipping amount which they have purchased or which we are suing for?

"The Court: It is stipulated that there were 2,200 boxes of prunes purchased at the price of $1.25 per box?

"Mr. Gerecht: Yes, your honor; that is 5 cents per pound.

"The Court: And delivered?

"Mr. Gerecht: And delivered.

"The Court: All right.

"Mr. Gerecht: And not paid for.

"The Court: All right. What is the defense?

"Mr. Gerecht: The defense is that the prunes, when they arrived in Texas, were defective, and that they could not use them, and those that they have sold are returned, and that they had to pay back the money paid, and also the freight; and they come with their cross-complaint for $1,160, or something like that, damages."

Whereupon a witness was sworn by plaintiff, and after a few preliminary questions the following colloquy ensued:

"The Court: It seems to me, in view of the stipulations here, that probably the burden is upon the defense to proceed with their side of the case.

"Mr. Gerecht: That is correct, your honor. We rest."

The defendant then, without objection, assumed the burden of proof and introduced its evidence, thus assenting to the statement of the court, concurred in by Mr. Gerecht. George C. Esker, manager of defendant's Broadway store in Los Angeles, a witness for the defendant, on cross-examination testified as follows:

"Q. But he saw prunes that you had received from the plaintiff, did he not? A. He saw the prunes we were selling there.

"Q. That you were selling, and you have purchased them from the plaintiff, at the rate of 5 cents per pound? A. Correct.

"Q. And he wanted them for the same price? Was that f. o. b. Los Angeles, or was it f. o. b. Houston, Texas? A. F. o. b. Los Angeles.

"Q. F. o. b. Los Angeles? A. Yes.

"Q. Your company was to pay the freight? A. Correct."

[1] Appellant contends that the court erred in its decision referred to later that the delivery of the goods on board car at Los Angeles completed plaintiff's obligation. The court having found that the contract was to deliver the prunes f. o. b. Los Angeles, and that this was done, and, delivery and nonpayment having been stipulated, we cannot disturb the findings on these two points, but

the question raised by appellant of whether the plaintiff's liability then ceased merits consideration. In the absence of any understanding between the parties to the contrary the contract to deliver f. o. b. Los Angeles meant that the price was to be paid or become due when the prunes were delivered on board the cars at Los Angeles. Blackwood v. Cutting Packing Co., 76 Cal. 212, at page 215, 18 P. 248, 9 Am. St. Rep. 199.

[2] There are qualifications of this interpretation of the meaning of f. o. b., and some conflict of authorities in other states, but a discussion of these decisions is unnecessary here, as we believe the above is the rule in this state applicable to the case at bar, in view of the evidence and the stipulation that the prunes were delivered, so the only question remaining, which is the vital question on this appeal, is whether there was any understanding between the parties which qualified or modified this rule. Appellant contends that the condition of the prunes upon arrival at defendant's retail stores in Texas was a condition precedent to defendant's obligation to pay anything therefor. Appellant contends that the court erred in not finding upon the material issue as to whether or not prunes fit for merchandising at retail in defendant's Texas stores were delivered by the plaintiff.

The court, in deciding this case, stated that his view of the situation was that the "guaranty" of the Los Angeles Nut House (the plaintiff) ended when they put these prunes on board the cars at Los Angeles. This view of the situation assumes that there was no understanding, such as contended for by appellant, as to the condition of the prunes when received by defendant. If there was any such understanding and the court had believed that it related to the condition of the prunes when delivered f. o. b. Los Angeles, the appellant was entitled to a finding as to their condition at that time.

The court found:

> "That on or about the 29th day of August, 1921, plaintiff entered into an oral agreement with an agent of defendant in charge of its Texas stores, wherein plaintiff agreed to deliver to defendant on board cars at Los Angeles prunes which would be in a good and merchantable condition and fit for retail sale in its stores in Texas."

Assuming that the evidence justified this finding, and assuming that the court was justified in finding that the place of delivery was Los Angeles, the appellant was clearly entitled to a finding as to whether or not the prunes at the time of delivery were in "good and merchantable condition and fit for retail sale in its stores in Texas." There is no such finding. There is a negative finding that it is not true that any portion of the prunes shipped by plaintiff to defendant to the said Houston, Tex., store were unfit for human consumption or were filled with worms or maggots, at the time of their delivery under the contract.

There is also a finding that the prunes delivered on board the cars at Los Angeles were of the same class, quality, and grade of prunes which plaintiff had been delivering to said Los Angeles store of defendant. But the court having found that the terms of the contract in this case entitled defendant to prunes which would be in a good and merchantable condition and fit for retail sale in its stores in Texas, appellant was entitled to a direct finding—and neither of the findings above mentioned meets the point—as to whether or not the prunes met these requirements when delivered, and whether the place of delivery was Los Angeles, or Houston, Tex.

We think appellant's contention is correct that in the absence of such finding the judgment is not supported by the findings, and we deem it unnecessary to discuss further the question of the place of delivery or other contentions of appellant.

The judgment is reversed.

We concur: WORKS, P. J.; CRAIG, J.

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90 Cal. App. 122

BAYSIDE LAND CO. v. DABNEY.★

(Civ. 6118.)

District Court of Appeal, First District, Division 2, California. March 14, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Mines and minerals ⇐78(3)—Parties to subsequent leases under agreement to share in royalties of original lease need not join in lessor's notice of breach of original lease.

Where oil lease authorized lessee to enter into subsequent leases with owners of other lots to share in royalties to be paid under original lease, parties subsequently entering into such leases as authorized need not join in lessor's notice of breach, required under original lease, since permission to participate in royalties did not alter contractual rights and liabilities of parties to original lease.

2. Contracts ⇐318—Contract must be strictly interpreted in cases of forfeiture.

In cases of forfeiture contract must be strictly interpreted.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action to quiet title by the Bayside Land Company against Henry R. Dabney. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

See, also, 265 P. 566.

Bordwell & Mathews and Odell S. McConnell, all of Los Angeles, for appellant.

★Hearing denied by Supreme Court.

I. Henry Harris, of Los Angeles, for respondent.

NOURSE, J. This is an appeal from a judgment adverse to plaintiff in an action to quiet title to certain lands situated in Orange county which were held by the defendant under an oil-drilling lease. The lots owned by this company were leased to the defendant, Dabney, by written lease, dated October 24, 1921, for a term of 20 years. In this lease the company was designated as the "lessors" and the "parties" of the first part. By the terms of the lease these lessors gave permission to the lessee to enter into subsequent leases with the owners of other lots which were separately described in the original lease and these lessors covenanted that in the event such subsequent leases were made they would agree to share the royalties to be paid under their lease with any or all lots included in the subsequent leases in the proportion which such lots bear to the total number of lots included in the original lease. Subsequent leases were made with the owners of 13 lots and in each of said leases the owners of these lots were described as the lessors thereof and they separately agreed to be bound by the terms of the original lease executed by the Bayside Land Company.

The trial court found that the lease was executed between the company and the defendant, Dabney, as alleged, and required the lessee to drill a well to a depth of 4,000 feet unless oil in paying quantities was obtained before reaching that depth; that defendant had drilled only one well to a depth of 3,050 feet which had not produced any oil or other kindred substances; that he thereupon completely suspended all drilling operations and had failed for a period of more than three months prior to the commencement of the action to do any drilling. Upon these grounds the court held that the defendant had breached the terms and conditions of his lease, but that the notice required by section 13 thereof was insufficient because the lessors who executed the three subsequent leases had not joined with the plaintiff therein.

[1] On this appeal the whole case is submitted upon the authority of Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P. 369. The case has no application to the facts before us. It was there held that, where a lease executed by three joint lessors in which the three were designated as the parties of the first part and in which the right to elect to claim a forfeiture was reserved to the "parties of the first part," such forfeiture could not be claimed by two of the joint lessors over the objection of the third. The case was decided upon the strict interpretation of the terms of the lease; the court saying:

> "We are not dealing with the rights and remedies secured to the lessors by force of the law, but with the rights which they secured to themselves by the provisions of their contract. They attempted to lay the foundation for a forfeiture by proceeding under their contract, which requires the joint action of all the lessors to accomplish that result. The contract does not permit it to be done by less than all the lessors."

Here we have an original lease executed by a corporation alone in which the corporation is designated as "parties of the first part and lessors" and in which the corporation is designated and referred to throughout the lease in the plural as "lessors" and in which the company specifically authorizes the lessee at his option to join other lots in his lease and agrees to share the royalties to be paid under the lease to such other lots as the lessee may bring in. Following the execution of this lease the lessee executed three separate leases with individual owners, who in each case were described as the parties of the first part and the lessors of the lots described. By the terms of these leases these subsequent lessors bound themselves to the terms and conditions of the company lease which was made a part of the subsequent leases, but it should be borne in mind that beyond the covenant to share the royalties with the subsequent lessors the corporation lessor in the original lease did not bind itself to the terms of any of these subsequent leases. They were separate and distinct instruments which could be enforced or canceled according to the will of the parties executing them and without the consent or interference of the lessor under the original lease. When, therefore, the original lessor reserved to itself the right to claim a forfeiture under the terms of section 13 of its lease this right was not lessened or defeated by the subsequent joinder of other parties in the distribution of the royalties under these subsequent leases. As said in the Jameson Case, it is not a question of the rights and remedies secured to the parties under the law, but it is a question of what the parties have covered by their own contract.

Another feature of the Jameson Case will serve to distinguish it from the case presented here. In that case the lessors were all tenants in common of the entire tract leased, and, though it was intimated in the opinion that under sections 382 and 384, Code of Civil Procedure, a number of tenants in common less than all might sue jointly or severally, it was held that the parties to the lease could not have intended to give to any number less than all the right to claim a forfeiture because, the rights of the lessors being indivisible, this would require the lessee to perform all the covenants of the lease in behalf of the minority of the tenants in common, and they, in turn, would be required to contribute a proportionate share of the benefits to their cotenants who had claimed a forfeiture. This situation could not arise here. The original lease designated 20 drilling locations upon which alone the lessees were permitted to drill for oil. No one of these locations contained any lots of the subsequent lessors. They were all owners in fee of separate lots which were described in the lease and which were joined for the purpose of minimizing the necessity of sinking "off-set" wells. The relation of tenants in common between the corporation and the subsequent lessors did not exist, but we have a case where the subsequent lessors, in consideration of the right to participate in the royalties payable on the oil produced on the lands of the corporation, agreed that they would not suffer wells to be drilled upon their own lands.

[2] Giving the strict interpretation to the contract which is required in cases of forfeiture, we have the express provision that the lessor named in the lease is authorized to claim a forfeiture under certain conditions, and we find nothing in the contract which would justify an interpretation that because other parties were permitted to participate in the royalties by reason of subsequent contracts the contractual rights and liabilities of the parties to the original lease have in any way been altered.

The error lies in the conclusion of the trial court that the notice given was insufficient as a matter of law. The findings of fact are sufficient to support a judgment in favor of appellant, and a new trial will not therefore be required.

Judgment reversed, with directions to enter judgment for the appellant.

We concur: KOFORD, P. J.; STURTEVANT, J.

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90 Cal. App. 126

BAYSIDE LAND CO. et al. v. DABNEY et al.★

(Civ. 6119.)

District Court of Appeal, First District, Division 2, California. March 14, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Abatement and revival 🔑9—Pendency of action by one of lessors under oil lease held not to excuse lessee from performance as to other lessors.

Where former action to quiet title to lands held under oil lease was instituted by one of lessors only, lessee was not excused from performance as to other parties to lease on ground of another action pending, since in order to sustain a plea in abatement it is necessary that former action involve same parties and same subject-matter.

2. Mines and minerals 🔑78(3)—Lessee's failure to perform obligations of oil lease constituted continuing breach and supported notice and claim of forfeiture after each failure.

Failure to perform obligations under oil lease *held* to constitute a continuing breach, which could be claimed under lease by lessors at any time, and each failure to perform subsequent to trial involving breach of lease would support an additional notice and claim of forfeiture on part of lessors.

3. Appeal and error 🔑901—Lessee had burden of proving admitted breach of oil lease was excusable pending appeal from judgment involving breach.

Lessee under oil lease had burden of proving that admitted breach of lease was excusable on ground that performance was excused pending appeal from judgment involving breach of lease.

4. Mines and minerals 🔑78(7)—Lessees had burden of proving defense that lessors forbade them to operate on premises as excusing breach of oil lease.

Lessee under oil lease, claiming that lessors forbade them to operate on the premises as justifying failure to comply with conditions of lease, had burden of proving such defense in lower court.

5. Appeal and error 🔑901—Appellants have burden of showing error.

Appellants have burden of showing error in appellate court.

6. Pleading 🔑121(3)—Denial for lack of information or belief that notices for breach of royalties were served pursuant to terms of oil lease held sham.

In action to quiet title to land and secure forfeiture of oil lease, denial for lack of information or belief that notices of breach were served pursuant to terms of lease *held* sham, in view of fact that lessees had in their possession original leases and access to records to determine whether lessors held record title to lots.

7. Mines and minerals 🔑78(3)—Notice of forfeiture held not insufficient for failure to join purchaser of lot from lessor, who refused to join for purpose of hindering and obstructing lessors.

Notice of forfeiture of oil lease pursuant to terms thereof *held* not insufficient for failure to join one of purchasers of lot from lessor, who refused to join therein after request to do so for purpose of hindering or obstructing lessors in their efforts to require a full performance of covenants of lease.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the Bayside Land Company and others against Henry R. Dabney and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

I. Henry Harris, of Los Angeles, for appellants.

Bordwell & Mathews and Odell S. McConnell, all of Los Angeles, for respondents.

NOURSE, J. Plaintiffs sued to quiet title to certain real property situated in Orange county and to obtain a decree of forfeiture of a lease which had been given to the defendant Dabney for the purpose of drilling

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★Hearing denied by Supreme Court.

for oil. Plaintiffs had judgment and the appellants have appealed on a typewritten record.

The action is in two counts. One containing the usual allegations in a suit to quiet title and the other allegations to declare a forfeiture of an oil lease covering the lands described, consisting of 488 separate lots, 470 of which are owned by the plaintiff Bayside Land Company. The essential facts are stated in Bayside Land Co. v. Dabney (No. 6118) 265 P. 564.

On December 24, 1923, the plaintiff corporation commenced the former action to quiet title to the property owned by it alone upon the theory that the lease had been forfeited because of defendants' failure to perform in accordance with its terms. That action went to trial and resulted in a judgment in favor of the defendant upon the single ground that the subsequent lessors had not joined with the plaintiff corporation in giving notices of forfeiture of the lease. All the other issues raised by the plaintiff in that suit, including the issue of nonperformance and breach by the defendant, were found in favor of the plaintiff. Pending an appeal by the plaintiff from the judgment in the former action the subsequent lessors joined with the plaintiff corporation in serving upon the defendant a notice of forfeiture in accordance with the terms of section 13 of the original lease and, defendant having failed to remedy the breach or to continue drilling operations upon the premises, this action was commenced by the plaintiff corporation and the subsequent lessors joined with it as plaintiffs against the defendant Dabney individually and the defendants Dabney, Ellis, and Harris as trustees for the Dabney Company and against the defendant Hammer, who, it was alleged, had some interest in the property, but fraudulently refused to join as a party plaintiff. The grounds of forfeiture alleged in the second complaint were the defendant's failure to prosecute drilling operations of any character for a period of more than one year prior to the commencement of the action and the assignment by the defendant Dabney, contrary to the terms of the lease, to his codefendant trustees of all his interest in the lease without the written or any consent of the lessors.

The cause was tried before the court sitting without a jury; complete findings were made and judgment followed declaring that the plaintiffs were the owners of the separate lots claimed by them, and that all the leases referred to in the complaint had been forfeited by the defendants, and that the defendants had no further interest in any portion of the property described.

[1-3] On this appeal the appellants raise a number of points which will be taken up in the order presented. It is argued that the admitted failure of the appellants to pursue drilling operations subsequent to the judgment in the prior action did not operate as a breach of the lease which entitled the respondents to declare a forfeiture. The argument is that, inasmuch as the plaintiff in the former action took an appeal from the judgment in favor of the defendant Dabney, the latter was excused from performance under the lease until the final determination of that appeal. The point was raised in the trial court by what was termed a plea in abatement on the ground that another action was pending. The trial court ruled adversely to appellants on this plea and rightly so because the former action was not a suit by the same plaintiffs or one involving the same subject-matter, both of which must be present to sustain a plea in abatement of this character. Smith v. Smith, 134 Cal. 117, 119, 66 P. 81. Inasmuch as the former action was brought by the Bayside Land Company alone, any judgment in that case would not affect the rights of the subsequent lessors to claim a forfeiture for breaches occurring prior to the trial of that action and of course the prosecution of that action by the Bayside Land Company could not excuse appellants' failure to perform in so far as the rights of the subsequent lessors were concerned. In any event the failure to perform was a continuing breach which could be claimed under the lease by the lessors at any time and each failure to perform subsequent to the trial of the former action would support an additional notice and claim of forfeiture on the part of all the lessors. Here the failure of the appellants to continue drilling for a period of more than one year prior to the commencement of the action is an admitted fact. The excuse given by them in the trial court was that their difficulties incurred in sinking a well had been so great that they deemed it advisable to wait the result of the operations of another concern upon a nearby tract so that they might determine whether it would be profitable to continue under their lease. The trial court held that such excuse was not available to the appellants and their argument in this court that they were excused by the actions of the respondent land company in seeking a forfeiture is plainly an afterthought which does not require further consideration. The point is of little importance, however, as the trial court found on undisputed evidence that the appellant Dabney had breached the provisions of section 17 of the lease which prohibited an assignment of the lease without the written consent of the lessors. The fact that such assignment was made and that the consent of the lessors was not obtained or requested is conceded. The only defense made by the appellants was that the corporation must have known that an assignment had been made because on some portion of the premises signs had been erected bearing the name of the company for whose benefit the assignment was made. The burden of

proof to show that the admitted breach of the lease was excusable was a burden which was placed upon appellants and they have failed to show that the adverse finding of the trial court is not supported by the evidence.

[4, 5] Appellants complain of the finding adverse to their affirmative defense in which they allege that the respondent land company forbade them to operate upon the premises. Appellants do not call our attention to any evidence which would support a finding to the contrary. The burden was upon them to prove their defense in the lower court and it is incumbent upon them to show error here.

[6] It is argued that findings 23 and 24, covering the issues of service of notice upon the appellants and the signatures of the lessors upon such notices, are not supported by the evidence. The complaint alleged that the written notices were signed by the Bayside Land Company "and by each of the parties appearing as lessors or their successors in interest in those leases," and that such notices were served upon the appellants pursuant to the terms of the lease, and that all the parties signing the notices were the owners of the lots alleged to belong to them. These allegations were denied generally for lack of information and belief. Notwithstanding the form of the denial the respondents made proof of the allegations contained in the complaint, and it would be to no purpose to recite here the evidence which amply supports the finding of the trial court. The appellants had in their possession the original leases signed by the same parties whose names were attached to the notice of forfeiture, and they had access to the records to enable them to determine whether these lessors held the record title to the lots which they claimed to own. Thus their denial for lack of information or belief was sham.

[7] The argument seems to be that as one Julius Hammer was joined as a party defendant the notice of forfeiture is insufficient because his name was not appended thereto. The complaint alleged and the trial court found that the written notices of forfeiture were signed by the Bayside Land Company and by each of the parties appearing as lessors or their successors in interest in all the leases involved. It was also alleged that the Bayside Land Company was the owner in fee of lots 25 and 27 in block 212, subject to a contract by which the company agreed to sell said lots to Julius Hammer. It was further alleged that Hammer was requested to join in said notices, but refused to do so for the purpose of hindering and obstructing respondents in their efforts to require a full performance of the covenants of the lease on the part of the appellants. The trial court found that his refusal was fraudulent and for the purpose of hindering and obstructing the respondents in the manner alleged in the complaint. It does not appear what interest Hammer had, other than through a contract to purchase, which may or may not have been in force at the time and which may not have called for the transfer of any interest in the lease. In any event, he was not one of the parties executing the original leases and does not appear by either allegation or proof to have succeeded to the rights of any of these lessors. Hammer defaulted and the point is raised by the lessees only, but they have failed to show, so far as this record is concerned, that the proof does not support the finding that all the lessors of record joined in the written notices of forfeiture. Other points do not require consideration.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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90 Cal. App. 106

JOHANNSEN v. KLIPSTEIN et al.★
(Civ. 3432.)

District Court of Appeal, Third District, California. March 13, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Exceptions, bill of ⟹43(2)—Refusal to find that appellants' attorney was reasonably mistaken in assuming successor would serve bill of exceptions before substitution held proper (Code Civ. Proc. § 284).

Since, under Code Civ. Proc. § 284, only attorney of record may take steps in perfecting appeal until his successor attorney has been substituted, trial court did not abuse discretion in refusing to find that appellant's attorney of record, who had actual charge of trial, was reasonably mistaken in assuming that another attorney would take charge of case and prepare and serve bill of exceptions before there was a substitution, or in assuming that a substitution had taken place, or that there was a reasonable showing of diligence on his part, so as to make his failure to file bill of exceptions excusable neglect to authorize granting relief from the default.

2. Exceptions, bill of ⟹43(2)—Refusal to find appellants' attorney was prevented from timely serving proposed bill of exceptions by out of town business and illness held proper.

Where, after judgment was rendered for plaintiff, substitution of attorneys for defendant was made, refusal to find that substituted attorney was prevented from timely preparing and serving a bill of exceptions was within trial court's discretion, where there was no showing in his affidavits that nature of his out of town business or his sickness was such as prevented him from protecting his clients against default so as to obviate default in serving and filing bill.

★Hearing denied by Supreme Court.

3. Exceptions, bill of 🔑43(2)—Discretion to relieve from default in preparing and serving bill of exceptions should be based on trial court's reasonable inferences from facts.

Trial court's discretion to grant relief from neglect to prepare and serve a proposed bill of exceptions within time required by law should be allowed to be based on court's own fair and reasonable inferences drawn from showing of actual facts in particular case.

Appeal from Superior Court of Kern County; Howard A. Peairs, Judge.

Action by C. E. Johannsen against T. E. Klipstein and others. Judgment for plaintiff. From an order denying relief from their default in neglecting to prepare and serve proposed bill of exceptions within time required by law, defendants appeal. Affirmed.

E. F. Brittan, of Bakersfield, and Homer Johnstone, of Los Angeles, for appellants.

Gallaher, Simpson, & Hays, of Fresno, and Borton & Patrini, of Bakersfield, for respondent.

BUCK, Justice protem. This is an appeal from an order denying defendants' application for relief from their default, after judgment, in neglecting to prepare and serve their proposed bill of exceptions within the time required by law. The sole question for decision is whether the trial court abused its discretion in refusing, from the showing made, to find that the neglect involved was, under the circumstances, an excusable neglect.

The notice of entry of the judgment was served on defendants' attorneys on November 3, 1925, and there having been no extension of the time, either by order of court or by stipulation, the time to prepare and serve the proposed bill of exceptions was allowed to expire on November 13, 1925, and no attempt to serve such bill was made until December 3, 1925.

There being a number of counsel involved, we will ascertain first who was neglectful in performing some duty devolving upon him under the showing made, and, second, was the neglect in question such an excusable neglect as, upon the showing made, would require the trial court to set aside the default? This was apparently the method of inquiry adopted by our Supreme Court in the leading case of Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332.

The defendants, during the trial of the case, had of record four attorneys. But it appears that of these only one, Mr. Rollin Laird, had been employed to participate actively in the proceedings. The others were not required or expected to act, and no claim is made that any one was misled through their inaction. In the affidavit of attorney Laird the following showing is made:

"That he is one of the attorneys for defendants in the above-entitled action, and had charge of the actual defense of said action during the trial of the case. That upon the rendition of the decision in said action affiant was informed that a substitution of attorneys in said action was to be given and made, and that E. F. Brittan was to be substituted as attorney for the defendants therein. Affiant was informed by the defendants that said E. F. Brittan would prepare all the necessary papers in said action and take charge of the same after the decision was rendered herein, and therefore all papers in said action were sent to the office of E. F. Brittan after November 3, 1925, being the date upon which notice of entry of judgment was made and filed. That affiant assumed that the substitution of attorneys had been made and that E. F. Brittan was in charge thereof, and for that reason did not prepare a notice of intention to move for new trial, or bill of exceptions in said action, assuming that the said E. F. Brittan would do so. That it was the intention of the defendants to move for a new trial and to appeal for the purpose of determining the legal questions involved in the trial of said action, and affiant assumed by reason of the facts hereinbefore stated that E. F. Brittan would prepare the bill of exceptions to be used on said appeal."

And further, by the affidavit of Attorney Brittan, the following showing is made:

"That on or about the 1st day of November, 1925, affiant was consulted by the defendants T. E. Klipstein and Charles Haberkern in the above-entitled matter relative to preparing a bill of exceptions on motion for new trial and to appeal said case to the Supreme Court of the state of California, and informed said defendants that it would be necessary that a substitution of attorneys be obtained from the attorneys represening the defendants in said action. Affiant also talked with Rollin Laird relative to said matter and Laird informed affiant that he was so busily engaged he did not have time to prepare a bill of exceptions or to have anything to do with the case, and desired affiant to be substituted therein for the purpose of taking the matter to the Supreme Court for the purpose of ruling on the same.

"On the 3d day of November, 1925, affiant was compelled to go to the city of Santa Barbara, Cal., relative to taking depositions in some matter, and upon his return from Santa Barbara, Cal., to wit, on the 5th day of November, 1925, affiant was confined in the San Joaquin Hospital, was compelled to undergo an operation, and that affiant, after leaving said hospital, was confined at home for a period of about two weeks. That during said interval the papers in the above-entitled case were brought to the office of said affiant by T. E. Klipstein and placed upon the desk of affiant, and upon affiant's return to the office he did not observe that said papers had been left with him, although he understood an appeal was to be taken, and, consequently, affiant did not prepare the bill of exceptions in said action as was expected to be done for the purpose of taking the appeal to the Supreme Court. That on account of the illness of affiant the ten-day period of time within which to prepare and serve notice of intention to move for a new trial and prepare the bill of exceptions expired, and on account thereof affiant has been unable to file the same in this court upon said appeal within the time required by statute."

[1] First, as regards the question of negligence as between Attorneys Laird and Brittan, based upon their respective duties after the decision of the case by the trial court on October 30th, and the giving of the notice thereof on November 3d, learned counsel for appellant in their brief vigorously contend:

> "It is impossible to imagine a state of facts more forcible in their application than were presented on this motion. If that showing is not sufficient to warrant relief from the few days of default in presenting this bill of exceptions, then no sufficient showing can ever be made. In all the many cases that have been decided on this point, there is not one decision yet recorded in this state where the right to the relief sought is so apparent."

After making this statement, learned counsel does not find it necessary for the guidance of this court to indicate what "set of facts," or what definite or particular portion thereof, he relies upon to indicate mistake or inadvertence or excusable neglect, nor whose was the inadvertence or mistake or excusable neglect, or whether he relies upon mistake or inadvertence or neglect, and wherein or wherefore or whereby the neglect, if there was neglect, was excusable. He does, however, cite, "for illustration," a number of cases decided in this court, as follows:

> " 'Court may relieve a party from his failure to serve bill of exceptions in time where the delay was due to excusable inadvertence of the attorney in misreading a stipulation.' Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332.
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> " 'Or in entering the last day for serving notice of intention to move for new trial.' Haviland v. So. Cal. Edison Co., 172 Cal. 601, 158 P. 328.
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> " 'Or where affidavits filed that bill of exceptions was placed in mail and lost in transit.' Long v. Long, 162 Cal. 427, 122 P. 1077.
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> " 'Or where attorney left instructions to his clerk to obtain additional time and clerk failed to do so.' Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 P. 425.
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> " 'Or inadvertent conduct of attorney.' Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272."

Since he cites these cases "for illustration," it may be that he is relying upon "inadvertence or mistake" on the part of counsel in the case at bar. But, unlike in the cases cited "for illustration," there does not, in this case, appear to be any specific statement of fact or facts showing the tangible existence of any reasonable excuse for the existence of any mistake. Referring to the affidavit of Attorney Laird, it appears that he was fully advised of the intention of the defendants to appeal, and, since he was the attorney "in charge of the case for defendants," was advised of the running of the time, both on the appeal and the preparation of the bill of exceptions; and further advised of the law of the state which would make it ineffective and abortive for any attorney, except the attorney of record, to take any steps in the matter of such appeal until such other attorney had been substituted. Section 284, Code Civ. Proc.; McMunn v. Lehrke, 29 Cal. App. 298, 155 P. 473; McMahon v. Thomas, 114 Cal. 588, 46 P. 732; Prescott v. Salthouse, 53 Cal. 221; Starkweather v. Eddy, 196 Cal. 73, 235 P. 734.

And, furthermore, he knew that there could be no substitution of attorneys without notice thereof being given to him as attorney of record. Therefore, when he makes affidavit "that affiant assumed that the substitution of attorneys had been made," he assumed something which the slightest attention on his part, or the slightest effort of memory on his part, or the slightest knowledge of the law on his part would not have permitted him to assume. And it would seem that it was especially within the duty and function of the trial judge closely to scrutinize the affidavits for the purpose of gleaning some reasonable facts which would excuse an attorney of record for his assumption that a substitution of attorneys had been made while he was still the only active responsible attorney of record, and when he was fully advised, as such attorney of record having charge of the case, that none of the steps, either in law or fact, had been taken to accomplish or effect such substitution.

The mere fact, of course, that he was informed by defendants that "E. F. Brittan would prepare all the necessary papers in said action and take charge of the same after the decision was rendered herein," did not, as he well knew, absolve him of his duty to protect his clients until, as a matter of fact and law, Attorney Brittan had taken "charge of the same." And there is nothing in his affidavit to indicate that he was mistaken as to the nature, extent, or urgency of the duties imposed upon him in the premises. He does not state what fact or circumstance in any way obstructed or prevented him from obtaining such a stipulation from the other side, or such an order from the court as would have protected his clients until Attorney Brittan had to his knowledge taken charge of the case, either in actual fact or in the manner required by law. Nor does affiant state that he was of the opinion, at the time he permitted the default, that Attorney Brittan could, under the law, take the appeal and sign and present the proposed bill of exceptions. In other words, it does not seem it was an abuse of discretion on the part of the trial court to refuse to find that Attorney Laird had any reasonable or sufficient basis, or any basis at all, for a mistake, either as to his own plain duty in the premises or as to any reasonable belief that Attorney Brittan had, as a matter of fact, so, or at all, taken charge of the case, as to relieve him from continuing to perform such duty. And, further, as stated in the affidavit of Brittan, even the defendants in the case were informed and advised "that it would be necessary that a substitution of attorneys be obtained from the attorneys representing the defendant in said action."

So it would appear that the trial court was not abusing its discretion in refusing to find that the responsible attorney of record, learned in the law, and fully advised as to the facts, was reasonably mistaken either in assuming that Brittan would take charge of the case before there was a substitution, or in assuming that a substitution, as a matter of fact, had taken place, or that there was any substantial showing of reasonable diligence on his part. Further, even in his affidavit upon which he wished the trial court to rely as a showing of diligence, he somewhat ambiguously states that "all papers were sent to the office of E. F. Brittan after November 3, 1925." But he does not state how long after, nor how, or by whom sent, nor to whom delivered, or whether he communicated directly or indirectly with Brittan about having sent the papers. And Brittan says "he did not observe that said papers had been left with him."

[2] Coming now to the possible suggestion that the failure to present the bill of exceptions or obtain the necessary extension of time therefor was due to neglect on the part of Attorney Brittan; in other words, to the failure on his part to perform some duty which he might have assumed toward the defendants: Conceding that by reason of his consultations with the defendants in regard to his prospective services in the case, and in regard to what he said about the necessity of a prospective substitution of attorneys, that he may have assumed some duty in that regard, at least, towards the defendants, and that his failure to perform that duty was a neglect, the vital question would further arise whether sufficient facts are set forth in Attorney Brittan's affidavit to show that such an assumed neglect on his part was an excusable neglect.

In his affidavit Attorney Brittan states that on the 3d day of November, when the time for serving the proposed bill began to run, he went to Santa Barbara on business, and on the 5th day of November, upon his return, affiant was confined in the San Joaquin Hospital, and was compelled to undergo an operation, and that affiant, after leaving said hospital, was confined at home for a period of two weeks. It will be noted that the affidavit makes no attempt to indicate how or why his Santa Barbara business prevented his necessary action, nor does he show the extent or severity or nature of his confinement at the hospital, or to what extent the operation which he was compelled to undergo was a sudden or unexpected operation, or how, if at all, it affected his mind, memory, or powers of thought or locomotion or action. Furthermore, learned affiant does not state to what extent, if at all, his confinement at home for a period of about two weeks, during which time the default in question occurred, affected him physically or mentally, or prevented him from availing himself of any facilities of communication reasonably at his command, to obviate such default or to do what an ordinarily prudent attorney would have done under the circumstances—assuming, of course, that he had, as a matter of fact, undertaken to perform any duties in the nature of taking the appeal or serving the bill of exceptions in accordance with the law.

It does not seem that it was an abuse of discretion on the part of the trial court to decline to read into the deposition of the learned affiant facts which would show that either his Santa Barbara business or his operation or confinement at home were of such a serious and urgent nature as to prevent him from protecting his prospective clients against the default, or from preventing him from communicating with the attorney of record or attorneys on the other side, in such a way as to obviate the default.

It is true that there were no counter affidavits filed in the case, but, as regards the affidavits that were filed, it was certainly not the duty of the court to give to such affidavits any greater force or effect than was warranted by the court's own fair inferences from the very bare facts somewhat ambiguously stated therein. Furthermore, the court had already fully tried the case upon the merits, and had before him, on this motion, the affiants themselves, who were members of the bar of the court, and the court had a right to presume that the affidavits, made as they were by learned counsel, stated the facts in their favor as strongly as possible, and did not omit any facts or circumstances that could have confirmed or given color or vitality to the conclusions which counsel desired the trial judge to draw.

[3] While, therefore, we do not desire in any way to weaken or question the rule "that in case of doubt the court ought to resolve the doubt in favor of the application so that the full merits of the litigation might be presented," nevertheless, the trial court's discretion to grant the relief should be allowed to be based upon its own fair and reasonable inferences drawn from the showing of actual facts in the particular case before the court. Brennan v. Weissbaum, 77 Cal. App. 120, 245 P. 1104; Startzman v. Los Banos Cotton Gins (Cal. App.) 256 P. 220. In the case at bar it would seem that the court, in the exercise of its fair discretion, did reasonably infer that the default in this instance oc-

curred rather through mere gratuitous inadvertence and unwarranted inattention than through excusable neglect.

As stated in 14 California Jurisprudence, at page 96:

> "Inadvertence in the abstract is no ground for setting aside a default; the reason for that must be made to appear, and if it is wholly inexcusable, as where it arises from mere neglect, it does not justify relief. While negligence, either of the party or his attorney, may be excusable in proper circumstances, bare negligence is no ground for relief."

The order is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

90 Cal. App. 71

WINSHIP et al. v. HOLDEN et al.★
(Civ. 6275.)

District Court of Appeal, First District, Division 1, California. March 12, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Mechanics' liens 🔑134—Notice of mechanic's lien should be considered as a whole in determining its sufficiency (Code Civ. Proc. § 1187).

In determining whether mechanic's lien claim is sufficient, under Code Civ. Proc. § 1187, notice of claim should be considered as a whole.

2. Mechanics' liens 🔑139(3)—Materialmen's lien claim held not defective for failure to state kind of materials furnished (Code Civ. Proc. § 1187).

Claim for lien giving notice that materialmen furnished materials used in construction of certain buildings, and that contractor entered into oral agreement with them "to furnish building materials," *held* not defective for failure to show kind of materials furnished, as required by Code Civ. Proc. § 1187.

3. Mechanics' liens 🔑134—Same rules of construction should apply to claim for lien for material furnished original contractor and claim of original contractor in determining sufficiency of claim (Code Civ. Proc. § 1187).

In determining sufficiency of lien claim in statement of materials furnished, under Code Civ. Proc. § 1187, same rules of construction should apply in case of materialman dealing with the contractor as would be applied to the original contractor himself in dealing with the owner.

4. Mechanics' liens 🔑5—Statute prescribing requisites of mechanic's lien claim should be liberally construed, having regard to substance (Code Civ. Proc. § 1187).

Code Civ. Proc. § 1187, providing for filing lien claims on part of laborers and materialmen, is a remedial statute, and should be liberally construed in furtherance of purposes for which it is authorized, with regard to substance rather than form, as persons for whose benefit statute was enacted are not presumed to be versed in matters of pleading.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by J. E. Winship and others, copartners doing business under the firm name and style of J. E. Winship & Sons, against Minnie Holden and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hearing denied by Supreme Court: WASTE, C. J., voting for a transfer.

A. Heber Winder, of Riverside, for appellants.

R. J. Welch, Jr., and Estudillo & Schwinn, all of Riverside, for respondents.

PARKER, Justice pro tem. This is an action for the foreclosure of a materialman's lien. From a judgment in favor of plaintiffs decreeing that said lien be foreclosed, defendants appeal.

There is but one question presented here and that is that the claim of lien did not comply with the statute, in that it did not describe the kinds of materials furnished. No other point is urged on the sufficiency of the claim of lien, it being conceded that the claim in all other respects conformed to the requirements of the statute. All that appears in the claim of lien relating to the kind of materials furnished is as follows:

> "Notice is hereby given that J. E. Winship, J. Vernon Winship, and Frank E. Winship, copartners doing business under the firm name and style of J. E. Winship & Sons, dealers in lumber and building materials at all times hereinafter set forth, furnished materials which were actually used in the construction of certain buildings, to wit, two frame dwellings and garage now upon that certain lot of land situate in the city of Riverside, county of Riverside, state of California, and sought to be charged with the lien [describing property]."

Further in the claim of lien appears this paragraph:

> "That J. T. Nicholson, also known as Joseph T. Nicholson, is the name of the contractor with whom said parties contracted for the construction of said buildings, and that as such contractor with whom said parties contracted for the construction of said buildings, and that as such contractor and agent for said owners, entered into an oral agreement with said J. E. Winship & Sons to furnish building materials."

The appellants urge the insufficiency of the claim of lien, and base their contention upon the wording of the statute which gives the right of lien and the authorities construing said statute. Section 1187 of the Code of Civil Procedure provides:

> "Every original contractor, claiming the benefit of this chapter, * * * and every person save the original contractor claiming the benefit of this chapter, * * * may file for record with the county recorder of the county or

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★Hearing denied by Supreme Court.

city and county in which such property or some part thereof is situated a claim of lien containing a statement of his demand after deducting all just credits and off-sets, the name of the owner or reputed owner, if known, a general statement of the kind of work done or materials furnished by him, or both, the name of the person by whom he was employed or to whom he furnished the materials, and a description of the property sought to be charged with the lien."

The appellants contend that the claim of lien does not meet the requirements of the statute, in that it contains no statement of the kind of materials furnished.

[1, 2] In determining the question presented and in discussing the sufficiency of the claim, we will consider the notice of claim of lien as a whole, that is to say, that if in any portion of the claim there appears a sufficient statement of the kind of materials furnished the objection would be met. Therefore, taking the first portion of the claim as hereinbefore given, we find the statement merely that materials were furnished. In the second paragraph we find the statement that an oral agreement was entered into for the furnishing of building materials, and the further statement that such agreement has been fully performed. Summarizing the contents of the claim, we find this much expressly stated therein: That claimants, dealers in lumber and building materials furnished building materials which were actually used in the construction of certain frame buildings; and, in addition thereto, the claim of lien sets forth that the owners had due notice of said materials being furnished for said buildings. We may repeat here that it is conceded that in all other respects the claim of lien complies with the requirements of the statute.

[3] The contention of appellants is disposed of in the very recent case of Trout v. Siegel et al. (Cal. Sup.) 262 P. 320, decided on December 20, 1927. True, the facts in the case were somewhat different, but the same rule of law must be applicable. In that case the lien claimant was the original contractor who dealt directly with the owner, while in the instant case the claimant is a materialman, whose dealings were with the contractor. The courts in many instances have intimated that a different rule of construction would be applied to the original contractor who dealt with the owner than to a materialman dealing with the contractor. But the statute itself warrants no such distinction. The only distinction made in section 1187, Code of Civil Procedure, is as to the time within which claims may be filed. The claim in all cases is the same. Further, in the case of Trout v. Siegel et al., supra, the claim set forth that the claimant held a contract to furnish all of the materials to be used in the building and construction thereof, while in the instant case the claimant evidently did not furnish all of the materials. However, the same reasoning must apply. If we were to hold the claim of lien here to be insufficient, it would be on the theory that the purpose of the statute was, as has often been argued, to give the owner notice of exactly what was claimed, to the end that he might investigate the claim and learn upon such investigation whether or not the materials actually went into the structure. It seems apparent that there would be more reason for this investigation where the claim was presented in a blanket form by one who asserted that he furnished all of the materials, without specification of kind, than in a case where one claimed only for a certain amount, because in the latter case the owner would very likely have a knowledge of what other materials were used and some opportunity to check one with another. However, conceding the futility of comparison, the fact remains that the reasoning is as applicable in one case as in the other.

[4] In addition to the cited case, the following recent decisions of our Supreme Court may be noted: Hammond Lumber Co. v. Barth Co. (Cal. Sup.) 262 P. 29; Hammond Lumber Co. v. Barth Co. (Cal. Sup.) 262 P. 31; Hammond Lumber Co. v. Pile (Cal. Sup.) 262 P. 715. All of these cases, decided within the last six months, unmistakably affirm and apply the doctrine as follows: The statute is a remedial statute, adopted in obedience to the requirements of the Constitution, and is to be liberally construed in furtherance of the purposes for which it was authorized. The persons for whose benefit the statute was enacted are not presumed to be versed in matters of pleading, and the notices, which under its provisions they are authorized to give, have regard to substance rather than form.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

90 Cal. App. 151

MADIGAN v. O. A. HALE & CO. (Civ. 6233.)★

District Court of Appeal, First District, Division 1, California. March 16, 1928.

Hearing Denied by Supreme Court May 14, 1928.

1. Evidence 🔑20(1)—It is matter of common knowledge that business establishments maintain delivery stations apart from store itself.

It is a matter of common knowledge that every business establishment maintains, apart from the store itself, certain designated delivery stations.

2. Negligence 🔑32(2)—Salesman slipping on runway entering receiving room of defendant's store held an "invitee" and not a trespasser or mere naked "licensee."

Salesman delivering groceries to defendant's store and slipping on runway provided by defendant for entry into its receiving room was not a trespasser or mere naked licensee, but an invitee, to whom defendant owed duty of maintaining property in safe condition and of exercising reasonable care in protecting him from injury when making use of premises.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invitation; Licensee.]

3. Negligence 🔑134(5, 7, 11)—Evidence held to show that runway in defendant's store was defective, and was known to defendant but not known to injured salesman, and that defect caused salesman's injuries.

In action by salesman delivering groceries for injuries on slipping on runway provided for entering receiving room of defendant's store, based on alleged absence of cleats in runway, evidence *held* to show that runway was in defective and dangerous condition, known to defendant through its employees, that defect was not known to plaintiff, and that such defect caused plaintiff's injuries.

4. Negligence 🔑67—Salesman's failure to observe absence of cleats in runway of store held not negligence precluding recovery for injury on slipping on runway.

Salesman using runway entering receiving room of defendant's store being an invitee, he was justified in assuming that runway was one of safety, and his failure to observe absence of cleats in runway was not negligence on his part precluding recovery for injuries on slipping by reason of absence of cleats.

5. Negligence 🔑44, 48, 67—Owner of store must maintain runway in safe condition; that defect in runway in store arose without owner's knowledge or was observable in exercise of ordinary care does not alter owner's duty to maintain it in safe condition.

Owner of store maintaining runway into its receiving room as means of entry by persons delivering goods has duty of maintaining such runway in safe condition, and fact that defects arise without its knowledge or that they could have been observed in exercise of ordinary care does not alter owner's duty, but has probative value in determining whether duty has been fulfilled.

6. Trial 🔑296(3)—Instruction on duty of owner of premises to invitee which was a preliminary one held not prejudicial, in view of charge as whole.

In action by salesman for injuries in slipping on runway provided for entering receiving room of defendant's store, instruction that where one maintains entry or passageway which by reason of its arrangement and use would reasonably induce one to believe that use made by him thereof was proper, such person is an invitee to whom owner owes duty of maintaining entry in safe condition, which instruction was a preliminary one, *held* not prejudicial, particularly in view of charge as a whole.

7. Negligence 🔑138(3)—Instructions on general duties of owner of premises to invitee held not prejudicial as charging on issues not pleaded.

In action by salesman for injury in slipping on runway provided for entering receiving room of defendant's store, single issue at trial concerning runway and alleged missing cleats, instructions as to general duties of owner of premises to invitee *held* not prejudicial as charging on issues not pleaded, since owner's general duty to maintain premises in safe condition was necessary in order to charge it with specific duty of having cleats on runway.

8. Trial 🔑260(1)—Requested instructions, fully covered by instructions given, were properly refused.

Where every correct principle of law contained in requested instructions was covered by instructions given, they were properly refused.

9. Negligence 🔑141(4)—Instruction that invitee using entry may rely on presumption that it is maintained in safe condition, and need not exercise extraordinary degree of care, held proper.

Instruction that one lawfully using entry or passageway as invitee is entitled to rely upon presumption that it will be maintained in safe condition, and need not use extraordinary degree of care in ascertaining whether it is safe, *held* proper.

10. Trial 🔑296(4, 5)—Instruction, though subject to criticism as warranting inference that defendant must plead and prove contributory negligence, held not to require reversal, in view of further instructions on contributory negligence.

Instruction that damage sustained by invitee through injuries received as proximate result of negligence of one maintaining entry way were recoverable in absence of any pleaded or proven contributory negligence, though subject to criticism because warranting inference that contributory negligence must be proven and pleaded by defendant, *held* not to require reversal, in view of its slight importance by reason of further instructions relative to contributory negligence of plaintiff.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

★Hearing denied by Supreme Court.

Action by John Madigan against O. A. Hale & Co. for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco (Wm. M. Abbott and K. W. Cannon, both of San Francisco, and Enid Childs, of Berkeley, of counsel), for appellant.

Louis Oneal, Wm. F. James, and S. F. Holstein, all of San Jose, for respondent.

PARKER, Justice pro tem. This is an appeal by defendant from a judgment in favor of plaintiff entered pursuant to the verdict of a jury. The action was to recover damages on account of personal injury alleged to have been sustained through the negligence of defendant. A statement of the case follows.

The plaintiff at the date of the injury was a salesman engaged in the delivery of nine cases of groceries to the defendant company. The latter operates a large store in the city of San Jose. The goods sold are not manufactured on the premises, but the business conducted is that of retailing merchandise delivered to the said company. For the purpose of receiving such goods the defendant has provided, among other facilities, a delivery chute opening on the sidewalk and descending to the basement. This opening to the basement was equipped with sidewalk doors, which are lowered flush with the sidewalk when not in use, and when raised form a barrier to protect pedestrians. The easterly side of this opening to the basement of the store was approximately two feet from the street curb, and from this easterly side of the opening a wooden chute, almost five feet wide, ran from the level of the sidewalk to the receiving room in the basement. At the side of the chute a perpendicular iron ladder descended half way. The remaining half of the descent to the basement is provided with an inclined wooden runway about 5 or 6 feet long and 1½ feet wide, the completed arrangement comprising the iron ladder and wooden incline in one continuous structure from the sidewalk to the floor of the basement. The wooden part was inclined at an angle of 50 or 60 degrees, and had wooden cleats nailed thereon, approximately a foot apart. On the day of the accident two cleats were missing from the bottom of the incline. This description of the premises involved seems agreed upon by all parties.

The facts connected with the accident were in dispute, and the question of the sufficiency of the evidence is not presented as an independent question. As the contentions of appellant, however, center about the facts of the case, it will be necessary to further narrate them; but in this narration we take the facts as outlined in the evidence of plaintiff, and where these are substantially supported we ignore any conflict. Further, in reviewing the facts we adopt as true those most favorable to the conclusion reached in the court below when substantial evidence supports them.

On the morning of the accident, at about the hour of 9 a. m., and shortly before the store proper was opened to the public, plaintiff arrived at the chute with nine cases of merchandise, each case being of a weight of 50 pounds. After he had sent the goods to the basement, down the delivery chute, the plaintiff started down the little way beside the main chute. After getting over the iron ladder he reached the wooden incline, in going down which he slipped and sustained the injuries complained of.

This statement of facts suffices to present the first point of appellant. However, as this point is discussed, further facts will be developed.

[1] The appellant contends that plaintiff was at all times a mere licensee upon the premises, to whom no duty was owed other than to avoid doing any wanton or willful injury to him. We cannot uphold this contention. The defendant is engaged, as stated, in the retailing of general merchandise, including groceries. Manifestly, no business could be done by the retailer without goods to sell, and that they may be sold at retail it is necessary that a stock be carried on the premises. To effect this a delivery is essential, and it is a matter of common knowledge that every business establishment does maintain, apart from the store itself, certain designated delivery stations. The chute in question was the place provided for such deliveries. At the foot of this chute a shipping clerk was stationed who was in charge of a department for the receipt of goods, his receiving window facing the chute. Freight, express, parcel post, groceries and everything came down the chute, and all of the salesmen likewise came down the runway. It was the constant practice of the salesmen to enter that way, although some deliveries of small packages or rush orders carried in by boys on bicycles went directly to the store entrance. As a part of the usual delivery by salesmen it was the custom for the salesmen to enter the basement and arrange the goods delivered and place the same on shelves provided for that purpose. The plaintiff had been delivering goods to appellant for about six weeks before the day of the accident. This he did twice a week during that period, and he made the deliveries and came down the incline in the same way each time. Appellant's employees saw him making these deliveries and using the runway each time, and no one ever told him to do otherwise. The first time plaintiff made a delivery he was told by an employee of appellant to come down the runway.

This narrative is taken from the transcript of the testimony presented in the trial court and follows the language there used. The law governing destroys appellant's contention. In the case of Grant v. Sunset Telephone Co., 7 Cal. App. at page 273, 94 P. 368, the court cites many authorities on the subject.

In Sweeny v. Old Colony, etc., R. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644, the Supreme Court of Massachusetts says:

> "The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. * * * The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the * * * occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used."

Likewise, the other authorities reviewed in the case of Grant v. Telephone Co., supra. In Benson v. Baltimore Traction Co., 77 Md. 535, 26 A. 973, 20 L. R. A. 714, 39 Am. St. Rep. at page 436, it is said:

> "The distinction between an invitation and a license to go upon the premises of another appears to be that the former is inferred where there is a common interest or mutual advantage, while the latter is inferred where the object is the mere pleasure or benefit of the person using it."

The law of California accepts these principles as operative in this jurisdiction. 19 Cal. Jur. pp. 617–621. While it is true that in many cases the facts have been so found as to cause, in some instances, a seeming deviation from the rule, yet the principles have remained unchanged.

[2] Applying the law to the particular facts as here developed, we conclude that plaintiff at the time of the accident was upon the premises not as a trespasser or a mere naked licensee, but was there upon an invitation implied if not positively expressed, and that as such invitee the defendant company owed to him the duty of maintaining the property in a safe condition and of exercising reasonable care in protecting the invitee from injury when properly making use of the premises.

[3] Appellant then contends that if it should be held that plaintiff was an invitee, defendant under the evidence was guilty of no negligence and that plaintiff was injured by an obvious defect. It is conceded throughout the case by both appellant and respondent that the accident was caused by the absence of cleats on the wooden incline leading from the end of the iron ladder to the basement floor. The absence of these cleats was not a matter of faulty construction, but was a case of neglect to repair. Originally the incline was provided with cleats, and as these cleats became loosened or removed the same were tightened or replaced. The morning was a rainy, wet morning, and the rain had poured into the chute opening. Plaintiff observed this before sending the goods down and before going down himself. The remainder of the testimony by plaintiff is extremely uncertain and contradictory. In many instances the testimony given on direct examination seems to be directly contradicted by this same witness on cross-examination, and then on redirect examination the original testimony is repeated. This presents a matter for the jury's determination as to where the truth may be. The evidence supports these facts, viz.: The entire chute, from sidewalk to basement floor, was not visible, and while the top portion where the iron ladder was would indicate a wet and slippery condition, the full length of the runway could not be seen. The cleats on the wooden incline were often loose or missing, and were under the control and inspection of defendant. There is no evidence that the wooden incline was wet or slippery on the day in question. The plaintiff first noticed that the cleats were missing after he fell.

Appellant here argues that in his various deliveries covering a period of six weeks plaintiff must have become aware of the conditions existing, including the fact of the absence of the cleats. This, of course, is purely argumentative; and while a strong inference of knowledge might follow from such a user, yet the record discloses repairs from time to time. Likewise, it is true that very often where no injury results from use of a thing it is taken for granted that it is safe. The plaintiff testified further that after the accident he noticed that a cleat was missing about ten inches from the bottom, and also that there were less cleats there on this day than had been there before. The plaintiff slipped and fell at the point where the cleat was gone. On his previous use of the chute and incline he had used all of the cleats and had relied upon them for a safe entry as would appear from his statement that he did not know that he could go down the runway without using all of the cleats that were formerly there. Appellant stresses the fact that plaintiff testified that the entry looked dangerous to him by reason of its slippery condition due to the rain, but nevertheless assumed the risk of going down. A sufficient answer is that it is not shown that the apparent danger, to wit, the slippery condition, caused or contributed to the accident. Sufficient appears in the record to indicate that the absence of the cleat alone was the cause of his fall and injury. A realization of the slippery condition of the runway in no way embraced knowledge that any cleats were missing; and conceding that the runway was slippery and that such condition was obvious, yet the assurance of properly spaced cleats would minimize any danger to be expected from the slippery condition. Ordinarily any smooth inclined wooden surface is more or less slippery, and the function of cleats is to overcome this condition.

Appellant also urges that it was the slippery condition of the runway that caused the fall and not the absence of the cleat. This was a matter for the jury to determine from all of the facts and circumstances, and there was direct evidence to the effect that plaintiff fell just at the point where there was no cleat, and that was the point where he slipped, and that he did not slip on the runway.

In addition to the foregoing there is evidence to support the conclusion that those in the employ of defendant in charge of that particular department knew of the condition of the runway, and that others had fallen at that place with no serious results. The record further supports the inference that this particular runway served as a sort of entertainment for the basement employees, the cares of the day being somewhat lightened and the tedium of toil relieved by observation of the incongruous manner of descent of other salesmen who reckoned on a cleat that was not. It may be further noted that there is no evidence to indicate that the runway at the place of the accident or elsewhere on the wooden part was actually wet or slippery, and therefore the fact that plaintiff might have thought it was so would have no bearing on his conduct.

[4] As a corollary to appellant's contention as to the obvious character of the defect and the assumption of the risk, it urges the contributory negligence of plaintiff. Practically the same argument is used on this branch of the appeal. Conceding that if plaintiff had carefully looked he might have seen the defect or the lack of the cleats, he was under the circumstances justified in assuming the place to be one of safety, and hence his failure to abserve the exact condition was not negligence on his part. Brinkworth v. Sam Seelig Co., 51 Cal. App. 668, 197 P. 427.

Summarizing all of the facts, we find that plaintiff was on the premises as an invitee; that the premises were maintained in a defective and dangerous condition, known to the defendant through its employees and servants; that the defect was not obvious, but on the contrary was unknown to the plaintiff, and that plaintiff's injuries were caused by this defective construction and maintenance of the means of entrance which he was invited to use. These facts find ample support in the record, and remain unimpaired by the apparent conflict and such inconsistencies as cross-examination may have disclosed. No specific act of negligence on the part of plaintiff has been pointed out other than an argumentative dissertation on inferences to be drawn. Therefore, as far as the points heretofore discussed affect the merits of the appeal, we can see no good reason to disturb the verdict.

Appellant next presents for our consideration a number of instructions, some given and some which the trial court refused to give. We will take up these in the order presented.

[5, 6] The first instruction claimed to be erroneous is as follows:

> "The court instructs you that where one maintains an entry or passageway into his place of business, which by reason of the arrangement of his premises and the use made by others with his knowledge would reasonably induce one of common understanding to believe that the use made by him thereof was in accordance with the intention and design of the one maintaining the same, such person so using it is presumed by law to be doing so on the invitation of the owner, and the latter is charged with the duty of maintaining such entry or passageway in a safe condition, and a failure to do so on his part is negligence."

The specific objection of appellant to this instruction is thus given:

> "This instruction made defendant an insurer. By the charge, mere proof of injury was made proof of negligence, for if the entry was not kept 'safe' defendant was negligent. It was immaterial, under this instruction, whether defendant exercised ordinary care, whether plaintiff knew of the danger, whether the danger was obvious, or the place was reasonably safe, or the defendant notified of the alleged defect or of the danger."

The argument is not convincing. We cannot read into the instruction all that appellant contends that it contains. The questions of plaintiff's knowledge, or of the nature of the defect with reference to its being obvious, do not bear on defendant's duty in the abstract. If plaintiff has a knowledge of the defect, or if the same is obvious, these facts may go to affect plaintiff's right of recovery and to that extent limit the liability of defendant, but in no sense would they operate to change the duty of defendant in the premises. Further, the instruction was a preliminary one, merely attempting to outline the general duty of defendant without reference to any question of liability. It is the duty of the owner of premises, in the situation outlined in the instruction, to maintain the entry or passageway in a safe condition. If defects arise without his knowledge, or whether defendant could in the exercise of ordinary care have observed the defects, the duty of defendant is not altered, but these facts have probative value in determining whether or not the duty has been fulfilled, and this question depends upon the facts of each particular case.

In Corbett v. Spanos, 37 Cal. App. 202, 173 P. 770, the court quotes from the earlier case of Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580, as follows:

> "The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business."

Appellant, continuing further his attack upon this particular instruction, asserts that the instruction presumed plaintiff to be an invitee. By forced construction various meanings are attributed to detached phrases, and argument builded up thereon. To follow each contention would be to present a treatise of mixed reasoning, misapplied law, and erroneous conclusion. We see nothing prejudicial in the instruction as given, and this particularly in view of the charge as a whole.

[7] Next, it is claimed that the trial court erroneously charged the jury that plaintiff could recover upon issues not pleaded. The complaint charged that defendant "had negligently failed to cause to be nailed or fixed any cleats on the lower part of said runway, and that plaintiff by reason of the negligence and carelessness of the defendant company in failing to provide the lower part of said runway with cleats slipped and fell." The trial court charged the jury as follows:

> "That the inclined runway so provided by defendant had nailed across it certain cleats to prevent slipping thereon; and the negligence which plaintiff charges against defendant consists in its failure to maintain such cleats along the said runway, along the lower part of the same."

Also:

> "Such person so using it is presumed by law to be doing so on invitation of the owner, and the latter is charged with the duty of maintaining such entry or passageway in a safe condition."

Also:

> "The court instructs you that it is the duty of one maintaining such a passageway to maintain it in a reasonably safe condition."

Also:

> "You are instructed that one lawfully using an entryway under such conditions is entitled to rely upon the presumption that it will be maintained in a proper and safe way." "The court instructs you that any damages sustained by one lawfully using such an entry or passageway which may have been incurred by injuries received by him as the direct and proximate result of any negligence on the part of the party in the maintenance of such entry or passageway may be recovered by the injured party."

Appellant argues that the issues involved cleats, and the instructions commanded a "safe" entry and passageway as a whole. And further it is contended that the jury were authorized to conjecture, after the event, as to what precautions would have been proper or what precautions would have made the entire entry or passageway (not the incline) safe. The instructions, it is claimed, authorized recovery on any ground.

The single issue at the trial concerned the runway and the missing cleats. All of the evidence was addressed to this particular claim of negligence. There was no suggestion of any other defect in construction or maintenance.

The case of Kelley v. Hodge Transportation System, 197 Cal. 607, 242 P. 79, is in point. The trial court in that case instructed the jury that "if they should find from the evidence in the case that defendant at the time and place of the collision * * * violated any of the provisions of the state Motor Vehicle Act, then it is your duty to find that defendant was guilty of negligence." The portion of the instruction objected to contained the words, "violated *any* of the provisions of the state Motor Vehicle Act," and it was argued that the words within the quotation marks were not limited to those violations of the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382, St. 1919, p. 191) upon which respondent relied as the cause of her injuries. It was insisted that by the instruction as given the jury was told that *any* violation of the Motor Vehicle Act, whether or not it had any causative relation to the injuries inflicted, might be considered as a material element in the determination of the question of liability. The Supreme Court in passing upon this contention said:

> "It is scarcely conceivable that the jury should have been thus misled. Practically the only question in the case was whether or not the driver of the truck was guilty of negligence by continuing his course from one side * * * to the other in * * * face of the admitted fact that he saw Fisher at some distance prior to the collision and knew, or ought to have known, that he would soon be in his path without giving an alarm of any kind. * * * But if it may be said that appellant suffered prejudice by the criticized instruction standing alone the prejudice was removed by the giving of other instructions. * * * The jury could not have been led into the realm of surmises as to other violations of the Motor Vehicle Act inasmuch as none other was claimed to have occurred."

So here the jury were specifically instructed as to the issues, and these criticized instructions merely placed before them the general duties of the owner of premises upon which one had been invited. Before the owner owed plaintiff the specific duty of causing the cleat to be nailed or fixed there must rest upon said owner some general duty to maintain the premises in safe condition. Putting it differently, if appellant was not obligated to keep the premises and passageway in a safe condition, and owed no general duty whatsoever, then there would be nothing upon which to predicate a claim of negligence in failing to fix or nail any cheats on the runway.

[8] Lastly, appellant contends that the trial

court erred in refusing defendant's proposed instructions concerning contributory negligence and in misdirecting the jury on the subject. Appellant presents four separate instructions requested by it and refused. We have, however, examined the instructions given, and find that every correct principle of law contained in the refused instructions was covered by instructions given. As a matter both of fact and of law the jury were better advised and the rights of appellant better preserved in the instructions given than would have been the case had the charge contained the refused instructions and omitted those given. This ends further discussion.

[9] Instructions which were given and to which appellant directs its complaint are as follows:

> "You are instructed that one lawfully using an entry or passageway under such conditions is entitled to rely upon the presumption that it will be maintained in a proper and safe condition; and he is not required to use any extraordinary degree of care or circumspection in endeavoring to ascertain whether or not such entry or passageway is safe."

In view of the fact that appellant has presented us with an almost wholly italicized brief, and his contention being that the entire trial from beginning to end was a continuing error, we might expect to find in the brief or in an appendix or supplement thereto some reference that would indicate what preceded this particular instruction explanatory of the words therein "under such conditions." Finding nothing so indicative, we could disregard the point entirely and assume that the conditions upon which the use was made justified the instruction. However, we have again gone to the transcript, and find that the instructions immediately preceding this went into a detail of the entire subject-matter of the duties owing to an invitee by the owner of premises. The law on the subject was fully and clearly expounded, and this instruction, coming as it did after the others, merely in effect followed the doctrine of the case of Brinkworth v. Seelig Co., 51 Cal. App. 669, 197 P. 427, to the effect that an invitee is justified in assuming the place to be one of safety. Further, it might be added that throughout the law of negligence we find the standard to be ordinary care and circumspection under the existing circumstances, and that extraordinary care is not required.

[10] Complaint is made of this instruction:

> "The court instructs the jury that any damages sustained by one lawfully using such entry or passageway, which may have been incurred through injuries received by him as the direct and proximate result of any negligence on the part of the party in the maintenance of such entry or passageway may be recovered by the injured party from the one so negligent in the absence of any pleaded or proven contributory negligence."

The claimed error therein is in the concluding clause. First, it is contended that this clause assumed the absence of any pleaded or proven negligence. The phrase, "in the absence of," as here used, meant "if there is not," and to construe it differently would be to distort the meaning thereof as obviously intended. The instruction is, however, subject to the criticism that it might be inferred therefrom that contributory negligence must be pleaded or proven by the defendant. Yet this was of slight importance for the reason that other instructions explained that if the jury believed from the evidence that plaintiff's own negligence had contributed to the injury he could not recover. The instruction, it is true, might be so construed as to entirely eliminate such contributory negligence as might be shown from the testimony of plaintiff himself or that of his witnesses, or which might appear as a matter of law in the absence of an affirmative showing by defendant.

The jury were instructed that if it was found from a consideration of all the evidence in the case that such evidence was as consistent with a neglect of care on the part of plaintiff as with any alleged neglect of care on the part of defendant, then plaintiff could not recover, and, further, the jury were told that plaintiff was bound to use the same degree of care to prevent injury to himself as defendant was to prevent injury to him, and, if plaintiff failed to use such care, and his failure in this regard caused his injury, then he could not recover.

In the early case of Brooks v. Crosby, 22 Cal. 50, decided in 1863, Chief Justice Cope uses this language:

> "We are of opinion that the case was fairly submitted to the jury, and that the record discloses no error for which the judgment should be reversed. It is possible that instructions were refused which could properly have been given, and that some of those given are subject to verbal criticism. On the whole, however, we think there is no substantial ground of objection, as the question for the jury was a very simple one, and depended entirely upon the weight of evidence."

This seems peculiarly fitting here. The issue was simple, and little testimony was adduced. In fact, defendant put in hardly any evidence at all. The instructions as a whole were clear and full. There is hardly a trial of any issue but that a hypercritical analysis might somewhere disclose an error. But our organic law requires that in addition to the discovery of error there must also be at least some good reason to believe that from such error a miscarriage of justice has resulted.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 594

PROVENSAL v. MICHEL et al. (Civ. 6220.)

District Court of Appeal, First District, Division 1, California. March 1, 1928.

1. Appeal and error 🔑171(3)—Imperfect and defective denials, if acted on as sufficient at trial, are not admissions of allegations attempted to be denied.

Imperfect and defective denials, if acted on as sufficient at trial, are not admissions of allegations of a pleading which are attempted to be denied.

2. Trial 🔑396(3)—Finding that defendant was not friend, adviser, and manager of plaintiff held responsive to issue in relation thereto.

Where answer to complaint, in action to set aside a deed, denying that since death of plaintiff's husband defendant had been trusted friend, adviser, and manager of plaintiff, as alleged in complaint, was treated as having raised issue of such relation, trial court's finding that such relation did not exist was responsive to issue raised by denial, though it may have been defective.

3. Appeal and error 🔑1011(1)—Trial court's findings will not be disturbed on review, where facts were in sharp conflict.

Findings of trial court, in action to set aside a deed, will not be disturbed on appeal, where there was sharp conflict as to facts.

4. Deeds 🔑196(2)—Plaintiff had burden to prove confidential relationship before burden rested on defendant to show good faith and fair dealing.

In suit to set aside a deed, plaintiff, having alleged that since death of her husband defendant had been her trusted friend, adviser, and manager, had burden to prove such relationship before burden shifted to defendant to show good faith and fair dealing.

5. Deeds 🔑203—Evidence that grantor claiming fraud cried on discovery, two years later, that title to property was in defendant's son, held not pertinent to issue.

In action to set aside deed of land from plaintiff to defendant, where plaintiff alleged that since death of her husband defendant had been her trusted friend, adviser, and manager, refusal of evidence that, when plaintiff and others, two years after transaction, searched record, and found that deed had been executed to defendant's son, she burst out crying, was proper, as having no bearing on question at issue.

6. Evidence 🔑123(7)—That plaintiff cried on discovery, two years after transaction, that deed was executed to defendant's son, held not part of res gestæ.

In action to set aside a deed of land from plaintiff to defendant, where plaintiff alleged that defendant was her trusted friend, adviser, and manager, evidence that she burst out crying on discovery, two years after transaction, that title was in name of defendant's son, was inadmissible, as part of res gestæ.

7. Evidence 🔑135(1)—In action to cancel deed for fraud, excluding other deed from same grantee held proper.

In action to set aside a conveyance of land executed by plaintiff to defendant, who was alleged to be her trusted friend, adviser, and manager, and evidence showed that title to property in issue was taken in name of defendant's son, excluding from evidence deed from plaintiff to defendant's son, conveying property not described in complaint, was not error, where deed was offered only to support fact of a transfer, and plaintiff failed to accept opportunity offered earlier in case to show circumstances connected with execution and delivery of deed.

8. Trial 🔑67—Refusal to permit reopening of case in chief after defendants rested for additional evidence of value of premises conveyed held discretionary.

In action to set aside a deed of land from plaintiff to defendant, refusal to permit plaintiff to reopen case in chief after defendants had rested to introduce further evidence on question of value of premises conveyed was not abuse of discretion.

9. Appeal and error 🔑690(5)—Trial court cannot be put in error for restricting cross-examination, where no reference was made in record to direct examination.

Trial court cannot be put in error for restricting cross-examination of witnesses, or allowing too wide a scope therein, where no reference is made in the record to their direct examination.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Ernestine Provensal against Emile Michel and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. E. Manning, of San Francisco, Donovan & Lyman, of Oakland, Augustin Donovan, of Alameda, and John Jewett Earle, of Oakland, for appellant.

H. A. Stout, of Oakland, for respondents Long and Monez.

Abe P. Leach and Harry E. Leach, both of Oakland, for other respondents.

PARKER, Justice pro tem. This is an action in equity wherein plaintiff seeks to have set aside and declared of no effect a certain conveyance of real estate executed by her to defendant Joseph Michel. The property in question since the original transfer has been conveyed to other parties defendant. From a judgment in favor of defendants the plaintiff presents this appeal.

The complaint alleges that plaintiff was and is a widow, with little knowledge of the English language and having no familiarity with business transactions; that Joseph Michel, a trusted friend of plaintiff and her deceased husband, had, since the death of said husband, pursuant to a death-bed promise, been the confidential adviser of plaintiff and the one to whom she looked for guidance in her business affairs and in whom she placed full faith and trust; that she had no independent advice or no means of knowledge other than through said Joseph Michel.

Summing up the further allegations, the cause of action is that said Joseph Michel, to his own advantage and gain, abused this trust and confidence, and, falsely representing to plaintiff that she was signing some document of minor importance, procured from her a deed conveying the property in dispute to one Emile Michel, son of Joseph; that thereafter Emile Michel transferred to the Meyers, and the latter conveyed to Monez and his wife. The real property described is in the county of Alameda, state of California.

It is admitted that the deed to Emile Michel was in truth a conveyance to Joseph Michel; the former merely taking the title with no direct interest in the property.

[1, 2] The trial court made a finding as follows:

> "As to the allegations in that portion of paragraph IX of plaintiff's amended complaint reading as follows: 'That since the death of said plaintiff's husband said Joseph Michel has been the trusted friend, adviser, and manager of said plaintiff,' the court finds that each, all, and singular the allegations contained in that portion of paragraph IX of said amended complaint last above quoted are and each of them is untrue."

The first contention of appellant is that this finding is contrary to the admission in the pleadings. The complaint alleges:

> "That since the death of said plaintiff's husband said Joseph Michel has been the trusted friend, adviser, and manager of said plaintiff."

The answer of defendants Michel is as follows:

> "Denies that since the death of said plaintiff's husband said Joseph Michel has been the trusted friend, adviser, and manager of said plaintiff."

The argument of appellant is that, the relationship having been admitted, the burden of proof shifted to defendants Michel to show the utmost good faith in all of their transactions with plaintiff. Whatever the argument may be, the case discloses that no effect was given this claimed admission in the court below. Both sides proceeded with the case on the theory that the relationship between plaintiff and Michel was an issue in the case, and the trial court found against plaintiff thereon. It may well be that the denial is pregnant with some admissions, but an analysis would result only in a construction of the language employed. It is a complete disposition of counsel's argument on this branch of the case when we say that imperfect and defective denials, if acted upon as sufficient at the trial, are in no sense admissions of the allegations of a pleading which are attempted to be denied. Loftus v. Fischer, 106 Cal. 618, 39 P. 1064; Stockton Works v. Glens Falls Ins. Co., 121 Cal. 171, 53 P. 565. In Fitts v. Mission Health Shop, 58 Cal. App. 365, 208 P. 693, the court says:

> "It does not appear that plaintiff, by demurrer, motion, or otherwise, has heretofore raised the point that the denials in the answers were defective. It does not appear that they were acted upon at the time of trial as sufficient. Under such circumstances appellant cannot at this time avail himself of the ground that they are in fact imperfect and that they are general instead of specific in form."

Also Curns v. Brannon, 66 Cal. App. 794, 226 P. 941, to like effect.

Therefore in the instant case we will conclude that there was an issue before the trial court on the question presented by the complaint and that the finding was responsive thereto. It might be further noted that the defendants, other than the Michels, appeared separately, and, answering the complaint, did put in issue this allegation.

[3, 4] Appellant next urges that if we treat the question as being an issue in the case, then the evidence is insufficient to support the finding.

We find in the record a sharp conflict as to the facts. In this situation we will not disturb the trial court's findings. Appellant concedes the power of a reviewing court in this respect, but argues that, if the trial court against an admission finds a fact as in this case, the rule is changed. Expressing it differently, appellant contends that the trial court erred in placing upon appellant the burden of proof throughout the case; that, if the confidential relationship was shown as a matter of fact, then the burden of showing good faith and fair dealing shifted to defendants. However, at the outset we are confronted with the finding that such relationship did not exist; and, as far as the trial court's action is concerned, it was incumbent upon appellant to prove that relationship before the burden rested upon defendants.

The whole case as argued here involves a conflict of fact on every issue. We have before us almost 1,000 pages of testimony, and to digest this and incorporate it in this opinion would only serve to demonstrate the existence of the conflict referred to. We accept the trial court's findings.

[5, 6] Appellant specifies errors of law occurring at the trial. Plaintiff made the following offer of proof:

> "I want to prove not only that plaintiff expressed astonishment but refused to be convinced, and even went further, she went with two other people to have the record searched, and finally when she had the final word and the record was searched and the title was in Emile Michel's name she burst out crying."

The offer upon objection was refused and the proffered evidence excluded. The offer refers to the acts and conduct of plaintiff when others told her that the deed in question had been executed. It appears that the deed was executed about two years before the incident concerning which the offer was addressed. On whatever theory the offer was made the ruling of the court cannot be held erroneous. The trial court had all of the parties before it and heard all of the facts. The fact that plaintiff two years after the deed may have expressed astonishment, doubt, or regret could have but little bearing on the question at issue. If she had reason to express all of these emotions, the facts would be sufficient without the exclamations; if she had no reasons justifying the emotions, the expression thereof became quite immaterial. They were certainly not, as contended by appellant, any part of the res gestæ.

[7] Plaintiff offered in evidence a deed from plaintiff to defendant Emile Michel conveying property not described in the complaint. Upon objection, the trial court refused to admit the deed in evidence. Appellant urges that in a suit of this nature, wherein the relationship of the parties and their conduct toward each other is at issue, every fact bearing upon the situation has its merit. Conceding that, we still are at a distance from any reason sufficient to demand the admission of this deed upon the facts of this case. All that was offered was the deed to support the fact of a transfer. No evidence was offered as to the bona fides of the transaction; in fact, not a word of evidence concerning the same other than the offer, and this came at the close of plaintiff's case. The rule contended for by appellant that in an action where fraud in the purchase and sale of property is in issue, evidence of other frauds of like character committed by the same party at or near the same time is admissible has no application. It is to be noted, moreover, that when reference was made to this deed in the earlier stages of the trial the court permitted the instrument to be marked for identification and withheld ruling upon the admission thereof so that plaintiff might have the fullest opportunity of showing the circumstances connected with the execution and delivery of said instrument. Plaintiff failed to accept the opportunity thus offered, and offered the deed as stated with no explanation or claim of fraud other than argument.

[8] Appellant further urges that the trial court abused its discretion in refusing her permission to reopen her case in chief after defendants had rested. The purpose of reopening the case was to permit plaintiff to introduce further evidence on the question of the value of the premises conveyed. While no harm might have resulted from granting the request, yet it was a matter peculiarly within the discretion of the trial judge, and upon the record before us we cannot hold that any prejudice resulted to appellant through the trial court's action, nor can we say that in this instance the vested discretion was abused.

[9] Other specifications of error are predicated upon the court's rulings in permitting or restricting direct and cross-examination of witnesses. In those instances where it is claimed that cross-examination was unduly restricted or else allowed too wide a scope, no reference is made to the direct examination of the witness. It follows that without a knowledge of the extent of the direct examination it becomes impossible to determine the propriety of the ruling on the limits of cross-examination. We have gone rather closely into the entire transcript, and find the grounds urged without substantial merit.

The case was tried without a jury, and the voluminous record manifests an earnest effort on the part of the trial court to ascertain the true facts. Much latitude was allowed all parties in presenting even remote facts bearing on the situation, and in such a case it is but usual that to some small extent the technical refinements of the harsher rules of evidence are made elastic enough to permit the fullest inquiry.

The court having found that the original conveyance from plaintiff to defendants Michel was without fraud, for a valuable and sufficient consideration and with full knowledge thereof, coupled with the express finding that no relationship of trust or confidence existed between the parties, the case is disposed of.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

89 Cal. App. 558

MERCANTILE TRUST CO. v. SAN JOAQUIN AGRICULTURAL CORPORATION et al. (Civ. 3353.)★

District Court of Appeal, Third District, California. Feb. 29, 1928.

Hearing Denied by Supreme Court April 26, 1928.

1. Banks and banking 🔑67—On consolidation of two banking corporations, new corporation, in absence of contrary stipulation, becomes owner of properties, trusts, and contracts of former corporations (Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 609, § 9).

Where two banking corporations consolidate under Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 609, § 9, resulting in bringing into existence a single corporation as successor of the two, the successor corporation ipso facto succeeds to and becomes owner of the combined capital stocks and properties, trusts, and contracts of the former corporations, provided as to trust estates, or other like contracts, there is an absence of stipulation or agreement between the parties specifically prescribing a different devolution.

2. Mortgages 🔑342—Mortgage prescribing method of filling vacancy as trustee held not inconsistent with statute authorizing consolidation of banking corporations (Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 606, § 9).

Provision of mortgage, in form of deed of trust, that in case of dissolution, resignation, incapacity, or removal of trustee, a successor may be appointed by holders of a majority of bonds secured, *held* not inconsistent with Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 606, § 9, authorizing consolidation of banking corporations into a single corporate entity whereby latter becomes the successor in interest to properties, contracts, trusts, and obligations of consolidating corporations.

3. Mortgages 🔑342—Consolidation of corporate trustee with another corporation held not to effect "dissolution" of trustee within trust deed prescribing method of filling vacancy in case of trustee's dissolution (Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 606, § 9; Code Civ. Proc. §§ 1227, 1235).

Consolidation of bank and trust company, which was trustee under a mortgage, with another banking corporation under Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 606, § 9, providing that new corporation succeeds to rights of consolidating corporation, *held* not to effect "dissolution" of trustee within meaning of trust deed, so as to make it duty and exclusive right of bondholders to appoint a successor trustee as therein provided, and consolidated corporation was therefore not precluded from becoming successor trustee under said statute; "dissolution" as used in the mortgage meaning "dissolution of corporation" by procedure laid down in Code Civ. Proc. § 1227.

4. Corporations 🔑1—Corporations are solely creatures of Legislature (Const. art. 12, § 1).

Corporations are solely creatures of the Legislature, and they may exist or cease to exist after being brought into being by virtue of statutory enactment authorized by Const. art. 12, § 1.

5. Corporations 🔑391—Corporations must submit to all reasonable and nondiscriminatory conditions on which they are authorized by Legislature to do business.

So long as the Legislature, in exercising its right to regulate corporations, does not impose on them unreasonable burdens, obligations, or restrictions, nor unfairly discriminate as between corporations of the same general class, such organizations must submit to and abide by all conditions on which they are authorized to prosecute the objects for which they were created.

6. Constitutional law 🔑154(2)—Statute authorizing consolidation of banking corporations held not to impair obligation of contracts of merging corporations (Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 609, § 9).

Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 598, authorizing consolidation of banking corporations, and providing that the new corporation shall succeed to all capital stocks, properties, trusts, contracts, and assets of merging corporations, in no way impairs the obligations of contracts entered into by merging corporations prior to the merger, within the prohibition of either the federal or state Constitutions.

7. Banks and banking 🔑67—Statute authorizing consolidation of banking corporations becomes part of every agreement made by constituent corporations prior to merging (Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 606, § 9).

Bank Act St. 1913, p. 152, § 31a, as amended by St. 1917, p. 606, § 9, authorizing the consolidation of banking corporations, in so far as it prescribes a scheme for the transfer of their properties, rights, agreements, obligations, and duties to the consolidated corporation, enters into and becomes a part of every agreement or obligation entered into or assumed by the merging corporations prior to the merger, and of this its directors, bondholders, and others dealing with it are presumed to have knowledge.

8. Mortgages 🔑401(4)—Mortgage held to authorize trustee to declare entire principal due on default in interest payment without prior written notice to mortgagor.

That mortgage recited several events of default in the alternative *held* clearly to indicate that the happening of any one of the defaults should be sufficient of itself without reference to the conditions involved in any of the other defaults to entitle the trustee to proceed in any of the several ways prescribed to enforce rights of bondholders and of itself; and, where one of provisions did not require written notice by trustee to mortgagor of its default in payment of interest before right to proceed to enforce payment of interest in any of ways

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★Hearing denied by Supreme Court.

prescribed should accrue, none was required as prerequisite to action to foreclose the mortgage.

9. Corporations ⚷630(1)—Corporation suspended for failing to pay license and franchise tax may be made defendant in action commenced after suspension (St. 1917, p. 377).

Corporation which has been suspended for failure to pay its license and franchise tax under St. 1917, p. 377, may nevertheless be made a party defendant in an action commenced subsequent to such suspension.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the Mercantile Trust Company against the San Joaquin Agricultural Corporation and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Everts, Ewing, Wild & Everts, of Fresno, for appellants.

Morrison, Dunne & Brobeck and J. F. Shuman, all of San Francisco, for respondent.

HART, J. The brief of the plaintiff briefly and correctly sets forth a general statement of the foundational facts as follows:

"On July 1, 1919, the San Joaquin Agricultural Corporation made, executed, and delivered to the Savings Union Bank & Trust Company, as trustee, a mortgage to secure the payment of $500,000 par value of its bonds, together with interest at 6 per cent. per annum. This mortgage covered certain real property in Madera county. The Savings Union Bank & Trust Company, the trustee, accepted the trust; the San Joaquin Agricultural Corporation sold the entire issue of $500,000 of its bonds. On July 1, 1921, it defaulted in the preceding six months' interest, and when the complaint to foreclose the mortgage was filed on March 25, 1922, it had not paid any interest since January 1, 1921. The San Joaquin Agricultural Corporation also agreed that it would on July 1, 1921, pay the sum of $10,000 as a sinking fund for the retirement of its bonds. This it failed to do.

"After the execution and delivery of the mortgage, the Savings Union Bank & Trust Company, the trustee named in the mortgage, and the Mercantile Trust Company of San Francisco, another bank located in San Francisco, consolidated under the name of Mercantile Trust Company. This consolidation took place under the provisions of the laws of the state of California expressly permitting it. Mercantile Trust Company, the consolidated institution claiming to be the successor trustee, brought the action to foreclose the mortgage. After a trial the court gave a judgment in favor of the plaintiff in the sum of five hundred seventy-two thousand fifty-eight and 11/100 dollars ($572,058.00), and decreed a sale of the property. The defendant failing to put up a bond, the property was sold."

There are three major points urged by the defendants for a reversal of the judgment. They are:

(1) That the plaintiff is not, nor was it ever, the successor of the Savings Union Bank & Trust Company, within the intent or contemplation of certain provisions of the mortgage or trust deed.

(2) The principal debt not having matured at the time of the commencement of this action, the plaintiff was not entitled to recover the full amount of the principal and the accumulated interest, but such interest only as had accrued thereon for the six months immediately preceding July 21, 1921, in the payment of which the defendant defaulted and was in default on the date just named.

(3) That, the defendant having failed to pay its corporate license tax for the year 1921, by reason thereof it forfeited its right to do business, or, in other words, its corporate powers were thereby duly suspended. That thereupon it was without legal capacity to sue or to be sued or defend in any action at law or suit in equity. That the proper parties to proceed against in this suit under the law were the directors of the defendant, as trustees thereof.

The allegation of the complaint that the plaintiff came into existence by virtue of the consolidation of the Savings Union Bank & Trust Company, the original trustee under the trust herein involved, and the Mercantile Trust Company of San Francisco under the name of "Mercantile Trust Company" is not denied by the answer. The answer merely denies that the plaintiff "is now or ever has been a *successor* to said Savings Union Bank & Trust Company, as trustee or otherwise under the mortgage or deed of trust mentioned in paragraph 1 of said complaint," referring to the mortgage or trust deed to foreclose which is the object of the present action. It will be noted that the foregoing negative allegation does not, either expressly or by implication, deny that the two corporations mentioned in the complaint consolidated under the name of Mercantile Trust Company; nor, it may be further stated, is there elsewhere in the answer denial of such consolidation. The result is that it stands admitted in this case, as the complaint alleges, that the plaintiff "is a banking association duly created, organized, and existing under and by virtue of the laws of the state of California, by the consolidation of Mercantile Trust Company of San Francisco and Savings Union Bank & Trust Company"; the latter, as above stated, being the original trustee of the trust in question. But the claim that the plaintiff, upon such consolidation and by reason thereof, and in virtue of the provisions of the statute authorizing such consolidation, became the successor to said Savings Bank & Trust Company, as trustee under the mortgage or trust deed which is the subject of the controversy here, is, as will be perceived from the above quotation from the answer, traversed by the defendant and thus an issue tendered thereon. This proposition, the first in the order in which we have hereinabove stated the several points upon the solution of which the decision herein depends, must be determined by the ascertainment of the true meaning of certain provisions of the deed of trust, viewed in and by the light of the law of this state under and by virtue of the provisions of which banking corporations are at liberty to consolidate.

1. The statute, self-designated and known as "The Bank Act" was amended in a variety of particulars by the Legislature of 1913. Stats. 1913, p. 136. In that year, a new section was added to said act, numbered and designated "section 31a." Id. p. 152 et seq. At its legislative session in the year 1917, the Legislature further amended certain sections of said act. Stats. 1917, p. 598. Among the sections then amended was said section 31a. It is that section which authorizes the consolidation of banking corporations, and in pursuance of the provisions of which the Savings Union Bank & Trust Company and the Mercantile Trust Company of San Francisco consolidated under the name of Mercantile Trust Company, which is the plaintiff in the present action. It is, therefore, with the provisions of section 31a that the present controversy is directly concerned. So much of said section as is necessary to be considered in the determination of the questions presented by this appeal reads as follows:

> "Any bank incorporated under the laws of this state may consolidate with one or more banks incorporated under the laws of this state, its capital stock, properties, trusts, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description, upon such terms and in such manner as may be agreed upon by their respective boards of directors. * * * When the superintendent of banks issues the certificate of authorization provided for by section one hundred twenty-eight of this act the new or consolidated corporation shall be a body politic and corporate by the name stated in the certificate, and for the term of fifty years, unless it is, in the articles of incorporation and consolidation, otherwise stated and thereupon each constituent corporation named in the articles of incorporation and consolidation must be deemed and held to have become extinct in all courts and places, *and said new corporation must be deemed and held in all courts and places to have succeeded to all their several capital stocks, properties, trusts, claims, demands, contracts, agreements, assets, choses and rights in action of every kind and description, both at law and in equity, and to be entitled to possess, enjoy, and enforce the same and every thereof, as fully and completely as either and every of its constituents might have done had no consolidation taken place.* Said consolidated or new corporation must also, in all courts and places, be deemed and held to have become subrogated to its several constituents and each thereof, in respect to all their contracts and agreements with other parties, and all their debts, obligations, and liabilities, of every kind and nature, to any persons, corporations, or bodies politic, whomsoever, or whatsoever, and said new corporation must sue and be sued in its own name in any and every case in which any or either of its constituents might have sued or might have been sued at law or in equity had no such consolidation been made. Nothing in this section contained shall be construed to impair the obligation of any contract to which any of such constituents were parties at the date of such consolidation. All such contracts may be enforced by action or suit, as the case may be, against the consolidated corporation, and satisfaction obtained out of the property which, at the date of the consolidation, belonged to the constituent which was a party to the contract in action or suit, as well as out of any other property belonging to the consolidated corporation, and the stockholders of each constituent corporation so entering into such agreement shall continue subject to all the liabilities, claims and demands existing against them at or before such consolidation to the same extent as if the same had not been made." (Italics ours.)

[1] It is not claimed here, nor could it be, upon any sound or reasonable basis or hypothesis, that the legislation involved in the foregoing section of the Bank Act in any manner or degree impinges upon or transcends any of the constitutional restrictions by which the legislative department of the state is hedged. Nor can it be doubted that where, as here, there is, in pursuance of the provisions of section 31a of our Bank Act, a consolidation of two banking corporations the result of which is to bring into existence a single corporation as the successor of the two, the former ipso facto succeeds to and is invested with the ownership of the combined capital stocks, properties, trusts, contracts, etc., of the two several constituents of the corporation thus created, provided, of course, as to trust estates or other like contracts or agreements there is an absence of a stipulation or agreement between the parties to such contracts or agreements specifically prescribing a different devolution of such trusts, trust estates, mortgages, debts, etc., from that which otherwise would follow from the terms of said section. The rule as thus stated is declared and expressed in section 4712, vol. 7, Fletcher's Cyc. Corp., as follows:

> "When corporations are consolidated, the rights, franchises and privileges of the consolidated corporation depend upon the intention of the Legislature as manifested by the statute authorizing the consolidation. The Legislature may confer upon it, with the consent of the consolidating corporations, which consent is given impliedly by entering into the consolidation, all the rights, franchises, privileges and property of the consolidating corporations, or it may withhold some of them, or it may add to them new rights, franchises or privileges. * * * If there is no provision to the contrary in the statute *or agreement between the parties*, the general rule, based upon the presumed intention of the Legislature and the corporations, is that the consolidated corporation acquires by the consolidation all the rights, franchises, privileges and property of the consol-

idating corporations. * * * Generally, there is an express provision to this effect in the statute authorizing consolidation, but it is not at all necessary. Such an intention on the part of the Legislature will be presumed in the absence of provision to the contrary."

See, also, 5 Thompson on Corporations, §§ 6083, 6107, 6111.

The banking laws of the state of Illinois, as well as those of the state of New York, in all vital respects, are substantially the same as those of California. The provisions in the statutes of those states relating to the merging and consolidation of banking corporations are practically similar to those contained in section 31a of our own Bank Act. Especially illuminating and peculiarly pertinent to the present investigation, therefore, is the discussion in the decisions of the courts of those states in construing and expounding the several provisions of their statutes relative to banking corporations and the scope and the effect thereof with respect to the rights acquired and the obligations assumed by the offspring of the consolidation of two or more banking corporations. The case of Chicago Title & Trust Co. v. Zinser et al., 264 Ill. 31, 35, et seq., 105 N. E. 718, Ann. Cas. 1915D, 931, is, in the facts, strikingly similar to the case at bar, and discusses and disposes of several points advanced here. In that case a corporation named Real Estate Title & Trust Company of Chicago was made by one Etta Nelson the executor of her last will and testament. By her will she authorized said corporation, as her executor, to sell and convey the real estate of which she died seized. At the time the will was made the Real Estate Title & Trust Company and the Chicago Title & Trust Company were two distinct and unrelated corporations, each organized under and according to the laws of the state of Illinois and each vested with the power and right to accept and execute trusts and to be appointed assignee or trustee by deed, and also to be appointed executor, guardian, and trustee by will. Subsequently to the making of the will, and prior to the death of Etta Nelson, the two corporations were consolidated into one, under the name of Chicago Title & Trust Company, in pursuance of the statute of said state authorizing such consolidation. After due legal proceedings, letters testamentary were issued to the plaintiff (the consolidated corporation), and thereafter said plaintiff instituted a suit to compel the specific performance by the Zinsers of an agreement, entered into by and between the latter and the plaintiff after letters testamentary had been issued to the corporation, whereby the Zinsers agreed to purchase certain real estate belonging to the estate of the deceased. The suit was resisted upon grounds involving objections similar to some of those urged against the position of the plaintiff in the case now before us. The cause reached the Supreme Court of Illinois, and the action was by that court sustained in an opinion so clearly and satisfactorily disposing of the objections referred to that we feel that pardonably we may in extenso quote therefrom as follows:

"By the consolidation of the Real Estate Title & Trust Company and the Chicago Title & Trust Company the original corporations ceased to exist, and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights, and franchises of its component parts and became subject to all the duties, obligations, and conditions imposed upon them. Robertson v. City of Rockford, 21 Ill. 451; Chicago, Rock Island & Pacific Railroad Co. v. Moffitt, 75 Ill. 524.

"The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title & Trust Company as executor and trustee, knew that its directors, officers, and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement, or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur, and that the Real Estate Title & Trust Company might be consolidated with some other corporation such as the Chicago Title & Trust Company, and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer."

To the same effect are the Matter of the Will, etc., of Bergdorf, 206 N. Y. 309, 99 N. E. 714; McElwain Co. v. Primavera, 181 App. Div. 929, 930, 168 N. Y. S. 1134. See latter case also reported in 180 App. Div. 288, 167 N. Y. S. 815.

[2] The soundness of the conclusions pronounced in the foregoing cases is not seriously

disputed by counsel for the defendant. They do contend, however, that those cases have no application to the instant case for the reason that here the mortgage or trust deed itself specifically prescribes the method or means whereby a vacancy occurring for any reason in the office of trustee may be filled, and that the course thus pointed out for the filling of such vacancy is exclusive and must prevail and be followed, despite any legislation purporting by the force of its own terms to name or appoint a particular corporation as a successor to the retired trustee. The provisions of the trust deed referred to by counsel for defendant are embraced within article VI of the instrument, and are as follows:

> "That the trustee or any successor of the trustee may at any time resign and discharge itself of the trust created by this indenture by written notice to the company given 30 days before such resignation shall take effect, or such other time as may be accepted by the board of directors of the company. The trustee may be removed at any time by an instrument or instruments in writing under the hands of the holders of a majority in amount of the bonds secured thereby then outstanding, such instrument or instruments to be filed with the trustee but no such removal shall be made without the consent of the company before default hereunder shall have occurred." Section 3.
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> "In case of dissolution of the trustee or his resignation or incapacity or removal as trustee hereunder, a successor (which shall be a trust company of good standing) may be appointed by the holders of a majority in amount of the bonds secured hereby then outstanding, by an instrument or concurrent instruments signed by said bondholders or their agents duly acknowledged; provided that if any vacancy in the trusteeship shall at any time occur, the company may, by an instrument, executed pursuant to resolution of its board of directors, appoint a trustee to act, until a new trustee shall be appointed by the bondholders as aforesaid. Any succeeding trustee so appointed by the bondholders shall immediately and without further act, supersede any trustee appointed by the company." Section 4.
>
> "Any new trustee shall execute, acknowledge and deliver to the tustee last in office and to the company, an instrument accepting such trust and thereupon such new trustee, without further act, deed or conveyance shall become vested with all the assets, property, rights, powers, trusts, duties and obligations hereby created as if originally named as trustee herein but the trustee ceasing to act shall nevertheless, upon demand, execute and deliver to the new trustee, a written assignment of said trust and mortgaged property, suitable and proper to be recorded, and shall duly pay, transfer and deliver all personal property and money held by it hereunder, to such new trustee." Section 5.

The argument of the defendant is that the foregoing sections of the deed of trust must be construed together, and that as so construed it rationally follows that the intent of the instrument is that, in case of a vacancy for any reason in the office of trustee, the matter of filling such vacancy shall rest entirely with the holders of the bonds, or, concretely speaking, with the holders of a majority in amount of the bonds then outstanding.

[3] Section 3, it will be noted, merely prescribes the manner in which the resignation or the removal of the trustee may be effected. Without such a provision, the trustee could resign or relinquish all interest it has in the trust estate, and could, upon the happening of circumstances justifying it, be removed at the instigation of the parties owning the beneficial interest therein or such interested parties as might be deemed the proper ones to proceed in such case. It might, and perhaps would, in the absence of such a provision as is embodied in section 3, be necessary to invoke the aid of an equity court to supply the vacancy, and it may be assumed that this very consideration is what led to the insertion in the deed of section 3, whereby the procedure for the appointment of a successor to the trustee, in case of its resignation or removal, is specifically prescribed. Such a provision in a deed of trust or a testamentary trust is not unusual. Indeed, it would be strange if some such provision were not inserted in a trust deed or a will creating a testamentary trust, so that the purpose or purposes of the trust may not fail of full or proper accomplishment by reason of contingencies arising in the course of the administration of the trust which are in the very nature of things in such cases to be anticipated or must be expected may happen. It is perfectly clear that the power thus conferred upon the bondholders to fill a vacancy occurring in the office of trustee is not only necessary to the preservation of the trust and the objects thereof, but is in no way or sense inconsistent with the scheme provided for by section 31a of the statute of 1917, supra, in the case of a consolidation of two or more banking corporations into a single corporate entity, whereby the latter becomes the successor in interest to all the properties, contracts, trusts, obligations, corporate rights, etc., which may have been owned or controlled by the constituent corporations. The right of the bondholders to fill any vacancy occurring in the trusteeship of the trust continued and still remains unimpaired, notwithstanding the consolidation. They may exercise that right whenever there may arise any of the contingencies specified in section 3 of article VI of the deed of trust after as well as before the consummation of the act of consolidation. But it is insisted by counsel that the effect of the consolidation of the trustee named in the deed of trust with the Mercantile Trust Company of San Francisco was to dissolve the Savings Union Bank & Trust Company (trustee), and therefore, under the terms of section 4 of article VI of the trust deed, it became the duty and the exclusive

right of the bondholders to appoint a successor to the alleged defunct trustee, except that the board of directors of the defendant may, if the exigencies of the situation required it, appoint a trustee to act ad interim, or until the bondholders have themselves appointed "a new trustee."

Section 4 of article VI is hereinabove reproduced, and it will be observed that it provides that:

> "In case of dissolution of the trustee or his resignation or incapacity or removal as trustee hereunder, a successor (which shall be a trust company of good standing) may be appointed by the holders of a majority in amount of the bonds secured hereby then outstanding," etc.

The Savings Union Bank & Trust Company was not "dissolved" by the act of consolidation in the strict legal sense of that term, nor, in our opinion, in the sense in which it is used and was intended to be used in section 4 of article VI of the deed. The Bank Act does not expressly so declare. It is, as seen, therein declared (section 31a) that:

> "When the superintendent of banks issues the certificate of authorization provided for by section 128 of this act the new or consolidated corporation shall be a body politic and corporate by the name stated in the certificate, * * * and thereupon each constituent corporation named in the articles of incorporation and consolidation must be deemed and held to have become extinct in all courts and places," etc.

It is true that each of the consolidated banking corporations, as a distinct, independent, and separate corporate entity, practically passes out of existence or becomes extinct upon the completion of the act of consolidation. But, unlike in cases of dissolution, their corporate activities do not cease but are continued and are prosecuted and carried on through a new channel—a channel created solely by their own voluntary act under the sanction of the law for that specific purpose. Speaking figuratively, the act of consolidation is merely the joint transfusing of the blood of the constitutent corporations into the veins and arteries of a new single corporate entity, that they may enlarge and extend the scope and business ramifications of their own corporate purposes and also to impart enhanced solidity to their responsibility as banking and trust corporations. But, regardless of these considerations, the natural and therefore the more reasonable conclusion is that section 4 of article VI of the instrument, in so far as is concerned the authority therein vested in the bondholders to appoint "a new trustee" upon the "dissolution" of the trustee named in the deed, was intended to refer to the "dissolution" of the corporation by and through the procedure laid down in sections 1227 to 1235, inclusive, of the Code of Civil Procedure. Section 1227 provides:

> "A corporation may be dissolved by the superior court of the county where its principal place of business is situated, upon its voluntary application for that purpose."

[4] The sections immediately following prescribe the procedure for bringing the matter of dissolution before the court. Corporations are solely creatures of the Legislature. They may exist or, after brought into being, voluntarily cease to exist by virtue of statutory enactments, expressly authorized, it is true, by the Constitution. Article 12, § 1. In prescribing the procedure for effecting a dissolution, the Legislature has established a legal definition of the word "dissolution" as applied to the proceeding for completely and definitively terminating the existence of corporations. The proceeding to dissolve is not connected or conversant with consolidation or merger. The dissolved corporation leaves no successor, for it has none to leave. Since, therefore, the statute itself provides a legal definition of "dissolution" as the means for putting out of existence a corporation, the presumption is, there being nothing in the deed of trust to indicate a contrary meaning or intention, that the word "dissolution," as well as the word "incapacity" as used in section 3 of article VI, were intended to refer to the "dissolution" of a corporation which is expressly authorized by the sections of the Code of Civil Procedure above named. And, obviously, there was not a resignation of the trustee, nor, clearly, was there effected a removal of that officer by or through the act of consolidation, within the meaning of the word "removal" in its commonly understood and accepted signification, in which sense it was clearly used, to wit, a removal for mismanagement by the trustee of the affairs of the trust or any neglect in the discharge of its duties as trustee detrimental to those having a beneficial or other vital interest in the trust agreement. Neither from the connection in which the word is employed in said section of the trust deed, nor from any considerations otherwise arising from the instrument when viewed in its entirety, is there apparent any just reason for ascribing to the word as it is so used any other than its colloquial meaning.

Section 5 of article VI of the deed of trust or mortgage merely points out the course to be pursued where the trustee has resigned or been removed and the bondholders, exercising the right given them by section 3 of article VI of the deed to fill the vacancy, have appointed a successor or a new trustee. The provisions of said section in no way conflict with the conclusion that there is no inconsistency between the scheme provided by section 31a of the statute for the consolidation of banking corporations or the consequences flowing from such consolidation and the right conferred upon the bondholders by said section of the trust deed or mortgage to fill any vacancy that may occur by reason of the happening of any of the conditions specified in said section.

Much is said in the briefs upon the proposition (urged by the defendant and combatted by the plaintiff) that the authority vested in the bondholders by said section to appoint a trustee in the event of a vacancy in the trusteeship is exclusive; that is, that no such authority rests anywhere else. Counsel for the plaintiff argue that the language of said section 3 is permissive only, and in support of the argument cite the fact that the auxiliary verb "may" is used in conferring the authority upon the bondholders to appoint a trustee in the case of a vacancy, and that, if it had been intended by the parties to the instrument that the power to appoint was exclusively to rest in and be exercised by the bondholders, the mandatory word "must" or "shall" would have been used in the place of the verb "may." We have previously herein stated that the right of the bondholders to appoint under the provisions of the section named of the mortgage or trust deed has not been taken from them by the fact of the consolidation. As likewise, in effect stated, it would be the duty of the bondholders, so far as a permanent appointment is concerned, to make the appointment upon the happening of a vacancy under any of the circumstances specified in said section, and that if they failed or refused to do so, they could be compelled by a court of equity to perform that duty, or such court, upon a properly presented and sufficient showing, could itself fill the vacancy. These propositions, it seems to us, are unassailable. But by the act of consolidation under the law authorizing the consolidation or merger of banking corporations a trustee was in effect named or appointed to take the place of the trustee becoming extinct simultaneously with the consummation of the act of consolidation, or, in other language, the law itself designated who should succeed to the trusteeship in case of the consolidation of the trustee bank with another banking corporation, and the trustee so designated was competent to act and was legally acting as such at the time of the commencement of this action. And the trustee so designated will remain such trustee until its dissolution by or through the procedure established by the Legislature, or its resignation or removal happens, when (and only when) the bondholders may put into action their right under section 3 of article VI of the mortgage or deed of trust to appoint a successor to the dissolved or retired trustee.

[5] That there can be conceived no just objection on constitutional grounds to the statute is a proposition supported not alone by the authorities, of which some are hereinabove cited, but upon principle or the reason which is its foundational sponsor. The statute involves only the exercise of the power of the Legislature, from which alone corporations derive their right to exist and carry on business, to subject those organizations to such regulatory control as may be deemed or found by the lawmaking power to be necessary to the proper functioning thereof in accord with their corporate scope and purposes and also to the correction of corporate abuses, if such occur. So long as the Legislature, in exercising its right to regulate the manner in which corporations may carry out their purposes, does not impose upon them unreasonable burdens, obligations, or restrictions, or does not, in regulating them, unfairly discriminate as between corporations of the same general class, such organizations must submit to and abide by all the conditions upon which they are authorized to prosecute the objects for which they were created.

[6, 7] Much of what has been said above involves an answer to the suggestion that the effect of the application of the provisions of section 31a of the statute is to impair the obligations of contracts, contrary to the imperative inhibitions against legislation having such effect of both the federal and state Constitutions. It is obvious that the terms of the trust deed or mortgage are in no sense or measure changed, nor are the obligations of the instrument as they are written therein impaired or any the less enforceable by reason of the act of consolidation. The changing of the trustee as a result of the consolidation as has been stated and as is obvious, is the act of the law authorizing the consolidation. All corporations, as has also been stated, are organized with full knowledge by the people of all the laws governing the formation of corporations and the exercise of their rights and obligations thereunder, and therefore, in such an instance as we have here, the statute authorizing the consolidation or merger of banking corporations, in so far as it prescribes a scheme for the transfer of their properties, rights, agreements, obligations, duties, etc., to the consolidated corporation, enters into and becomes a part of every agreement or obligation entered into or assumed by the constituent corporations prior to the consolidation, and of this the defendant, its directors, and bondholders are presumed to have known before and at the time of the execution of the trust deed. Indeed, in appointing the Savings Union Bank & Trust Company the trustee of the trust, the defendant and its officers and the holders of the bonds secured by said deed to or mortgage upon the lands therein described are to be held to have impliedly assented to the exercise of the legal right of said bank to merge into or consolidate with another banking corporation, with all the consequences following such merger or consolidation as are prescribed by the law. At all events, the consolidation having been effected under and by virtue of express authority of law, the contracts of third parties with either of the constituent corporations cannot be violated by the consolidated corporation, but will be enforced according to the strict letter of their terms as fully and effectually as they would be by the constituent corpora-

tions had there been no consolidation. As to all the propositions which we have just been considering, the following from McElwain v. Primavera, 180 App. Div. 288, 167 N. Y. S. 815, is singularly enlightening:

> "'Dealing with the original banking corporation, the defendant subjected himself to the possibility of merger and the enforcement of the contract by the new corporation, which is new, so far as the defendant is concerned, in name only.' [Bank of L. I. v. Young, 101 App. Div. 88, 91 N. Y. S. 849.]
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> "The provisions of section 37 of the banking law, quoted above, regulating the transfer and the vesting of property in a case where merger occurs, are very broad. The Legislature did not contemplate that the property of one bank merged in another should vest in the corporation in which the merger takes place by operation of any assignment, or that such transfer should be attended with the usual rules of law in respect to assignments. The scheme is that the corporation which is merged with another should lose its identity only so far as its separate existence is concerned, and that it should be swallowed up in the other and become an integral part thereof, carrying into the corporation which survived all its rights, powers, liabilities, and assets, except the indicia and attributes of a corporate body distinct from that into which it is merged."

[8] 2. The question presented under this assignment is, as seen, whether the plaintiff was entitled, under the provisions of the mortgage or trust deed, to a decree for the entire amount of the principal as well as for the interest falling due and becoming payable under the terms of the instrument. The complaint alleges and the answer admits that the interest on certain bonds secured by the mortgage became due and was payable on the 1st day of July, 1921, and like interest became due and payable on the 1st day of January, 1922; that the defendant defaulted in the payment of such interest. It is further alleged in the complaint and expressly admitted by the answer that the defendant failed to create, as provided in the mortgage, a sinking fund to be applied to the purchase, redemption, and payment of the matured bonds secured by the instrument, and failed therefore to pay plaintiff the sum of $10,000 due and payable out of said fund on the 1st day of July, 1921, as stipulated in the mortgage or trust deed. While it is admitted that the plaintiff was entitled to these payments and was at liberty, under the provisions of the mortgage, to proceed to the enforcement thereof, the right of the plaintiff to a decree also for the full amount of the principal is denied. This position is predicated upon the proposition that the plaintiff failed or omitted, prior to the bringing of this action, to comply with the provisions of the mortgage requiring it, as a prerequisite (as is the claim) to the exercise of the right to invoke any of the several remedies provided by the instrument for the enforcement of the payment of any moneys falling due and becoming payable under the mortgage, to give the defendant notice in writing of its default in the payment thereof, and like notice of its election to declare the whole principal sum due and payable by reason of such default; that is, notice of the acceleration of the maturity of the bonds because of the default in the payment of interest due, and also in failing to create the sinking fund for the redemption or purchase of matured bonds and out of said fund paying to plaintiff the sum of $10,000 on the date mentioned in the complaint, as hereinabove indicated.

The complaint alleges that the notices referred to were duly served upon the defendant. The answer denies the allegation. Upon the proof submitted upon that issue, the court found that the notices had been given to or served upon the defendant in manner and form as prescribed by the mortgage, with this exception: That, while the mortgage expressly provides that the notices shall be delivered to the president or secretary of the defendant, or sent to it by registered mail at the city of San Francisco, the notices were not so sent at the city named, but purported to have been sent to the defendant by registered mail at "Fairmead." It is contended that the finding is not supported for the reason that the notices were neither delivered to the president or secretary of defendant nor sent "by registered mail to it at San Francisco," and for the further reason that it was not properly or sufficiently shown that they were sent by registered mail to defendant at "Fairmead."

The vice president of the plaintiff, R. W. Sims, testified that the notices required by the mortgage to be delivered or sent to defendant by plaintiff upon default by the former in making payments required were prepared by certain employees of the plaintiff under his (Sims') directions; that they were signed by him as such vice president and also by the secretary of plaintiff, and, with a letter explaining their nature and purpose, were delivered to an employee of the plaintiff to be registered and then deposited in the mail; that they were addressed to defendant at Fairmead, a post office on or near the lands covered by the mortgage, and registered receipts returned acknowledging the receipt of the documents as they were designated by the post office registered number. Sims stated that he knew "from the ordinary procedure" of the business of the corporation that the letters and notices were sent in the name of the defendant to Fairmead. These letters and notices over objection by the defendant were admitted in evidence. It also appeared that the defendant maintained offices on the lands under mortgage and that one Casterson was the superintendent of the ranch and that he signed one of the registered receipts and that another was signed by one P. L. Billman. These signatures were over a printed line in the notice as follows: "Signature of addressee's agent." Whether this testimony was sufficient to make out a legal prima facie showing that the notices, etc., were properly or legally delivered or sent to the defendant, is a question which counsel for the respondent do no argue in reply to the contention of the defendant that the showing is wholly insufficient for the purpose. It is, however, the contention of the plaintiff that under the provisions of the mortgage where there is default in the payment of interest and such default has continued for a period of 60 days a notice to defendant of such default is not necessary to justify it in proceeding to enforce the payment of such interest by any of the several remedies pointed out in the mortgage; that this is not only true, but that the plaintiff may also without any notice declaring the full amount of the bonded indebtedness due and payable before maturity institute proceedings in court for the purpose of foreclosing on the principal as well as on the interest. This will necessitate a construction of the provisions of the mortgage regarding defaults and the steps which may be taken and the scope thereof to enforce the payment of interest due and payable and in the payment of which the defendant is in default.

Section 1 of article V of the mortgage provides:

> "If one or more of the following events, hereinafter called events of default, shall happen, that is to say, if:
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> "(a) Default shall be made in the payment of the principal of any of the bonds hereby secured; or
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> "(b) Default be made in the payment of any interest of any of said bonds and such default in payment shall have continued for the period of sixty (60) days; or
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> "(c) An order shall be made and kept in force for thirty (30) days for the appointment of a receiver of the company or of any of the property hereby mortgaged or for the winding up or liquidation of the affairs of the company, or corporate action shall be taken by the company for any of said purposes; or
>
> "(d) Default shall be made in any payment required by or in the due performance or observance of any covenant, promise or condition on the part of the company, its successors or assigns, in the said bonds or in this indenture contained, and such default shall continue for sixty (60) days after written notice to the company from the trustee specifying such default and requiring same to be remedied."

Then follow provisions prescribing any one of several acts to which the mortgagee may resort for the enforcement of the payment of any money due under any of the defaults above enumerated. These provisions will be hereinafter considered. Section 5 of article V, among other things, provides as follows:

> "Sec. 5. If any one or more of the events of default shall happen the trustee with or without entry, personally or by its attorney, may and upon written request of the holders of twenty-five (25) per cent., or more, in amount of the bonds issued hereunder then outstanding, shall either:
>
> "(a) Sell at public auction to the highest and best bidder, all and singular the mortgaged property and premises, rights, franchises, interests and appurtenances, and all other real and personal property of every kind, including shares of stock, securities, contracts, leases, franchises and all rights, title and interest, claim and demand therein and right of redemption thereof; or
>
> "(b) Proceed to protect and enforce its right or rights of the bondholders under this indenture by a suit or suits in equity or action of law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal remedy as the trustee shall deem most effectual to enforce or protect any of its rights or duties hereunder."

Section 13 of said article provides how the "money, proceeds and avails of any such sales hereunder" shall be applied. These include the payments of costs, expenses of sale, compensation to the trustee, agents, and attorneys, and "all expenses, liabilities, advances made or incurred by the trustee and to the payment of all taxes, assessments or lien prior to the lien of these presents, except any taxes, assessments or other superior lien subject to which such sales have been made." The second subdivision of said section then provides:

> "To the payment of the whole amount of principal and accrued interest of the bonds hereby secured, with interest on the overdue installments of interest at the same rate, and in case such proceeds shall be insufficient so to pay in full the whole amount of said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal, or of any installment of interest over any other installment of interest, ratably according to the aggregate of such principal, and accrued interest, subject, however, to the provisions of section 2 of article II of this indenture."

The specific contention of the defendant that written notice must be given it of the happening of any of the "events of default" before the right of action on such default shall accrue to the plaintiff is grounded on the language of subdivision (d) of section 1 of article V and that of section 4 of said article. It will be observed that the language of subdivision (d) of said section provides that if "default shall be made in any payment required by or in the due performance or observance of any covenant, promise or condition on the part of the company * * * in the said bonds or in this indenture contained, and such default shall continue for sixty days *after written notice to the company from the trustee specifying such default and requiring* *same to be remedied,*" etc., then, stating it as it is correctly stated in respondent's brief:

> "(1) It could enter upon the mortgaged property, take possession thereof, exclude the owner therefrom, and collect all the income, and it could apply this income, first to the costs of operation of the property, and next 'to the payment of the principal of all bonds hereby secured and then payable.'
>
> "(2) It could declare the principal of all of the bonds to be due.
>
> "(3) It could proceed to foreclose the bond issue."

Section 4 of article V provides:

> "If one or more of the events of default shall happen, the trustee may, and upon the written request of the holders of twenty-five (25) per cent., or more, in amount of the bonds hereby secured and then outstanding, shall by notice in writing delivered to the president or secretary of the company or sent to it by registered mail at the said city and county of San Francisco, declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately. This provision, however, is subject to the condition that, if at any time after the principal of said bonds shall have been so declared due and payable before maturity, all matured interest and principal of such bonds, with interest on overdue interest at the same rate, and expenses and compensation of the trustee or of any receiver, and all other payments which may be due from the company under this indenture, either shall be paid by the company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made. * * *"

The mortgage has given to the trustee several different remedies, independent of each other and cumulative, whereby the rights of the bondholders may be protected or enforced; and section 7 of article V expressly declares that:

> "Every remedy in this indenture provided shall be cumulative, and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute, and every power or remedy given by this indenture to the trustee or to the bondholders may be exercised from time to time and as often as may be deemed expedient. No delay or omission of the trustee or of any bondholder to exercise any right or power arising from any default shall be construed to be a waiver of any such default or an acquiescence therein."

It will be observed that section 1 of article V expressly declares that failure by the defendant to do any one of four things specified separately in as many subdivisions thereof will constitute "an event of default," upon which the trustee may proceed in any of the ways prescribed by the three succeeding sections of article V to enforce its rights and those of the bondholders. It will also be noted that each of the three subdivisions following subdivision (a) is immediately preceded by the disjunctive "or," so that said subdivisions must be read as follows: If (subdivision [a]) "default shall be made in the payment of the principal of any bonds hereby secured"; *or* (subdivision [b]) if "default be made in the payment of any interest of any said bonds and such default in payment shall have continued for the period of sixty days"; *or* (subdivision [c]) if "an order shall be made and kept in force for thirty days for the appointment of a receiver of the company * * *"; *or* (subdivision [d]) if "default shall be made in any payment required by or in the due performance or observance of any covenant, promise or condition on the part of the company * * *"; then the plaintiff was at liberty to proceed to enforce the rights of itself and the bondholders in any of the several ways pointed out above. It follows from this alternative form in which the several events of default are stated or defined that each event was intended to be wholly independent of and disconnected from any of the others. To be somewhat more explicit, the alternative form of setting forth the several events of default clearly indicates that the happening of any one of the defaults should be sufficient of itself and without reference to the conditions involved in any of the other defaults, to entitle the trustee to proceed in any of the several ways prescribed by said section 1 and by the three succeeding sections of article V to enforce the rights of the bondholders and itself. Therefore, since subdivision (b) of said section 1 does not itself require that written notice be given by the trustee to defendant of its default in the payment of interest which is due and payable before the right to proceed to enforce the payment of such interest in any of the several ways indicated in said section 1 and the three succeeding sections of article V has ripened or accrued, it must be held that none is required and that it was not intended that such notice should be required.

The language of both sections 1 and 5 ot article V is too plain to encourage serious contention that the happening of any one of the events of default mentioned in the first section of said article is not sufficient to authorize the trustee to invoke any of the several remedies expressly made available to the trustee for the enforcement of the right infringed by such default. In other words, as counsel for the plaintiff states in their brief, the trustee's authority thus to proceed may be exercised where but one of the events of default has happened. Indeed, section 5 of article V expressly so declares. Under said section, as will be noted, where "any one or more of the events of default shall happen," the trustee may itself, in the exercise of its discretion, either sell at public auction all the mortgaged property and premises, rights, franchises, etc., or "proceed to protect and enforce its right or the rights of the bondholders under this indenture" by foreclosure "of this indenture," unless written request is made of the trustee so to proceed by the holders of 25 per cent. or more, in amount of the bonds issued under the mortgage outstanding, in which event it then becomes the mandatory duty of the trustee to proceed to sell or foreclose, as indicated. Reinforcing the construction that on the happening of any one or more of the events of default the trustee may foreclose the mortgage without previously declaring the principal debt due and payable is section 13 of article V, providing that:

> "The money, proceeds and avails of any such sale hereunder, whether under the power of sale hereby granted or pursuant to judicial proceedings, * * * shall be applied as follows: First, to the payment of the costs and expenses of such sale * * *"; second, "to the payment of the *whole amount* of the principal and accrued interest of the bonds hereby secured. * * *"

Again, section 6 of article V provides:

> "In case of a sale of any of the mortgaged and pledged property, whether under power of sale hereby granted, or under judicial proceedings, the whole of the principal sum of the outstanding bonds shall immediately become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding."

The language of the foregoing section cannot be construed to mean anything other than that when a sale takes place in pursuance of proceedings in foreclosure the entire principal sum of the mortgage immediately becomes due, thus clearly negativing the proposition, above declared, that it was intended to be necessary that the trustee should declare the entire principal due, or, in other words, by declaration accelerate the maturity of the bonds before action can be brought to foreclose the mortgage.

Viewing by the light of each other, as we have above considered them, all the provisions of the mortgage to which special attention has been given, it is clear that the trustee was at liberty to exercise its specially given right to proceed with the foreclosure of the instrument for the full amount of principal and interest upon the default in the payment of interest without giving to the defendant notice of the default in the payment of interest (for two interest periods, as the complaint alleges and the evidence shows) or notice declaring the whole of the principal due by reason of the defaults mentioned.

That the language of subdivision (b) of section 5 (article V) and that of the second subdivision of section 13 (same article) clearly indicate that, upon the happening of any one or more of the events of default described in section 1 of said article, the plaintiff trustee might sue in foreclosure for the whole amount of principal and interest, is a proposition which affords no legitimate ground for controversy. The provision of subdivision (b) is that upon any of such defaults the trustee may, among other things, maintain a suit "for the *foreclosure of this indenture*"; that is, of course, for "the foreclosure of this mortgage." The language of section 13 is in this respect equally clear. It provides, as will be seen, that "the money, proceeds and avails of any such sale hereunder, whether under the power of sale hereby granted or *pursuant to judicial proceedings*," are to be applied, after first paying compensation to the trustee, etc., expenses, etc., "to the payment of the *whole amount of principal* and accrued interest of the bonds hereby secured." As counsel for the plaintiff well suggest, the language referred to "can mean one thing, and one thing only, and that is that the full amount of the mortgage became due by the terms of the mortgage upon the filing of the foreclosure suit, and no notice declaring it due was necessary."

The right of the trustee in this case to foreclose for the full amount of the principal upon default in the payment of interest is given in language no less explicit than that held to confer a similar right in the case of Brickell v. Batchelder, 62 Cal. 623, and in other cases following and approving the reasoning and the result reached in that case. There the mortgage was to secure the payment of a promissory note for $36,000. The note provided that the interest should be payable monthly, and all arrearages in interest should be added monthly to the principal and bear interest at the same rate. The mortgage, however, provided that in case of default in the payment of the principal sum or the interest thereon, the trustee had the right to proceed to sell the mortgaged premises before the maturity of the principal " in the manner prescribed by law," and "out of the money proceeding from such sale, the party of the second part (mortgagee) shall *retain* the above amount of $36,000.00, with interest," etc. The contention in that case was that the note itself measured in full and limited the rights of the plaintiff in case of default in the payment of interest only in the provision that such interest should be added to the principal and bear like interest; that the provision of the mortgage that in the event of such default the mortgagee might proceed to sell the mortgaged property "in the manner prescribed by law" was not reasonably susceptible to the construction that thus the mortgagee was empowered to proceed to foreclose the mortgage. The court denied the validity of both contentions, saying, among other things:

> "In regard to the note and mortgage of June 1, 1874, we are of opinion that, taking the terms of the note and the stipulation above quoted from the mortgage, the plaintiff had the right, on default in the monthly payment of the interest, to commence an action to foreclose. The interest by the terms of the note was payable monthly, and there was a default in its payment, so alleged and not denied.
>
> "It would be difficult to detect any difference between a stipulation empowering a mortgagee to proceed to foreclosure on such default,

and one giving authority on like default 'to proceed to sell' 'in the manner prescribed by law.' The law prescribes but one mode of sale in the case of mortgaged property, and that is at public outcry, by virtue of an execution issued on a judgment of foreclosure. Code Civ. Proc. §§ 684, 726, 744. The power given in the mortgage by the clause just above quoted is to proceed to sell in the manner prescribed by law—which, in our judgment, is in substance the same as a power to proceed to sell by means of an action to foreclose. The power to sell in the manner prescribed by law being given, all means given by law to render such power effectual are also conferred; that is, all means necessary to effectuate a sale in the mode established by law are given. The power to use the lawful means necessary and proper to carry out the express power is conferred and given by an implication as strong and clear as if it was expressed in so many words. Civ. Code, § 1656. This is a familiar and well-established rule in the construction of powers. See Story on Agency, §§ 55, 56, 58, 59, 60, 73; Wharton on Agency, § 187."

Again, speaking of the contention as to the provision in the note regarding default in the payment of interest, the court said:

> "But it is urged that the proper interpretation of the language of the note shows that such remedy was not to be allowed to plaintiff; that his only right, if the interest was not paid every month, was to add it to the principal and to have interest on it at the rate which the principal bore. To admit the soundness of this position would be to lay out of view the terms of the note, which binds the makers to pay the interest monthly. It would be to discard and reject the rule which requires one in looking for the true meaning of an instrument to accord to every word its just and proper meaning. Civ. Code, § 1639-1641; Broom's Legal Maxims, 555—Exantecedentibus," etc.

In Maddox v. Wyman, 92 Cal. 674, 28 P. 838, the action was to foreclose a chattel mortgage given to secure the payment of a note for $2,400, payable in monthly installments of $50, together with interest. The mortgage provided that, in case of default in any payment, then the mortgagee "may take possession of the property * * * and may immediately proceed to sell the same *in the manner provided by law*, and from the proceeds pay the whole amount of said note." The defendant contended that the plaintiff was entitled to sell only so much of the property as was necessary to pay the two installments in the payment of which there was default, as provided by section 728 of the Code of Civil Procedure. The court held that the plaintiff was entitled to foreclose for the full amount of the unpaid installments, citing Brickell v. Batchelder, supra; Leonard v. Tyler, 60 Cal. 299; Beal v. Stevens, 72 Cal. 451, 14 P. 186. It was further held in that case that, to put the defendant in default, it was not necessary that "demand should have been made for such payment before the commencement of the action."

In Phelps v. Mayers, 126 Cal. 549, 58 P. 1048, the defendant had given plaintiff a mortgage on certain land to secure the payment of a note for $1,500. There was no provision in the note that the whole of the principal should become due in case of a default in the payment of interest. The mortgage, though, contained the following provision:

> "But in case default be made in the payment of the said principal or interest as herein provided, then 'the mortgagee is' hereby empowered to sell the said premises * * * or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges * * * of suit for foreclosure, including counsel fees at the rate of fifteen per cent. upon the amount which may be found to be due."

The action for the foreclosure of the mortgage was commenced some six months before the maturity of the principal, and the defense that the action was prematurely brought was interposed, supported mainly by the argument that neither the note nor the mortgage provided that the principal debt should become due on default in payment of interest. The court said:

> "The note and mortgage, however, must be construed together; interest on the note is payable semiannually, and the mortgage is clear that upon default in the payment of the interest, equally with default in the payment of the principal, the mortgagee may cause the premises to be sold and retain from the proceeds 'the said principal and the interest'; there is scarcely room for interpretation in these provisions; they support the action for the amount of the note, both principal and accrued interest. Brickell v. Batchelder, 62 Cal. 623; Maddox v. Wyman, 92 Cal. 674 [28 P. 838]."

See, also, Hall v. Jameson, 151 Cal. 606, 614, 91 P. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137.

The doctrine of Brickell v. Batchelder has been approved in other jurisdictions. In Hooper v. Stump, 2 Ariz. 262, 14 P. 799, the mortgage provided that upon default in the payment of principal or interest, "as provided," the mortgagee was empowered to sell the mortgaged premises, even though the note be not due, "in the manner prescribed by law; and, out of the moneys arising from such sale, to *retain* the said principal and interest. * * *" The action was begun before the note matured. The trial court awarded plaintiff a decree of foreclosure, which was affirmed by the Supreme Court. It was said in the opinion, citing Brickell v. Batchelder, supra:

> "The language is plain and can mean nothing else than, on failure to pay the principal or interest, power is given to sell the premises and retain such principal and interest. If it were only to cover interest in default of payment of interest, why say to *retain* the principal? Such

is the contract, and by it the parties must stand."

See, also, Copper Belle Mining Co. et al. v. Costello, 12 Ariz. 318, 100 P. 807, citing Phelps v. Mayers, 126 Cal. 549, 58 P. 1048, which cites Brickell v. Batchelder, and Clemens v. Luce, 101 Cal. 432, 35 P. 1032; Castor v. Muramoto et al., 69 Wash. 145, 125 P. 153, 42 L. R. A. (N. S.) 108.

It would be difficult to point out any distinction, except in the manner of expressing the proposition, between the above cases and the case here. Here the language is that after the payment of certain costs, etc., the moneys received from the sale of the property under the decree of foreclosure shall be applied to the payment of the whole amount of the mortgage debt.

We now come to a consideration of section 4 of article V, hereinabove referred to, and also subdivision (d) of section 1 of said article. As will be seen, the provisions of section 4 are to the effect that, upon the happening of any one or more of the events of default, the trustee may, or, if requested in writing by the holders of a specified amount of the bonds, must by written notice delivered to the defendant declare the principal of all bonds to be due and payable immediately. The construction of said provisions by counsel for plaintiff as given in their brief is, in our opinion, a correct view of the meaning and the purpose thereof. We therefore adopt as a part of this opinion the language of said brief dealing with said section 4, as follows:

"The only real purpose of this provision is to enable the trustee to apply any moneys which it received by virtue of its rights of entry on the mortgaged property to the payment of the principal of the bonds. Article V of the mortgage gives the trustee several rights in the event of default in any of the terms of the mortgage, and one of these rights is to enter upon the mortgaged property in the event of default; the mortgage saying, in this particular, that the trustee may 'enter into and upon and take and hold possession of all and singular the premises, estates, franchises, privileges and property hereby granted and mortgaged * * * and may exclude the company * * * therefrom, and * * * may operate the same * * * and receive all rents * * * and income of all property hereby mortgaged.' Section 2 of article V of the deed of trust provides that, after paying all the expenses of operating the property, 'the trustee shall apply the money received as aforesaid, first, to the payment of accrued interest, together with interest on the overdue installments thereof at the same rate, and next to the payment of the principal of all bonds hereby secured, and then payable.' If the trustee took advantage of these provisions of the mortgage, and went into possession of the property upon default, and collected certain moneys by the operation of the property, it could not apply any money to the payment of the principal of the bonds unless the bond issue had been matured by some provision of the mortgage. This provision for acceleration of maturity, therefore, is in order to enable the trustee to be in a position to apply the moneys so received to the payment of the bonds, if it so desires, and it serves no useful purpose if the trustee decides to foreclose the mortgage by a suit in equity, because those rights are conferred upon it by other provisions of the instrument; and it does not have to declare the principal due by notice, in order to bring the suit."

Section 4 provides for one of the several alternative remedies made available to the trustee and the bondholders. It is important to note that its language is that the trustee *may* proceed as therein specified, unless the holders of a named per cent. in amount of the bonds, by writing, request it to proceed as specified therein, in which case it *shall* adopt that remedy. In other words, such a request by such bondholders is peremptory, and the trustee in that case must so proceed. But, as stated, it may or may not act pursuant to the provisions of said section, unless the bondholders require it in the manner prescribed, and the latter may or may not make the request that the trustee so proceed. There are other remedies afforded the trustee by the indenture by means of any one of which its rights and those of the bondholders as well as those of the defendant may be conserved and protected. And peculiarly proper to the exercise by the trustee of the remedy afforded by the provisions to which section 4 applies is the requirement that, before the whole of the principal debt shall be declared to be due and payable, written notice thereof shall be given to the defendant; for the remedy thus provided for is manifestly of a summary nature, in that it authorizes the taking possession and the control and management of the mortgaged premises and the exclusion therefrom of the defendant, and is in positive contrast to the remedy by foreclosure in a court of equity, where every equitable consideration is vouchsafed to the defendant by the deliberate and care-taking method inherently characteristic of the practice in a court of conscience. This proposition is clearly, forcefully, and logically discussed by Judge Brewer, then United States circuit judge, later one of the justices of the United States Supreme Court, in Mercantile Trust Co. v. M., K. & T. Ry. Co. (C. C. A.) 36 F. 221, 1 L. R. A. 397, in which a situation similar to that here existed. See, also, Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C. A.) 61 F. 543.

The trustee in this case did not elect to invoke the remedy provided in section 5, article V, by entering upon and taking possession and assuming control and management of the mortgaged premises, nor was it requested so to do by the bondholders, they obviously preferring to proceed by the remedy of foreclosure by authority of section 1 and the succeeding sections of article V.

As seen, section 7 of article V specifically provides that no remedy of the several conferred upon or reserved to the trustee or bondholders by the indenture "is intended to be exclusive of any other remedy but every remedy in this indenture provided shall be cumulative, and shall be in addition to every other remedy given hereunder, or *now or hereafter existing at law or in equity or by statute*." Each of the remedies, as has been previously stated, is separate and distinct from the other and is to be invoked and exercised exclusively according to the terms of the particular provision of the mortgage authorizing its exercise. Nowhere in any section of article V or elsewhere in the mortgage, where proceedings in foreclosure are authorized or mentioned, is there a word which may be so construed or interpreted as to justify the conclusion that precedently to the right of the trustee to foreclose for the whole of the principal debt prior to its maturity by reason of default in the payment of interest, or default in the compliance with any other vital covenant or provision of the instrument, the trustee is required first to declare the whole of the principal due and payable. If there was the least ambiguity in the language of any of the other sections of article V as to this proposition, section 6 of said article, above herein quoted, makes it perfectly clear that it is not necessary, before foreclosure proceedings may be brought for the recovery of the whole of the principal debt prior to the maturity of the same, that there should be notice delivered to defendant to that effect. But there is no ambiguity in the language of any of said sections in that particular; nor is there any inconsistency between them. Where, under the mortgage here, default in the payment of the interest has continued for 60 days, all that is required to effect an acceleration of the maturity of the entire amount of the principal debt is to commence suit to foreclose the mortgage for the entire indebtedness, principal, and interest. The commencement of the suit for the whole debt is itself notice of the acceleration of the maturity of the bonds.

In this case, not only did the first default in the payment of interest continue for 60 days before the commencement of the action, but, according to the uncontradicted testimony of the trust officer of plaintiff, there were three successive interest periods in which the defendant defaulted. Moreover, the defendant was in default in its agreement to create the sinking fund from which it agreed to pay the trustee the sum of $10,000 at the time and for the purpose above explained. These defaults the defendant was fully aware might occur, and would have actual knowledge of their occurrence, and further knew that they authorized the trustee to proceed to collect the whole debt, principal, and interest. Why, then, the necessity for giving notice to the defendant declaring the whole of the principal debt due before it could sue in foreclosure? These considerations support the view that there was no intention to provide for such notice as a prerequisite to the exercise by plaintiff of the right to proceed to the collection of the entire debt through foreclosure proceedings.

Subdivision (d) of section 1, art. I, was no doubt intended to cover or meet contingencies which might arise other than those specifically mentioned in said section and other sections, as, for instance, failure by the defendant to pay any taxes, assessments, or other expenses which might become a burden on the mortgaged premises not specifically referred to or provided for. But whatever its purpose, it is, as pointed out, one of the alternative provisions of section 1 of article V, so cannot reasonably be construed or intended to qualify or affect any of the other provisions of the instrument relating to remedies.

[9] 3. The contention under this assignment is that the defendant is not a proper party defendant, because it failed to pay its license and franchise tax for the year 1921, such tax having become delinquent in the latter part of February, 1922, and the defendant thereupon "suspended, and incapable of being exercised for any purpose or in any manner, except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, *and to defend in court any action brought against such corporation* [italics ours], until said tax with all accrued penalties, taxes and charges due to the state under this act and subdivision * * * are paid." Stats. 1917, p. 377. This action was commenced March 25, 1922, or several weeks subsequent to the suspension of the defendant and its corporate rights, privileges, etc., except such as the statute expressly saves to it, as above indicated. The fact of suspension and the fact that the penalties, etc., have not been paid are admitted. The argument of counsel for the defendant is that the above section of the statute of 1917 "applies only to such corporations against whom suits have been filed prior to their suspension or forfeiture." Under the old law, of which the statute of 1917 is amendatory, when a corporation failed to pay its license and franchise tax it ceased to exist or was dissolved. No action could then be brought against it, but could be brought against the directors as trustees. It will be noted from the above quotation from the statute of 1917 that a corporation suspended or its franchise forfeited by reason of its failure to pay its franchise and license tax may defend in court any action brought against it. The provision is merely remedial and can affect no substantial right of the suspended corporation. There is, therefore, no reason for holding that an action may not be brought against the corporation at any time within the statutory period of limitation, as well after such suspension or forfeiture as before.

The cases cited by the defendant upon all the points herein discussed have been carefully examined and found either not to be in point or not to announce any conclusions at variance with those arrived at herein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

203 Cal. 758

WINN v. LONG. (Sac. 3810.)

Supreme Court of California. March 29, 1928.

1. Automobiles 🔑226(2)—Plaintiff's failure to have lighted tail light on automobile stopped on highway constituted negligence which could be considered as proximately contributing to injury from other automobile striking car (Vehicle Act, §§ 99, 106).

In action by automobile driver for personal injuries received from another automobile striking his car, which was stopped on the highway, plaintiff's failure to have the tail light turned on as required by Vehicle Act, §§ 99, 106 (St. 1923, pp. 546, 551), at time of accident, constituted negligence which could be considered as proximately contributing to the accident.

2. Automobiles 🔑245(91)—Whether automobile driver could have avoided striking unlighted automobile standing in road held for jury under last clear chance doctrine (Vehicle Act, §§ 99, 106).

Whether automobile driver could have avoided striking plaintiff's automobile standing in road at point where highway was slightly curved, the two left wheels of which automobile rested on improved portion of highway, and tail light of which was not turned on as required by Vehicle Act, §§ 99, 106 (St. 1923, pp. 546, 551), *held* for jury under last clear chance doctrine.

3. Appeal and error 🔑928(1)—In absence of showing of prejudicial error in instruction, assumption is jury was correctly instructed.

In absence of showing of prejudicial error relative to instruction, the assumption on review is that the jury was correctly instructed.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Frank E. Winn against J. Karl Long. Judgment for plaintiff, and defendant appeals. Affirmed.

Hardin Barry, of Susanville, and James A. Nutting, of Quincy, for appellant.

R. M. Hardy, of Susanville, for respondent.

SHENK, J. From a judgment on a verdict in favor of the plaintiff, the defendant prosecutes this appeal. The action is one for damages for personal injuries received by the plaintiff in an automobile accident. Briefly the facts are as follows: On the evening of March 9, 1924, the plaintiff was operating an automobile on the public highway between Johnstonville and Susanville, in Lassen county. As he approached Susanville, but while he was still in open country territory, his supply of gasoline became exhausted. The car thereafter rolled by its own momentum for a distance equal to about two or three lengths of the car and was brought to a stop in a position such that the two left wheels were resting on and the two right wheels were off the main traveled and improved portion of the highway. About one-half of the car was on that portion of the highway used by cars traveling toward Susanville. The highway is slightly curved at the point of the accident, but not sufficiently so to prevent a clear and unobstructed view of the highway in either direction for at least a quarter of a mile. A stream of water approaches within a few feet of the highway on the side on which the plaintiff was traveling, and his car stopped as far off the main traveled and improved portion of the highway and as close to the bank of the stream as reasonable safety would permit. The plaintiff left his car at this point and went back about 200 yards to a farmhouse and obtained two gallons of gasoline. He returned to his car, and the gasoline was place in the tank. He then lifted the hood on the left side of the car, and, with his back toward the center of the highway was manipulating the carburetor. At this point of time the defendant was driving his car on the right side of the highway, also going toward Susanville, and at a speed of about 25 to 30 miles per hour. He first saw the plaintiff's car when he was from 30 to 50 feet in the rear thereof. He applied his brakes and swerved to the left, but not sufficiently to clear the plaintiff's car. His car collided with the left rear wheel and fender of the plaintiff's car in such manner as to force the plaintiff's car upon the plaintiff and seriously injure him.

It is contended by the defendant that the evidence was insufficient to prove negligence on his part, but, on the contrary, established without conflict that the plaintiff was guilty of negligence.

[1-3] It is deemed unnecessary further to review the evidence in detail. It is enough to say that sufficient appears in the record to justify the application of the doctrine of last clear chance. The sun set on the evening in question at 5:53 o'clock. The accident occurred a few minutes more than 30 minutes after that time. Sections 99 and 106 of the California Vehicle Act (St. 1923, pp. 546, 551) then provided and now provide, among other things, that every vehicle when upon a public highway within this state during the period from a half hour after sunset to a half hour before sunrise shall carry at the rear a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of 500 feet toward the rear. There was positive evidence that the tail light on the plaintiff's car was "off," and there was no evidence upon which the jury could rightly find that said tail light was "on" at the time of the accident. Although the accident occurred only a few minutes subsequent to the expiration of the half-hour after sunset, yet the failure of the plaintiff to have the tail light turned on at the time of the accident constituted negligence which could be

considered as proximately contributing to the accident. However, the plaintiff, stooping with his head down near the carburetor and his back toward the center of the highway, was apparently oblivious to the danger to which he was then subjected by the defendant's approaching car. There was room to the left of the plaintiff's standing automobile for two cars to pass, but no cars were then passing on the main traveled and improved portion of the highway. The jury impliedly found that as the defendant approached the standing car he first observed it at a point far enough to have avoided the accident by the exercise of ordinary care. This question under the facts here presented was one so peculiarly for the jury to determine that it cannot be said that there was no reasonable basis for the finding. It is not claimed by the defendant that the jury was not properly instructed on the doctrine of last clear chance. The charge to the jury is not in the record, and, in the absence of a showing of prejudicial error in that regard, it must be assumed that the jury was correctly so instructed.

We find no error in the record. The judgment is therefore affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

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203 Cal. 665

MAGRUDER v. REDWOOD CITY et al.

(S. F. 12089.)

Supreme Court of California. March 26, 1928.

1. Municipal corporations 🔑589—Municipalities have right to enact zoning ordinances (St. 1917, p. 1419).

Municipalities of state have right to enact zoning ordinances in accordance with provisions of St. 1917, p. 1419.

2. Municipal corporations 🔑626—Zoning ordinance held not discriminatory or unreasonable because expressly excluding certain businesses with implied permission to maintain others in residence district.

Zoning ordinance of Redwood City, establishing residence, industrial, business, and restricted business districts, *held* not discriminatory or unreasonable because of expressly excluding certain named businesses, and thereby impliedly permitting other businesses not expressly excluded to be carried on within residence district.

3. Municipal corporations 🔑626—Court must uphold city zoning ordinance, in absence of showing that good reason does not exist for discrimination.

Court has duty to uphold provisions of city zoning ordinance excluding certain named businesses from residence district, in absence of clear showing that good reason does not exist for discrimination shown by implied permission for carrying on other businesses not expressly excluded.

4. Municipal corporations 🔑111(3)—Ordinance is not rendered special simply because it does not cover every conceivable subject; "special ordinance."

A city ordinance is not rendered special simply because it does not cover every conceivable subject which legislative authorities might have included in it.

5. Municipal corporations 🔑626—Ordinance may properly prohibit new business within certain district while permitting continuance of existing establishments.

A city zoning ordinance may properly prohibit the establishment of any new business of a given kind within certain district while permitting the continuance of existing establishments of the same kind and character.

6. Municipal corporations 🔑626—Zoning ordinance held not invalid because providing that provisions excluding certain businesses from residence district should not apply to business lawfully established.

Ordinance of city of Redwood, establishing residence, industrial, business, and restricted business districts, *held* not invalid because of provision excluding certain enumerated businesses from residence district, but providing that such regulation should not apply to any business lawfully established within city at time of adoption of ordinance, when construed as only intending to exempt existing occupations within district and not to authorize removal from district in which business was located at time of passage of ordinance into another district, where restrictions were more onerous.

7. Estoppel 🔑62(5)—Zoning ordinance, excluding certain businesses from residence district, held not repudiated by trustees' action in granting permission to erect lumber yard shed and store building.

City trustees, by granting license to erect a shed on lots located within residence district without knowledge that it was to be used for lumber yard, and by granting permit to erect building for use as hardware store, *held* not to have repudiated ordinance excluding such businesses from residence district and thereby prevented themselves from thereafter enforcing terms of ordinance, since board of trustees have no power to in such manner nullify legal ordinance adopted by municipality.

8. Estoppel 🔑62(5)—Duty of officers to prosecute all violations of legally adopted ordinance cannot be waived, nor can they be estopped by their action.

An ordinance of a municipality when once legally adopted becomes binding on all citizens thereof, officers as well as private citizens, and duty of officers to prosecute all violations thereof is not a personal duty that can be waived, nor can they be estopped by any action from faithful performance of same.

9. Appeal and error ⚷417(1)—Request for transcript with statement of plaintiff's desire and intention to appeal held sufficient notice of appeal (Code Civ. Proc. § 953a).

Request for a transcript, in accordance with provision of Code Civ. Proc. § 953a, containing statement that notice is given that plaintiff in the above-entitled action desires and intends to appeal from judgment therein given, *held* to constitute sufficient notice of appeal.

Department 1.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by E. W. Magruder against the City of Redwood City and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Joseph J. Bullock, of Redwood City, and Eric Lyders, of San Francisco, for appellant.

Albert Mansfield and A. J. Stebenne, both of Redwood City, for respondents.

CURTIS, J. This action was instituted by the plaintiff for the purpose of enjoining the city of Redwood City and its municipal officers from proceeding with the prosecution of a pending criminal action in the recorder's court of said city, and from instituting or maintaining any further actions against plaintiff, for maintaining and carrying on a lumber yard in said city in violation of Ordinance No. 211, adopted by the board of trustees of said city, and, further, to have said ordinance declared void, and the defendants perpetually enjoined from arresting, interfering with, or molesting plaintiff in the conduct of his said lumber yard.

The city of Redwood City is a city of the sixth class. It has never adopted a charter, and therefore is operating under the general law of this state applicable to municipalities of that class, and is governed by a board of trustees consisting of five members. Ordinance No. 211 of said city was adopted by the board of trustees on April 4, 1921, and purported to divide said city into four districts or zones described therein as residence, industrial, business, and restricted business districts. Section 9 of said ordinance declared it unlawful for any person, firm or corporation to erect, establish, manage, or carry on within the residence district of said city certain enumerated and described businesses and industries, among which are lumber yards. Section 12 of said ordinance provided that the provisions thereof should not apply to any factory, works, or business which, at the time of said ordinance, was lawfully established within the limits of said city. Plaintiff acquired and became the owner in the year 1893 of lots 1 and 2 and in the year 1894 of lot 3, all being in block C of a certain subdivision situated in said city, and all of said three lots were included within the residence district as fixed and defined by said ordinance.

The court found that, since the adoption of said ordinance, and under and by virtue of a written permit from the board of trustees of said city, the plaintiff constructed and erected a frame shed on a portion of said lot 1, and that, ever since on or about May 5, 1923, plaintiff has and does now carry on and conduct a lumber yard upon said three lots entirely within said residence district without the permission of any one. The court also found that, on or about July 5, 1924, under and by virtue of a written permit from the board of trustees of said city, the plaintiff erected and constructed a frame store building on the southeasterly corner of said lot 1, which store building has been ever since, and now is, used for the storage, display, and sale of hardware. The court further found that the territory surrounding and immediately adjacent to plaintiff's business is rapidly being built upon with homes averaging in value from $3,000 to $8,000; that it is particularly suitable for residential purposes, and said business of plaintiff is a menace to the community because of the inflammable nature of the material kept. The conclusion of the court was that said ordinance was valid, and that plaintiff was carrying on, and conducting, said lumber yard within the residence district of said city, as fixed by said ordinance, and contrary to, and in violation of, the prohibitive terms thereof. It accordingly gave judgment in favor of defendants, and the plaintiff has appealed therefrom.

The ground upon which the plaintiff based his prayer for relief in the trial court, and that upon which he now asks for a reversal of the judgment in this court, is that said Ordinance No. 211 is invalid, and of no binding force or effect upon him in the conduct of his said lumber yard at the place where it is located. In this connection appellant contends that said ordinance is unreasonable and discriminatory, and therefore invalid, in that it does not prohibit manufacturing, trade, or business generally within the so-called residence district, but only prohibits certain factories. trade, and classes of business specifically enumerated in said ordinance within said district, while it allows other factories, trades, or business of a more obnoxious character to be conducted therein.

There is no provision of the ordinance which excludes business and trade generally from being carried on and conducted in said residence district, but section 9 of the ordinance, as above noted, enumerates certain classes of business, trades, factories, and plants which are prohibited from being established, maintained, or carried on within said residence district. This enumeration includes most pursuits which are usually followed in a business district of a city, but appellant has called attention to the fact that there has been omitted therefrom a number of occupations, the establishment and conduct of which in a residential section would be obnoxious to the health, safety, and general welfare of the inhabitants therein. As illustrating his contention, he has pointed to the fact that the ordinance prohibits the blacksmith and cooper from exercising their trades within the residence district, but permits the carpenter, the cabinet maker, the painter, and the printer; it prohibits hotels, but not lodging houses; pool rooms, but not bowling alleys; lumber yards, but not livery stables, and vinegar works, but not a cider press. A more extended list is set forth in appellant's brief, but the above will be sufficient to illustrate his argument. Appellant makes no claim that the various classes of business which the ordinance has prohibited from being established, maintained, and carried on within said district are of such a character that their establishment and operation in a residential district would not be objectionable and obnoxious to the inhabitants thereof, and therefore may be lawfully excluded from such a district by the municipal authorities in the proper exercise of the police power with which they are invested, but he contends that, by failing to exclude, and thereby impliedly consenting to their existence and operation in such residence district, other occupations equally, if not more, obnoxious than those excluded, the ordinance containing such enactments and producing such results is both unreasonable and discriminatory, and therefore void.

[1] The right of municipalities of this state to enact zoning ordinances is now settled beyond any doubt, and has received the sanction of both the Legislature and the courts. Stats. 1917, p. 1419; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388.

A question similar to that above mentioned was raised as to the validity of an ordinance considered by this court in the case of Grumbach v. Lelande, 154 Cal. 679, 98 P. 1059. By this ordinance the city of Los Angeles had prohibited wholesale liquor establishments in certain districts, in which saloons and liquor selling restaurants were permitted to be operated and carried on. It was contended "that if the design of the ordinance be to protect the residents of the district of the city from the presence of an annoying, disagreeable, or offensive business, there was more reason to suppress the saloon and the liquor selling restaurant than there was to put the wholesale business under the ban." For this reason, the petitioner therein urged that the ordinance was unreasonably and unjustly discriminatory, and therefore void. In answer to this claim this court said:

> "The question thus presented is not without difficulty. The reasons which may have induced the council of the city to suppress the one class of business while permitting the other are not obvious. But upon the other hand there may have been reasons actuating the council, good and sufficient in themselves, though not clearly appearing from a mere reading of the ordinance itself. Thus, it is not improbable that the so-called wholesale liquor houses within the prohibited district were but adjuncts to retail grocery stores. The regulations governing the conduct of saloons forbid the presence at or about them of women or girls. These regulations do not apply to the wholesale houses and it is conceivable that abuses may have sprung up from the sale to or use by women and girls of liquors purchased from such grocery stores. While designated 'wholesale dealers' liquors are allowed to be vended by such houses in such small quantities as pints, and the presence of women and girls in grocery stores where liquor could be vended in this way might have resulted in an evil not attached to the existence of the saloon which by law all women and girls and children are forbidden to enter. It certainly is not made clear that good reason does not exist for the discrimination, and in the absence of a satisfactory showing to this effect a court leans to the upholding of such regulatory provisions."

[2, 3] In considering Ordinance No. 211 of Redwood City in the light of this ruling, we might say that, while we may not be able to discern the reason which induced the board of trustees of said city to pass this kind of an ordinance, rather than one which excluded generally all business from the residence district, we cannot say that no good reason existed for the passage of the ordinance in its present form. However, it is not difficult to discern a distinction in most cases between those lines of business expressly mentioned in the ordinance, and which were prohibited from being carried on within said residence district, and those not enumerated therein, and therefore, at least, impliedly permitted to be carried on in the residence district of said city. The business of a blacksmith and that of a cooper are, as a general rule, productive of loud and resounding noises, while the same complaint cannot be made against the carpenter, the cabinet maker, the painter, and the printer as they ply their respective trades. There is also an apparent difference between a hotel and a lodging house, the former being what might be properly termed a strictly business establishment, while the latter partakes more of the nature and character of a residence. Pool rooms have become in many localities highly objectionable as places where the idle, and often the criminal element, congregate, and thus prove a menace in a residential section, while such a complaint is seldom, if ever, made in reference to a bowling alley. The objection to a lumber yard in a residence district is most obvious. Its presence in such a neighborhood has been declared by this court to "be a menace to the property" therein. In re Montgomery, 163 Cal. 457, 125 P. 1070, Ann. Cas. 1914A, 130.

The same, however, may be said regarding a livery stable. Just why the board of trustees did not prohibit the latter business from being carried on within the residence district may not appear from the ordinance itself, yet there may have been good and sufficient reasons for not including it within the lists of business occupations excluded from the residence section of the city. The day of the old horse is about gone. Livery stables are now in a large measure a thing of the past. A person seeking for a livery stable in one of our modern cities would, as a rule, not only seek in vain, but also might subject himself to the suspicion of having just been awakened from a sleep as prolonged and profound as that which made the name of Rip Van Winkle famous. The board of trustees may well have concluded that it was no longer necessary to make this class of business the subject of legislative regulation, for the reason that it had passed out of existence in that community entirely. A satisfactory reason, we think, might be given for the action of the trustees in omitting from the prohibited occupations most, if not all, of those mentioned by appellant, and the omission of which appellant claims renders the ordinance illegal. But, even if this could not be done, so long as it is not made clear, and we do not think it has, that good reason does not exist for the discrimination, it is the duty of the court to uphold the regulatory provisions of the ordinance. We are satisfied from the showing made that the ordinance is not discriminatory or unreasonable, but that it is a valid legislative enactment of the board of trustees of said city. We might close the discussion of this phase of the case by quoting from a recent decision of this court as follows:

> "The * * * courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise, and unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals or general welfare that it will be nullified by the courts." Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 385 (38 A. L. R. 1479).

[4] Appellant has cited a long list of authorities upon the question of special legislation, which we do not question, but they are not applicable in this action. An ordinance is not rendered special simply because it does not cover every conceivable subject which the legislative authorities might have included in it. This was decided in the case of In re Martin, 157 Cal. 51, 106 P. 235, 26 L. R. A. (N. S.) 242, where this court sustained a statute which regulated the hours of employment in underground mines and in smelting and reduction works, and limited the period of employment therein to eight hours. In the course of the opinion in this case the court said:

> "It is argued by the appellant that the act is special because it does not include in its scope many occupations other than mining which are equally dangerous to the health of the persons engaged in them. Reference is made, for example, to marble cutters and marble drillers, diamond cutters, workers in furnaces and laundries, men employed in wine cellars, breweries and icehouses, men in boiler works, matchmakers, cleaners of clothes, makers of white lead, of china and earthenware and many others.
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> "The argument is, apparently, that any law is special which does not include all of these occupations. This view is obviously unsound. Whether these other occupations present the same dangers to health as those involved in mining, etc., and whether, if they do, these dangers can best be met by restricting the hours of labor, are primarily questions for the legislature. * * * In other words, the law is not rendered special by the mere fact that it does not cover every subject which the Legislature might conceivably have included in it. It is enough that the subjects covered possess such intrinsic peculiarities as to justify the legislative determination that those subjects require special enactment."

[5, 6] A further objection is made to the validity of the ordinance by reason of the provisions of section 12, which provides that it should not apply to any business lawfully established in said city at the time of the adoption of said ordinance. It is conceded that an ordinance may properly prohibit the establishment of any new business of a given kind within a certain district, but permitting the continuance of existing establishments of the same kind and character. It was so held in the recent case of Zahn v. Board of Public Works, 195 Cal. 497, 512, 234 P. 388. It is claimed by appellant, however, that the provisions of section 12 of the ordinance go further than merely permitting existing factories and business to continue as they were before the passage of the ordinance, but that they permit, for instance, the owner of a factory, which at the date of the adoption of the ordinance was located in the industrial district of said city, thereafter to move said factory into any other district in the city, even into the residential section thereof. In our opinion, this is an extreme construction to be placed upon the provisions of section 12 of said ordinance. These provisions must be construed in connection with the other terms and provisions of the ordinance, and, when so construed, we think their intent and purpose are clear, and that it was only intended by the provisions of section 12 of the ordinance to exempt existing occupations from making any change in their location or manner of

doing business by reason of any of the terms of the ordinance. In our opinion, there is nothing in the ordinance which would give to an existing business any right to move from the district in which it was located at the date of the passage of the ordinance into another district where the restrictions are more onerous than those applicable to that particular business.

[7, 8] Lastly, appellant contends that the trustees of said city have repudiated the ordinance by granting appellant a license to erect a shed on his lots, in which he now carries on said lumber yard, and also in granting appellant a license to erect the building on said lots in which he is now conducting a hardware store. The court found that the appellant has carried on the lumber yard on said lot without the permission of anybody, and that, under and by virtue of a written permit from said board of trustees, appellant had erected the building in which he was conducting his hardware business. As to whether he ever received any permit to carry on the hardware business in said building the findings are silent. The criminal proceeding instituted against appellant in the recorder's court of said city, and to enjoin which this proceeding was instituted, charges appellant with the violation of said ordinance only in maintaining said lumber yard, and does not pretend to call in question his right to carry on the hardware store. The court found, as we have seen, that appellant was conducting the lumber yard without the permission of the board of trustees. Appellant contends, however, that, as he had received a permit from the trustees to erect the building in which he conducted his lumber yard, and also a like permit to erect the second building and to carry on therein his hardware business, the board of trustees thereby repudiated and violated the ordinance, and are now in no position to enforce the same. The permit to erect the building in which appellant afterwards carried on his lumber yard did not state any purpose for which the building was to be used. Neither did the permit for the building in which appellant carried on the hardware business give the use or purpose for which it was to be used. There is no evidence that the board of trustees knew the purpose for which the first named building was to be used at the time the permit therefor was granted. There is evidence, however, that the board knew that the appellant intended to carry on a hardware store in the second mentioned building at and before the permit therefor was issued. That matter, therefore, is resolved down to the question whether the board of trustees, by granting a permit to erect the second building knowing at the time it was to be used as a hardware store, which use was contrary to the terms of the ordinance, thereby placed themselves in a position that prevented them from thereafter enforcing the terms of the ordinance which prohibited a lumber yard from being operated within the residence district. Appellant contends that they have. He cites no authority to support his contention, and we are not seriously impressed with it. We know of no power possessed by a board of trustees that will permit it in any such manner to nullify a legal ordinance adopted by the municipality. An ordinance of a municipality when once legally adopted becomes binding upon all the citizens thereof, officers as well as private citizens, and it is the sworn duty of those officers, charged with its enforcement, to prosecute all violations thereof. This duty is not a personal duty that can be waived at their will, nor can they be estopped by any action of theirs from the faithful performance of the same. There is no merit in this contention of appellant.

[9] The objection of respondents to the hearing of this appeal on the ground that no notice of appeal was ever filed by appellant is without merit. Appellant filed a request for a transcript in accordance with the provisions of section 953a of the Code of Civil Procedure, containing the following sentence:

> "Notice is given that the plaintiff in the above-entitled action desires and intends to appeal from the judgment therein given."

This has been held to be sufficient notice of appeal. Purity Springs Water Co. v. Redwood Ice Delivery (Cal. Sup.) 263 P. 810.

The judgment is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

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203 Cal. 657

FICKLING v. JACKMAN et al. (L. A. 7788.)

Supreme Court of California. March 26, 1928.

1. Mortgages ⚿151(3)—Trust deed is "lien or other incumbrance" within law preferring mechanics' liens to incumbrances attaching after improvement is commenced (Code Civ. Proc. § 1186).

Deed of trust is a lien or other incumbrance within meaning of Code Civ. Proc. § 1186, preferring mechanics' liens therein provided for to "liens or incumbrances" attaching subsequent to time when building, improvement, or structure was commenced or of which lienholder had no notice and which was unrecorded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lien.]

2. Mortgages ⚿151(3)—Trust deed recorded before work is done or materials furnished ordinarily takes precedence over subsequent mechanics' liens.

A trust deed recorded before any work is done or materials furnished is ordinarily prior to mechanics' liens subsequently attaching, although some of the money may have been ad-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes vanced after the lien attached, since owner has right to create by deed of trust preferred lien on property to raise money for purpose of erecting building which will take precedence over subsequent mechanics' liens.

3. Mortgages 🔑151(3)—Lien of mortgage, requiring advances, is prior to subsequent mechanics' liens, but lien as to optional advances attaches as of date thereof.

Where consideration for mortgage or deed of trust is not paid until after work commenced or materials furnished, although recorded prior to commencement of work or furnishing of materials, lien of mortgage or deed of trust is prior to mechanics' lien, where making of advances is obligatory, but, where advances are optional, lien of mortgage or deed of trust is postponed to date advances are actually made.

4. Mortgages 🔑151(3)—Title under trust deed delivered in escrow held to vest as of date of execution as respects priority over mechanics' liens.

Where deed of trust is delivered in escrow to be effective on completion of building as provided in contract for construction thereof, effect as respects priority over mechanics' liens is the same on performance of condition as though there had been a direct delivery of executed deed of trust, and title vests at date of such execution and delivery.

5. Mortgages 🔑151(3)—Trust deed, delivered to contractor and recorded before commencement of work on building and assigned to materialmen, held prior to subsequent mechanics' liens (Code Civ. Proc. § 1193, and § 1183, as amended by St. 1911, p. 1313, § 1).

Where contractor accepted deed of trust as part payment of contract price for construction of building as authorized by Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, § 1, and thereafter made advances of materials as consideration assigning deed of trust to materialmen, such deed of trust, which was recorded before commencement of any work or furnishing of materials, was prior to subsequent mechanics' lien, and proceeds did not become a fund for payment of mechanics' liens under Code Civ. Proc. § 1193.

6. Mortgages 🔑151(3)—Trust deed to contractor, recorded before building was commenced, held, in absence of bad faith or fraud, prior to mechanics' liens.

Trust deed, executed to contractor as part of contract price for construction of building, and placed on record before any labor was performed or materials furnished, *held*, in absence of showing of bad faith or fraud, prior to mechanics' liens subsequently attaching.

In Bank.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by J. M. Fickling against W. T. Jackman, the Hammond Lumber Company, and the Title Guarantee & Trust Company and others. From the judgment, the last two named defendants appeal. Reversed.

Superseding opinion in District Court of Appeal, 259 P. 84.

R. L. Horton, of Los Angeles, for appellants.

Page & Hurt, of Los Angeles, for defendant estate of Schneider.

Peyton H. Moore, of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff in an action to foreclose a mechanic's lien. Abraham Schneider in his lifetime, as owner, made a contract with W. T. Jackman Company, one of the defendants, as builder, for the construction of a fifteen-unit bungalow court on Cahuenga avenue in the city of Los Angeles. The Jackman Company agreed to furnish all labor and material necessary for the erection and completion of the units. The contract price was stipulated to be $43,840, payable in amounts equal to 70 per cent. of paid bills as the work progressed, and a sum in cash 35 days after completion sufficient to bring the cash payments to a total of $32,840, $1,000 90 days after completion and $10,000 on or before 4 years after date of completion, payable in installments of $250 per month beginning 30 days after completion. The note for $10,000 was provided to be and was secured by a deed of trust which, as also provided in the contract, was filed for record the day following its date and before any materials were delivered or construction work was commenced. A prior lien, a first deed of trust for $24,000, was also of record. The deed of trust securing said payment of $10,000 of the contract price was executed by Schneider on July 12, 1921, to Title Guarantee & Trust Company as trustee, and Kathryn Thompson, a stenographer in the office of W. T. Jackman Company, as beneficiary. It was recorded on July 13, 1921, and delivered to Hellman Commercial Trust & Savings Bank with written instructions signed by Schneider that it should be held by the bank until he should notify it to deliver the same to W. T. Jackman Company. The contract provided: "Said note to be put in trust at Hellman Bank till bldg. completed." Hammond Lumber Company, another of the defendants, during the progress of the work, had delivered considerable building material to the job. It received a further order from the Jackman Company for about $10,000 worth of lumber and material. It refused to make delivery of the order without first receiving security in addition to its mechanic's lien rights; whereupon negotiations were entered into and the trust deed and note for $10,000 were assigned to Hammond Lumber Company, together with a letter signed by the owner and the Jackman Company to the effect that the said trust deed should be effective only upon completion of the building in accordance with the plans and specifications, and that upon completion of the building the Hammond Lumber Company should hold the trust deed as security for the account of the Jackman Company. The Hammond Company thereupon made the requested delivery of material. A notice that the building was duly constructed and actually completed on the 16th day of December, 1921, was filed pursuant to section 1187, Code of Civil Procedure.

The plaintiff installed the plumbing in the bungalow court, and thereafter brought the present action to foreclose his mechanic's lien. Portions of a stipulation entered into between the parties material to the questions involved on this appeal are as follows:

> "The claim of J. M. Fickling for four thousand and fifty-five dollars ($4,055.00), and interest thereon at seven per cent (7%) per annum from January 12th, 1922, as set forth in his complaint, together with a mechanic's lien, securing said amount, upon the real property described in the complaint of the said J. M. Fickling, is hereby admitted as established, and further proof thereon is hereby waived. * * * The claim of the Hammond Lumber Company, as set forth in its complaint in a certain action instituted in this court and numbered 105044 of the records of this court, wherein Hammond Lumber Company was plaintiff and W. T. Jackman et al. were defendants, together with its right to a mechanic's lien for the amount of said claim upon the real property described in the complaint in said action, shall be deemed established, and further proof of the amount of said claim and of the right to a lien upon the real property, referred to in said complaint, is hereby waived. * * * It is stipulated that the mechanic's lien claims of the said J. M. Fickling and of the said Hammond Lumber Company, respectively, as above stipulated for, shall be deemed as standing on the same basis, and upon an absolute equality under the law, neither having a preference over the other; it being understood, however, that no stipulation is made as to whether that certain trust deed, executed by Abraham Schneider in favor of the Title Guarantee & Trust Company, upon the real property set up in plaintiff's complaint, and securing a note for ten thousand dollars ($10,000.00) in favor of Kathryn Thompson, which said note was assigned to the Hammond Lumber Company, is a prior lien upon said real property superior to the mechanic's lien of J. M. Fickling, the plaintiff above named, the priority between the lien of said trust deed and the lien of the mechanic's lien claim of J. M. Fickling being left for the determination of the court in this action."

The trial court found, and it is conceded, that the Jackman Company is the real beneficiary under the deed of trust. Judgment was ordered in the sum of $4,380.23 in favor of plaintiff and in the sum of $20,413.23 in favor of Hammond Lumber Company, and it was adjudged that upon a sale of the property these two amounts should be paid before any payment should be made on the note for $10,000 secured by the trust deed assigned to the Hammond Lumber Company. From that judgment the Hammond Lumber Company and Title Guarantee & Trust Company have appealed.

Under the issues framed by the pleadings and under the stipulation of facts, the main question here presented is this: Which has priority, the deed of trust which was recorded prior to the commencement of any work and the furnishing of any materials, or the mechanics' liens of the plaintiff and of the defendant Hammond Lumber Company?

It is contended by the appellants that the question is settled by the provisions of section 1186 of the Code of Civil Procedure, which are as follows:

> "The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished."

[1, 2] By a long line of decisions in this state a deed of trust is a lien or other incumbrance within the meaning of that section. The general rule is stated to be:

> "Accordingly, if recorded before any work is done or materials are commenced to be furnished, a trust deed is in the ordinary course of things prior to mechanics' liens. * * * An owner has a right to create by deed of trust a preferred lien on the property to raise money for the purpose of erecting a building which will take precedence over subsequent mechanics' liens. So deeds of trust for advances to be made for building purposes are ordinarily superior to mechanics' liens subsequently attached, although some of the money may have been advanced after the lien attached, the making of advances being obligatory." 25 Cal. Jur. 52, 53, and cases cited.

[3, 4] Unless there is something which distinguishes this case from the situation recited in the rule, we find no reason for refusing to apply it. The decisions have clearly settled that, where the consideration for a mortgage or deed of trust has not passed until after work commenced or materials furnished, although the mortgage or deed of trust has been recorded prior to the commencement of work or the furnishing of materials, the lien of the mortgage or deed of trust is prior to the mechanics' liens where the making of the advances is obligatory on the part of the mortgagee or the beneficiary. Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288; Savings, etc., Society v. Burnett, 106 Cal. 514, 39 P. 922; Hall v. Glass, 123 Cal. 500, 56 P. 336, 69 Am. St. Rep. 77; Valley Lumber Co. v. Wright, 2 Cal. App.

288, 84 P. 58; Fuller v. McClure, 48 Cal. App. 185, 191 P. 1027; Harper Reynolds Co. v. Hammond Lumber Co., 51 Cal. App. 74, 196 P. 97; San Francisco Lumber Co. v. Yates, 54 Cal. App. 109, 204 P. 423. But, where the advances are optional with the mortgagee or beneficiary, the lien of the mortgage or deed of trust is postponed to the date or dates respectively as of which the advances actually are made. W. P. Fuller & Co. v. McClure, supra; Jones, Chat. Mortg. (3d Ed.) § 97. In the building contract in the present case, the Jackman Company, in consideration of the contract price agreed to be paid by the owner in the manner and at the times provided, promised to "furnish all labor and material necessary for the erection and completion" of the bungalow court. It has been held that a binding promise to furnish all labor and materials in such a contract is an agreement to pay for them. Callan v. Empire State Surety Co., 20 Cal. App. 483, 129 P. 978, 981. This promise to pay for as well as furnish all labor and material necessary is also clearly inferable from the contract, which provides, as noted, that the owner will pay the contractor, as the contract price, during the progress of construction, 70 per cent. of *paid* bills, etc. Unquestionably under this contract—and it is so conceded—the Jackman Company was bound not only to furnish all labor and material necessary for the erection and completion of the bungalow court, but also to pay for all such labor and material. So, when the deed of trust was executed and delivered as part of the purchase price, there was a binding obligation on the part of Jackman Company to make payments up to the full principal amount thereof, if that should become necessary in the performance of its obligation to pay for all labor and material furnished by it. There is no distinction between a delivery of the executed deed of trust directly to the Jackman Company and, as in this case, a delivery in escrow to be effective upon the completion of the buildings as provided in the contract. On the performance of the condition or the happening of the contingency, the effect is the same, and title vests at the date of such execution and delivery. See 10 Cal. Jur. 593, and cases cited.

Respondent contends that no consideration has been given by the Jackman Company for the trust deed, or, in other words, that no advances have been made by the Jackman Company under the trust deed which would have the effect of attaching the lien of the trust deed at the date of its execution, and that therefore the proceeds of the deed of trust became a fund for the payment of mechanics' liens pursuant to section 1193, Code of Civil Procedure. That section makes provision for recovery by the contractor upon liens filed by him of such amount only as may be due him according to the terms of his contract after deducting all claims of other parties for work done and materials furnished. If there is nothing due to the contractor, the section does not apply. The amendment in 1911 of section 1183, Code of Civil Procedure, made a change in the law as it formerly stood in that section with respect to the manner and time of paying the contract price. It is not now required that the owner pay in any stated percentages or at any particular time. "All these things are left to the will of the owner and the contractor as they may agree. * * * The parties are at liberty to contract for payment in advance, or in specific property." Roystone Co. v. Darling, 171 Cal. 526, 534, 154 P. 15, 18. The parties, owner and contractor, could therefore have agreed on payment in cash or property, in advance or in the future, as they pleased. By giving the contractor a trust deed to secure a promise to pay in the future a part of the contract price, the owner has not withheld, under the meaning of the section, any part of the contract price except in so far as he has not received any consideration for the trust deed. To the extent that the contractor has given consideration for the trust deed, the owner has paid as effectively as though he had advanced cash on the contract price instead of having given a trust deed. In other words, there is no distinction between this situation and the case where a third person binds himself to make advances as the work progresses in consideration of a promise to pay secured by a mortgage or deed of trust which is recorded prior to the commencement of any work and before any materials are furnished. And it has been held that such obligatory advances under a deed of trust need not be in cash, but may be in property, and payment therefor by the contractor may be by assignment of the trust deed security for the contract price. Harper Reynolds Co. v. Hammond Lumber Co., 51 Cal. App. 74, 196 P. 97.

[5] We conclude, therefore, that the contractor, under its obligation so to do, has made advances—or paid consideration—for the deed of trust for the full principal sum thereof by the furnishing of materials delivered by Hammond Lumber Company; that the deed of trust for $10,000, having been recorded prior to the commencement of any work or the furnishing of any materials, is prior to the liens of the plaintiff and of the defendant Hammond Lumber Company.

[6] The plaintiff urges that the approval of such a trust deed transaction would result in an unjust advantage being taken of lien claimants, but such is not the case under the circumstances here shown. The validity of the note and the trust deed is not attacked. They were given as part of the contract price, which under present law does not, as formerly, constitute a fund for the protection

of lien claimants. The consideration for the assignment to the Hammond Lumber Company is not questioned. The only question in the case is one of priority under the statute. The trust deed was on record before any labor was performed or materials furnished. In the absence of a showing of bad faith or of fraud on the part of the parties to the transaction, the rights of mechanics' lien claimants must be deemed, under the statute, to have attached subject to the prior recorded deed of trust.

No other points require discussion.

The judgment is reversed.

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203 Cal. 621

DULLANTY v. SMITH. (S. F. 11573.)

Supreme Court of California. March 16, 1928.

1. Appeal and error 🔑1002—Verdict on conflicting evidence as to negligence and contributory negligence held conclusive.

In action for personal injuries sustained through collision with automobile driven by defendant, verdict of jury on conflicting evidence as to negligence on part of defendant and contributory negligence of plaintiff *held* conclusive.

2. Trial 🔑133(6)—In personal injury action, showing in defendant's deposition that defendant carried insurance held not reversible error where objectionable passages were not properly marked and jury were admonished to disregard testimony which was stricken.

In personal injury action against automobile driver, introduction of deposition of defendant showing that he carried insurance *held* not prejudicial error where defendant's counsel did not properly mark objectionable passages and submit them for ruling, objections were sustained, motion to strike granted, and jury directed and admonished to disregard evidence stricken out and remarks of court and counsel.

3. Trial 🔑127—In personal injury action, evidence containing reference to defendant's indemnity insurance is not necessarily inadmissible.

In personal injury action against automobile driver, fact that testimony, in addition to unobjectionable matter, contained references to insurance of defendant did not necessarily make it inadmissible for all purposes, notwithstanding that court frowns on any attempt to show that defendant carried indemnity insurance.

4. Damages 🔑158(4)—Evidence that plaintiff's teeth were knocked out, shoulders, neck, head, and throat were black, and that she suffered lapses of memory held admissible under allegations of concussion of brain, laceration of forehead, contusions of chest, cheek, arms, and legs, and nervous shock.

In personal injury action, evidence that plaintiff had two teeth knocked out, shoulders, neck, head, and throat made black and blue, and suffered lapses of memory for three days, with forgetfulness recurring at intervals thereafter, *held* admissible under allegations that she suffered severe concussion of brain, deep laceration of forehead, severe contusions of chest, left cheek, arms, and legs, great physical pain and anguish, and severe shock to nervous system.

5. Trial 🔑253(4)—Instruction that pedestrian may assume motor vehicle drivers will obey traffic laws held not erroneous as ignoring contributory negligence.

In action for injuries received when pedestrian was struck by automobile, instruction that person lawfully and carefully using street may assume that all others using it will also use ordinary care and that pedestrians may assume that motor vehicle drivers will obey traffic laws *held* not erroneous as against contention that it disregarded doctrine of contributory negligence.

6. Automobiles 🔑245(39)—In pedestrian's personal injury action, whether motorist failed to sound horn and whether failure was negligence held for jury.

In action against automobile driver for personal injuries sustained when pedestrian was struck by car while crossing street, evidence as to whether plaintiff saw defendant's car or knew of its approach *held* sufficient to take to jury question whether defendant failed to sound horn, and, if so, whether under circumstances such failure constituted negligence.

7. Automobiles 🔑246(19)—Instruction requiring automobile driver to give "seasonable warning signal" held not reversible error in personal injury action (St. 1923, p. 545, § 95, subd. a).

In pedestrian's personal injury action against automobile driver, instruction that automobile driver must give "seasonable warning signal," using means required by Motor Vehicle Law (St. 1923, p. 545, § 95, subd. a) to give timely warning of his approach to other persons using street, *held* not reversible error on ground that it told jury that failure to sound horn was violation of law, whereas duty was to sound horn if necessary.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Eleonore Dullanty against Ashley Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion in Court of Appeal, 260 P. 337.

Lasher B. Gallagher, Cooley & Gallagher, and Cooley, Crowley & Gallagher, all of San Francisco, for appellant.

Ralph H. Lachmund, of San Francisco, for respondent.

PRESTON, J. By this action plaintiff seeks to recover damages for personal injuries sustained through collision with automobile driven by defendant. The complaint alleges negligent operation of said automobile by defendant; the answer, contributory negligence on the part of plaintiff. Verdict of the jury was in favor of plaintiff, and defendant has appealed.

Briefly, the following facts are fairly established by the evidence: Defendant, returning from a funeral, was traveling south at a slow rate of speed on Webster street, near its intersection with Grand avenue, Oakland, Cal. The day had been rainy and the streets were wet and slippery. Plaintiff, a woman 67 years of age at the time of the trial, was crossing Webster street just south of the intersection, approaching the west curb. She was holding her skirts up to keep them dry and walked straight ahead until almost the moment of impact, when she hesitated in confusion and turned slightly north. Defendant put on the brakes and turned to the right to avoid hitting her, thus reducing the speed of his car from 15 or 18 to 7 or 8 miles an hour or less, whereupon the car skidded diagonally to the left. The front end passed plaintiff, but the right rear door hit her, knocking her to the ground, where she was found unconscious, with her feet pointed toward the machine and her head away from it. The machine stopped partly or wholly on defendant's wrong, or the left side of the road, and the left front fender thereof became entangled with the left rear fender, or end, of the automobile of a Mr. Rinderneck, who was traveling in the opposite direction, north, and had just previously slowed down to enable plaintiff to cross in front of his machine. The actual occurrence is narrated by defendant, his brother, who was riding with him, and Mr. Rinderneck.

Plaintiff testified that she had safely crossed Webster street from west to east, searching for a certain vine-covered house. Not finding it, she turned and started to retrace her steps, hesitating at the east curb with the intention of crossing again to the west side of Webster street. As a result of the accident, however, she suffered a complete lapse of memory as to what happened between that moment and her awakening in the hospital. She testified that the last thing she recalled was that she stood on the curb and looked to the right and left preparatory to stepping into the street.

[1] Appellant complains of the insufficiency of the evidence to prove negligence on his part, and further contends that the negligence of plaintiff contributed proximately to the happening of the accident. On these points we are concluded by the verdict of the jury. Plaintiff's loss of memory, coupled with other uncertain and conflicting testimony, leaves the record in such a state that it is impossible for an appellate tribunal to say from examination of it, who was or was not negligent, but plain it is that a finding by the jury either way would have had support. It can by no means be said that there is not competent evidence of negligence on the part of defendant sufficient to justify the verdict; neither can it be said that the record is so clear as to establish any contributory negligence whatsoever on the part of plaintiff. In short, these were questions for solution by the jury and its conclusion is final.

Errors of law are assigned by appellant in connection with the admission of testimony and alleged prejudicial conduct of the trial court in his attitude and remarks relative thereto, and in the giving of alleged erroneous instructions.

[2] During the trial, pursuant to stipulation, counsel for plaintiff introduced and was reading in evidence the deposition of defendant, when defendant's counsel interrupted to ask the judge to look at the next 10 or 15 questions and answers, saying:

> "We will object to the reading of them to the jury, as incompetent, irrelevant, and immaterial."

Accordingly, certain testimony, not appearing in the record, was omitted and the reading then resumed. The questions and answers immediately following the omission disclosed the fact that defendant carried insurance; that he had reported the accident to the police and thereafter to the insurance company; and that he had referred plaintiff to said insurance company, placing the entire matter in its hands. Counsel for defendant thereupon again objected and moved to strike out said testimony. The motion was granted and the jury was informed as to the matter stricken out. Counsel persisted in his statement that he was not satisfied and the following colloquy ensued:

> "The Court: Do you want the jury discharged?
>
> "Mr. Gallagher: Yes.
>
> "The Court: I just wanted to see how far you would go in the case.
>
> "Mr. Gallagher: I take an exception to the remarks of the court.
>
> "The Court: Ladies and gentlemen of the jury, the court has stricken out certain testimony to which counsel has addressed himself in objecting to the testimony. You are not to consider it for any purpose in this case, nor are you to consider the remarks of counsel on either side in connection with it, nor the remarks of the court, as evidence in this case."

Assuming, first, for the purposes of this discussion, that said testimony was legally objectionable, the circumstances reveal no prejudicial error. It is apparent that counsel failed to make clear to the court, prior to reading thereof, exactly what portions of the deposition he wished omitted. Had he properly marked such passages and submitted them for a ruling, the matter of insurance might not have gone before the jury. No blame attaches to plaintiff for such neglect in this respect. Furthermore, not only were the objections sustained and the motion to strike granted, but the jury was first directed, and subsequently admonished in even stronger language, to disregard the evidence stricken out and the remarks of court and counsel. In addition, to prevent any possible misconception or prejudice remaining in the minds of the jurors, two full and complete instructions on the subject were given, directing them to discard entirely from their thought whatever discussion was had between court and counsel, and all the evidence in question, and charging them that under their oaths it was their solemn duty not to permit the fact that an insurance company had been mentioned to influence their verdict in the slightest degree.

[3] The fact that this testimony contained, in addition to unobjectionable matter, references to the insurance of defendant did not necessarily make it inadmissible for all purposes. It is true that the court frowns upon any attempt to show that a defendant carries indemnity insurance, but where, as here, there is an entire absence of any indication whatsoever of lack of good faith on the part of plaintiff, evidence of this character, as an admission against interest, or for certain other purposes, may be received, notwithstanding the fact that it contains material which under other circumstances would be objectionable. Upham Co. v. United States, etc., Co., 59 Cal. App. 606, 610, 211 P. 809. See, also, McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23, treating of the very situation here under consideration.

[4] The complaint in this case alleged that plaintiff suffered the following injuries: Severe concussion of the brain, deep laceration of forehead over the left eye, L-shaped, extending down across eyebrow; severe contusions of chest, left cheek, arms and legs; great physical pain and anguish; severe shock to nervous system—as a result of which she believed she would be permanently injured and disfigured. These allegations were broad enough to permit of the admission, over defendant's objection, of testimony to the effect that by reason of the accident plaintiff had two teeth knocked out, shoulders, neck, head and throat made black and blue, and suffered for the first three days a complete lapse of memory, with forgetfulness recurring at intervals thereafter. Lauder v. Currier, 3 Cal. App. 28, 84 P. 217; Martin v. Pacific Gas & Electric Co. (Cal. Sup.) 264 P. 246, and cases therein cited.

[5] Appellant contends that under the authority of McPherson v. Walling, 58 Cal. App. 563, 209 P. 209, the giving of the following instruction constituted reversible error in that it disregarded the doctrine of contributory negligence:

> "I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations."

We believe no error was committed in the giving of this instruction. It contains the very element which was found to be lacking in the instruction disapproved in the McPherson Case; that is, it is especially limited to "a person lawfully and carefully using a street." As is said in that case:

> "Where no question exists as to the lawfulness of the plaintiff's acts it may be proper to instruct the jury that 'the general rule is that every person has a right to presume that every other person will perform his duty and obey the law. * * *'"

Furthermore, in the instant case, the jury was fully informed with respect to all phases of contributory negligence by numerous other instructions.

Appellant criticizes two other instructions. The first, a lengthy one, it is unnecessary to quote. The attack is directed against a portion of it only when separated from the full context. When read in its entirety, the plain meaning of the instruction is apparent, and it is not subject to the interpretation or objections urged by appellant. The other instruction mentioned has not our unqualified approval and it would have been better to have omitted it; still, it does not appear that the substantial rights of the defendant were prejudiced thereby or that the giving of it constituted reversible error. It is to be noted that in the case of Mulholland v. Western, etc., Co., 21 Cal. App. 44, 52, 131 P. 110, 113, on an application to transfer, this court, in a divided opinion, held said instruction to be not erroneous.

[6, 7] The court further instructed the jury:

> "The Motor Vehicle Law also provides as follows: 'Every motor vehicle when operated upon the public highways shall be equipped with a bell, gong or horn in good working order capable of emitting sound audible under normal conditions for a distance of not less than two hundred feet' [St. 1923, p. 545, § 95, subd. a]. It is the duty of the driver of an automobile to give notice of the approach of said automobile towards pedestrians or other vehicles using the same highway by seasonable warning signal such as sounding a horn in sufficient time to give timely warning to other persons using said street of the approach of said automobile and a failure to comply with this requirement of law constitutes negligence in itself. If you find from the evidence in this case that the defendant failed to comply with this requirement of law, and that such failure was the proximate cause of the injury herein complained of, while plaintiff was in the exercise of ordinary care, then your verdict must be * * * in favor of the plaintiff. * * *"

Appellant contends that this instruction told the jury in effect that his failure, if any, to sound a horn was a violation of law and of the duty resting upon a motorist to sound it upon approaching every intersection in use by pedestrians, whereas the actual requirement of law is only that vehicles be equipped with horn, or other similar device, and the duty of a motorist is only to blow such horn when it appears to be necessary. There was testimony tending to show that plaintiff saw the machine bearing down upon her, and there was also testimony that, intent upon avoiding puddles in the street, she kept her eyes to the ground and was totally oblivious of its approach. It was, therefore, for the jury to determine whether appellant in fact failed to sound a horn and, if he did fail to sound it, whether, under the circumstances as disclosed by the evidence, such failure constituted negligence on his part. The instruction complained of might have been more carefully worded. However, it contains a saving clause which limits the duty of a motorist to the giving of a "seasonable warning signal." This was as much as to say that it was a duty to sound the horn only when the circumstances were such as to require that notice or timely warning be given of approaching danger, but did not necessarily imply that it was a violation of law to neglect to sound it at every intersection in use by pedestrians. Furthermore, it is our opinion that the giving of said instruction, in connection with all the other instructions, did not result in any miscarriage of justice.

The other points urged by appellant, including his further criticisms of instructions, relate to alleged defects so slight as to be unworthy of prolonged discussion. We have carefully considered them all and find none which constitute reversible error.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.

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203 Cal. 721

BRYANT v. KELLY et al. (L. A. 10091.)

Supreme Court of California. March 28, 1928.

1. **Appeal and error 🔑102, 103—Orders sustaining demurrer to complaint and striking out certain portions thereof are not appealable.**

Orders sustaining demurrer to amended complaint and striking out certain portions of amended complaint do not constitute appealable orders.

2. **Appeal and error 🔑640—Appeal will not be dismissed because request for transcript was defective, where proper and sufficient transcript was duly presented.**

Where request for transcript is merely defective and a proper and sufficient transcript is duly presented, Supreme Court will not dismiss appeal for that reason.

3. **Appeal and error 🔑939—It will be presumed that appellant has pointed out portions of record relied on for reversal (Code Civ. Proc. § 953c).**

It will be presumed that an appellant has complied with Code Civ. Proc. § 953c, requiring that attention of court must be called to such portions of record relied on to justify a reversal, though on failure to do so appellant incurs risk that judgment on order appealed from may be affirmed on motion.

4. **Appeal and error 🔑1126—Judgment will be affirmed on motion, where appellant printed but 8 short extracts from 190-page record (Code Civ. Proc. § 953c).**

Where record on appeal under Code Civ. Proc. § 953c, consisted of 190 typewritten pages, and amended complaint covered 34 pages thereof without exhibits attached, and appellant printed in his brief only 8 very short extracts from record, all being fragmentary quotations from exhibits, judgment will be affirmed on motion for failure to point out portions of record on which reliance was had for reversal.

5. **Appeal and error 🔑1127—Motions to affirm judgment for failure to print portions of record relied on for reversal are determined according to facts of case (Code Civ. Proc. § 953c).**

Motions to affirm judgments for failure to print portions of record that were relied on for reversal, as required by Code Civ. Proc. § 953c, are granted or denied according to peculiar facts of each case.

In Bank.

Appeals from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by W. J. Bryant against Herbert C. Kelly and others. From an order sustaining a demurrer to the amended complaint and an order striking out certain portions of the amended complaint, and from a judgment for defendants after demurrer was sustained without leave to amend, plaintiffs separately appeal. On motion to dismiss appeals and affirm judgment. Motions granted.

A. G. Reily, of Los Angeles, for appellant.

Herbert C. Kelly, of San Diego, for respondents.

WASTE, C. J. [1] The respondents move to dismiss three appeals, to wit, an appeal from an order sustaining a demurrer to the amended complaint, an appeal from an order striking out certain portions of the amended complaint, and an appeal from the judgment entered after demurrer sustained without leave to amend. The respondents move to dismiss the first two appeals upon the ground that the orders therein concerned are not appealable orders. In making this contention, the respondents are correct. 2 Cal. Jur. pp. 156, 157.

[2] It is urged that the appeal from the judgment should be dismissed, or the judgment affirmed, upon the ground that no tran-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

script had been filed within the time required; that the transcript on file is not properly indexed; and that no part of the record has been printed in appellant's brief, or in any supplement appended thereto. The appellant filed two separate and distinct notices of appeal, the first stating that he appealed from the two nonappealable orders above referred to; the second, that he appealed from the judgment there rendered. It appears, however, that appellant filed but one request for a transcript, that filed in connection with the attempted appeal from the nonappealable orders. Respondents urge, therefore, that there is no transcript properly before the court in connection with the appeal from the judgment. The cases relied on, Goyhinech v. Goyhinech, 80 Cal. 410, 22 P. 175, and Soule Co. v. Severtson, 68 Cal. App. 46, 228 P. 351, correctly state the rule when applied to the facts there involved, but are not applicable to this appeal. There is here but the one appealing party, and there is before the court a transcript of the proceedings had in the lower court which fully enables this court to pass upon the merits of the appeal from the judgment. Where the request for a transcript is merely defective, and a proper and sufficient transcript is duly presented, we will not dismiss the appeal for that reason. Lynch v. Coe (Cal. Sup.) 264 P. 747.

The index to the transcript is, it is true, somewhat meager; still it is an index, and draws attention to the principal portions of the record.

[3, 4] Respondents' further motion to dismiss the appeal from, or to affirm, the judgment is made upon the ground that the appellant had not complied with the requirements of section 953c of the Code of Civil Procedure, which provides that, in filing briefs on appeals, taken on a typewritten record, the parties must print in their briefs, or in supplements appended thereto, such portions of the record as they desire to call to the attention of the court, and on which they rely to justify a reversal of the judgment or order appealed from. It will be presumed that an appellant has done so (Schurman v. Look, 190 Cal. 113, 210 P. 816), but if he fails to do so he incurs thereby the risk that the judgment or order appealed from may be affirmed on motion (Jeffords v. Young, 197 Cal. 224, 229, 239 P. 1054). The record on appeal in this case consists of 190 typewritten pages. The amended complaint covers 34 pages without the exhibits attached thereto, one of which, comprising the clerk's and reporter's transcripts of the proceedings in a former action, including a number of exhibits, consists of 133 pages. Yet the appellant has printed in his brief but 8 very short extracts from the record, all of them being fragmentary quotations from the exhibits to the amended complaint. Appellant must be credulous to think that the court can be induced by him to believe that this "little leaven leaveneth the whole lump." We are not called upon to make an independent examination of the record necessary to determine whether or not it does.

[5] Motions to affirm judgments for failure to print, as required by section 953c, supra, are granted or denied according to the peculiar facts of each case. For a decision involving the point in this case last discussed, see Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290.

Respondents' motion to dismiss the appeal from the order sustaining defendants' demurrer to the amended complaint, and to dismiss the appeal from the order granting the motion of defendants to strike out certain portions of the amended complaint, are, and each is, granted. The motion to affirm the judgment is also granted.

We concur: LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.

203 Cal. 628

PEOPLE v. ELY. (Cr. 3050.)

Supreme Court of California. March 20, 1928.

1. Automobiles 🔑357—Refusal to instruct to acquit driver of failing to aid one struck by his automobile unless he had guilty knowledge held prejudicial error (Vehicle Act, § 141; Pen. Code, § 367c).

In a prosecution of an automobile driver for failing to stop and render aid to one struck by his automobile, as required by Pen. Code, § 367c, and Vehicle Act, § 141 (Deering's Gen. Laws 1923, Act 5128), refusing to instruct that the prosecution must establish beyond reasonable doubt that defendant knew he had struck a person, and, if not satisfied thereof beyond reasonable doubt, to find defendant not guilty, *held* prejudicial error.

2. Automobiles 🔑354—Evidence of condition of bumper after striking deceased held not inadmissible because bumper was not shown to be in same condition before accident.

In a prosecution of an automobile driver for failing to stop and render aid to one struck by his automobile, refusal to strike testimony that there were marks on the bumper such as would be made by striking clothing like that worn by deceased, on the ground that there was no testimony that the bumper was not in the same condition before the accident, *held* not error; objection going solely to the weight of the testimony.

3. Criminal law 🔑388—Testimony respecting experiments rests largely in court's discretion, and substantially same conditions must be shown.

The reception or rejection in a criminal case of testimony respecting experiments rests largely within the discretion of the trial court, but it must be shown that substantially the same conditions existed, and the evidence must be of such a character as to aid the jurors, rather than to confuse their minds with collateral matters.

4. Criminal law ⚷388—Excluding testimony as to experiment held not error, in absence of showing similarity of conditions.

In a criminal case, where there was no attempt to show that the circumstances surrounding an experiment were similar to those which existed at the time of the accident, resulting in death of deceased when struck by defendant's automobile, it was not error to exclude testimony as to what witness had found by an experiment respecting the impression that would be made upon automobile bumpers by corduroy.

5. Automobiles ⚷355(8)—Conviction of automobile driver failing to aid one struck held sustained by evidence (Vehicle Act, § 141).

In a prosecution of an automobile driver for failing to stop and render aid to one struck by his automobile, as required by Vehicle Act, § 141 (Deering's Gen. Laws 1923, Act 5128), evidence *held* sufficient to sustain conviction as against contention of uncertainty in name of deceased.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

R. H. Ely was convicted of failing to stop and render aid to one struck by an automobile driven by him, and he appeals. Reversed.

Superseding opinion in District Court of Appeal (258 P. 146).

Honnold & Hubbell, of Escondido, for appellant.

Stephen Connell and James H. McKinney, both of San Diego, U. S. Webb, Atty. Gen., John L. Flynn and John D. Richer, Deputy Attys. Gen., for the People.

CURTIS, J. By the information filed against the defendant in this action he was charged with driving an automobile which struck a human being, to wit, Isaac Pupkin, and said defendant failed to stop his automobile and render assistance to said Isaac Pupkin, "So struck as aforesaid." Upon this charge he was tried and found guilty by a jury, and from the judgment of conviction, entered upon the verdict of the jury, and, from an order denying his motion for a new trial, he appealed to the District Court of Appeal, which affirmed the judgment. 258 P. 146. The appellant thereupon presented to this court a petition for a hearing of his said appeal by this court, which petition was granted.

[1] In most respects we are in accord with the opinion of the District Court of Appeal rendered herein, but are not able to agree with that portion of said opinion holding that it was not prejudicial error on the part of the trial court to refuse to give the following instruction requested by the appellant:

> "The prosecution must establish beyond a reasonable doubt that the defendant knew he had struck a person. The guilty knowledge of defendant is as material to the prosecution as any other element of the offense charged, and, if you are not satisfied beyond a reasonable doubt that defendant had such knowledge, you must find the defendant not guilty."

There is no contention that this instruction does not contain a correct statement of the law as to the necessity of knowledge on defendant's part that he had struck a person with his automobile before he could be found guilty of failure to stop and render assistance to the person so struck, nor is there any claim that it was not error on the part of the trial court to refuse to give this instruction. The only claim made in defense of the action of the court is that the refusal to give this instruction was not prejudicial error.

The court, in its instructions to the jury, defined the crime of which appellant was charged by quoting in full section 367c of the Penal Code, excepting the last paragraph thereof, which fixes the punishment for a violation of said section. This section of the Code, in substance, provides that, whenever an automobile strikes any person, the driver thereof shall immediately cause said automobile to stop and render to the person struck all necessary assistance. By a strict interpretation of this section, standing by itself, it might be held to apply to all persons coming within the precise meaning of its terms, whether the person whose machine had struck another person had knowledge that he had struck such person or not. While it has been said that it is difficult to believe that a jury would convict an accused of a violation of the provisions of a statute similar to those of this section of the Code without being assured to a certainty that he had actual knowledge that his machine had struck another person (People v. Graves, 74 Cal. App. 415, 240 P. 1019), yet we are not prepared to say that a jury would in every case disregard the strict language of the section and render its verdict in accordance with a more liberal and correct interpretation thereof. When, therefore, the trial court was asked to instruct the jury, as it was in this case, that, before the defendant could be found guilty under this section of the Code, it must believe beyond a reasonable doubt that he had knowledge that he had struck another person, we think the better practice would have been to have given the requested instruction, and we do not feel that we can say that the appellant's substantial rights were not seriously prejudiced on account of the refusal of the court to permit such an instruction. We find no objection to the remaining portion of the opinion of the District Court of Appeal, as written by Justice Thompson. We therefore adopt as the opinion of this court the remaining portion of said opinion, which is as follows:

"The essential facts are that on the evening of September 21, 1926, at about 10:30 p. m., the defendant was traveling west on University avenue, in the city of San Diego, in company with two young ladies in a red Buick roadster without a top. Miss Boatman and Miss Hill, the young ladies in the car, testified that shortly after they turned into University avenue from another street they ran over something, and Miss Boatman asked what it was, and the defendant jokingly replied, 'A man on a bicycle.' Miss Boatman testified that, although she had noticed a noise in the motor before the time of the accident, it became worse thereafter, and when she arrived home she observed that the motor meter was broken. Both of the young ladies suggested to the defendant that he stop and investigate, to which he replied that he had seen the man pick himself up, and that he could do nothing. He did not stop. The defendant admitted the remarks attributed to him by these witnesses, and said that, while they had struck what he thought was a sewer drain, they had been joking all evening, and he made this remark in jest, laughing about it. He said that earlier in the evening some one must have backed into him and broken his motor meter, a part of which was found at the place where the man was struck, and that they had also dented the radiator and pushed it back until the fan arms were striking against it; that this was the cause of the noise referred to by the other witnesses.

"Other testimony established that a man was struck by a red roadster with its top down or off, and that on the car driven by defendant there were, in addition to the damage to the radiator and motor meter, marks on the bumper indicating that they had been made by striking corduroy clothing, such as that worn by the man who was struck and killed. Hair and pieces of thread were also found under the car on the battery box.

[2] "The appellant bases his appeal upon several grounds, the first of which is that the court erred in refusing to strike out the testimony that there were marks on the bumper such as would be made by striking clothing like that worn by the deceased. The ground urged by defendant as the reason for requesting his testimony be stricken at the time of trial was that there was no testimony to show that the bumper was not in the same condition prior to the time of the accident. Such objections run solely to the weight to be attached by the jury to the testimony, and is not a ground for its entire exclusion.

[3, 4] "The next objection is somewhat related to the one just mentioned. During the examination of the defendant he was asked by his counsel if he had made an experiment on dusty bumpers with a piece of corduroy, and, this question being answered in the affirmative, he was asked to tell the jury what he had found out about the impression that would be made upon the bumper by corduroy 'when it was pressed lightly or when it was struck a heavy blow.' An objection was interposed, and was sustained, on the ground that the proffered testimony was incompetent, irrelevant, and immaterial. We find no error in the ruling. The testimony comes within the class of testimony designated as experiments, which, when shown to have been made under the same conditions as those existing in the case itself, are admitted. The reception or rejection of such testimony lies largely within the discretion of the trial court, with this limitation—that it must be shown that substantially the same conditions existed, and, further, that the evidence shall be of such a character as to aid rather than to confuse the minds of the jurors with collateral matters. People v. Woon Tuck Wo, 120 Cal. 294, 52 P. 833; Western S. B. Co. v. O'Brien, 49 Cal. App. 707, 194 P. 72. It is apparent that the experiment could not well have been conducted under similar conditions with those of the accident without danger of a homicide; furthermore, there was no attempt to show that the surrounding circumstances were similar. * * *

[5] "The other reasons assigned for the reversal of the judgment are, in effect, that the evidence is not sufficient to sustain the verdict, and particularly in this, that uncertainty exists as to the name of the deceased, and that the circumstantial evidence is consistent with the theory of innocence. * * * In so far as the name is concerned, Officer Lindsey testified that after the injury he discovered the man's name to be Pipkin, which he later corrected to Pupkin. Under the rule announced in People v. Foster, 198 Cal. 112, 243 P. 667, the correct name of the injured person may not be of serious consequence, but, regardless of that rule, we think the name of the deceased was sufficiently supplied in the case at bar."

From the recital of the facts as contained herein, we think there was sufficient evidence to support a verdict of guilty, and we would not be disposed to disturb the determination of the jury upon that ground, but, on account of the error of the trial court in refusing to instruct the jury that it was necessary for the prosecution to prove knowledge on the part of the appellant before he could be found guilty of the charge against him, the verdict cannot be upheld.

The judgment and order are reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

203 Cal. 712

WARD v. SAN DIEGO SCHOOL DIST. et al.
(L. A. 8352.)

Supreme Court of California. March 28, 1928.

1. Schools and school districts 🔑79—As regards right to employ private counsel, board of education members held not "city officers," within charter requiring assistance of city attorney (Pol. Code, § 1576; San Diego Charter art. 3, c. 5, § 2).

As regards right of school district to employ counsel to defend litigation, Pol. Code, § 1576, providing that each city forms a school district, creates a school district as a public corporation separate from the city, so that board of education members are not "city officers" within San Diego Charter (St. 1889, p. 664) art. 3, c. 5, § 2, requiring city attorney to assist city officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, City Officer.]

2. Schools and school districts 🔑78—As regards right to employ private counsel, city held not "legally interested" in district's litigation requiring city attorney to assist (Pol. Code, § 1576; San Diego Charter, art. 3, c. 5, § 2).

As regards right of school district to employ counsel to defend litigation, Pol. Code, § 1576, making every incorporated city a school district, creates a school district as a separate entity, so that city of San Diego was not "legally interested" in district's litigation within charter (St. 1889, p. 664) art. 3, c. 5, § 2, requiring city attorney to assist in suits and matters in which the city might be "legally interested."

3. Corporations 🔑499—Corporation has implied power to sue and be sued.

It is one of the implied powers of a corporation that it may sue and be sued.

4. Schools and school districts 🔑78—School district has implied power to employ counsel in defending litigation.

In defending litigation, a school district has the implied right to have the assistance of, and the power to employ, counsel.

5. Schools and school districts 🔑78—Where counsel who should defend litigation for school district refuses to act, district may employ other counsel.

If the counsel, to whom by statute a school district is legally entitled to have to defend litigation, refuses to act, the district has the power to employ other counsel.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by M. L. Ward against the San Diego School District in San Diego County, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Adopting opinion of District Court of Appeal in 259 P. 349.

S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for appellants.

Ward, Ward & Ward, of San Diego, for respondent.

PER CURIAM. A hearing was granted by this court after decision by the District Court of Appeal, in and for the Second Appellate District, Division 1, affirming the judgment of the trial court. Upon a full and careful reconsideration of the questions involved in this appeal, we are of the opinion that the District Court of Appeal was correct in its reasoning and conclusion upon the merits of this appeal. We therefore hereby adopt the opinion of that court, written by Mr. Justice Houser, affirming said judgment, which opinion reads as follows:

The appeal herein was taken from a judgment rendered in favor of the plaintiff and against the defendants in an action brought to recover the sum of $2,250, which was the unpaid balance due on a contract for legal services rendered by plaintiff to the defendants in connection with the defense of certain litigation which arose from the construction of a school building by the defendant school district.

It is contended by the appellants that neither the San Diego school district nor its representatives had any authority, either express or implied, to employ the plaintiff or any other attorney to represent it in any litigation, but that, in any litigation which might arise concerning either the rights or the liabilities of said school district, either the city attorney of the city of San Diego, or the district attorney of the county of San Diego, was the proper attorney to represent the San Diego school district and the members of its board of education.

The record discloses that the district attorney of the county of San Diego refused to represent the defendants in the litigation in question; and, because it was generally understood that it was no part of the duty of the city attorney to represent the defendants in any way, no request was made that he do so in the litigation which forms the basis for the judgment in the action upon which the appeal herein is predicated.

The decision of the questions here involved primarily depends upon the statutes relating thereto, together with such charter provisions of the city of San Diego as may be applicable. For the purpose of this decision only, it may be conceded that, while no statute expressly authorizes or directs either the city attorney of said city, or the district attorney of the county of San Diego, to assume charge of litigation in which a board of education is directly interested, certain statutes, as distinguished from charter provisions, at least indicate that the duty rested with such district attorney, rather than with said city attorney. On the other hand, it is contended that by certain provisions of the charter of the city of San Diego (Stats. 1889, p. 664), the city attorney is impliedly charged with the duty of such representation. Article 3, c. 5, § 2, of the San Diego charter is as follows:

> "It shall be the duty of the city attorney to prosecute, in behalf of the people, all criminal cases arising upon violations of the provisions of this charter and city ordinances, and to attend to all suits, matters, and things in which the city may be legally interested; provided, that the common council shall have control of all litigation of the city, and may employ other attorneys to take charge of any such litigation, or to assist the city attorney therein. He shall give his advice or opinion in writing whenever required by the common council, mayor, or other city officers, and shall do and perform all such things touching his office as by the common council may be required of him."

On the part of appellants, it is urged that, in accordance with the language of such charter provision requiring the city attorney to give his advice or opinion to "the common council, mayor, or other city officers, * * *" the duty of the city attorney in the litigation in question was clearly indicated. Partly in answer thereto, the respondent points to the language of such charter provision which in effect limits the duty of the city attorney to those "suits, matters, and things in which the city may be legally interested."

In order, perhaps the first thing which requires consideration, is the question of whether members of a board of education are "other city officers."

[1] Although as a matter of first impression it might appear that all officers elected by the electors of a city were necessarily "city officers," upon reflection, and possibly more mature consideration of the legal aspects involved, together with the authorities handed down by the Supreme and Appellate Courts of this state, it will become apparent that the election of the several members of the board of education is merely a preliminary means of inducting such members into their respective offices, and that, when seated therein they become, and thenceforward are, officers of a political subdivision of the state, separate and distinct from the municipality within the boundaries of which the school district is located.

In the case of Kennedy v. Miller, 97 Cal. 429, 32 P. 558, it is held that, under the provisions of section 1576 of the Political Code, every incorporated city constitutes a school district, having the powers of a public corporation wholly distinct from the municipality in which it is situated. In considering the question of whether, in accordance with a charter provision of the city of San Diego, the funds of the school district should be deposited in the city treasury of the city of San Diego, the court said in part:

> "Section 1576 of the Political Code declares that 'each county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district.' By virtue of this legislative authority, each school district becomes a public corporation (Estate of Bulmer, 59 Cal. 131; Hughes v. Ewing, 93 Cal. 414 [28 P. 1067]), and its functions and powers as such corporation are those which are given to it by the act under which it is created. The legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has by virtue of the Political Code. The city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the Legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized; and, even though the charter may purport to define the powers and duties of its municipal officers in reference to the public schools in the same language as has the Legislature in the Political Code, yet these powers and duties are referable to the legislative authority, and not to the charter."

To the same effect are City of San Diego v. Dauer, 97 Cal. 442, 32 P. 561; Hancock v. Board of Education of the City of Santa Barbara, 140 Cal. 554, 74 P. 44; Los Angeles City School Dist. v. Longden, 148 Cal. 380, 83 P. 246; Malaley v. City of Marysville, 37 Cal. App. 638, 174 P. 367; People ex rel. Williamson v. Rinner, 52 Cal. App. 747, 199 P. 1066.

In the case of Hancock v. Board of Education of the City of Santa Barbara, 140 Cal. 554, 74 P. 44, the principal of a high school brought an action on contract against the board of education. Among other things, the court said:

> "The defendant further contends that the plaintiff should have begun the action against the city of Santa Barbara, and not against the board of education. This claim is not tenable. Every city constitutes a separate school district, including such outlying territory as may be legally attached to it. Pol. Code, § 1576. * * * A city charter adopted under the provisions of the Constitution has no effect whatever upon the existence or legal character of a school district formed under the general law. The school system is a matter of general concern, and not a municipal affair. Kennedy v. Miller, 97 Cal. 434 [32 P. 558]. The function of the city under the charter is simply to furnish the officers who compose the governing body of the district, and, when the new charter was adopted, the former board of school trustees was superseded as the governing body by the city board of education. * * *"

[2] The only authority which might be interpreted as being in any manner opposed to the views of the appellate courts as expressed in the cases hereinbefore cited, is that of Ackerman v. Moody, 38 Cal. App. 461, 176 P. 696, which case ultimately involved solely the

question of whether a recall of members of the board of education was a municipal affair. It was there held that under the charter of the city of San Diego the right vested in said city not only to elect the members of the board of education, but to recall them as well. While in the course of the opinion some language may be found which in its tenor may be construed as out of harmony with that heretofore quoted herein as affecting the question of whether members of a board of education are "other city officers," upon consideration of the several cases to which reference has been had it will appear that, because of the unanimity of the several opinions to the effect that a school district is a corporate entity separate and distinct from the municipal corporation, it would necessarily follow that the officers of the San Diego school district were not "other city officers" of the city of San Diego, and, consequently, not within the purview of the provisions of the city charter which prescribes the duties of the city attorney with reference to the persons or officials whom he shall counsel and advise. Those cases, especially the cases of Kennedy v. Miller, 97 Cal. 429, 32 P. 558, City of San Diego v. Dauer, 97 Cal. 442, 32 P. 561, and Hancock v. Board of Education of the City of Santa Barbara, 140 Cal. 554, 74 P. 44, are likewise convincing, if not conclusive, authority to the effect that in the circumstances surrounding the instant case the city of San Diego was in no wise "legally interested"—which fact, according to the charter provision of the city of San Diego, was a prerequisite to the proper assumption by the city attorney of the duty of defending the litigation which was the basis of the employment of the respondent.

To revert to the case of Kennedy v. Miller, 97 Cal. 429, 32 P. 558, a reading thereof discloses the fact that therein the city of San Diego was seeking to compel the county treasurer of the county of San Diego to deposit with the city treasurer of the city of San Diego certain moneys then in the custody of such county treasurer, which had been derived in part from the public school fund and apportioned to the San Diego school district. Although the city charter expressly provided for the eventual custody of such funds in the city treasury, the ruling by the Supreme Court was to the effect that such provision did not supersede the requirements of the Political Code that all moneys belonging to the school fund should be paid into the county treasury.

In the Dauer Case, supra, 97 Cal. 442, 32 P. 561, the city of San Diego sought to enjoin the county treasurer of the county of San Diego from paying out of school funds a warrant for the salary of the superintendent of public schools of the city of San Diego. In the course of the opinion it is said:

> "These moneys are in the treasury [of the county] to the credit of the school district, and the city of San Diego, as a municipal corporation, has no interest therein."

It therefore becomes manifest that, as to each of the two requirements specified in the charter provision of the city of San Diego to which reference has been had, no duty was enjoined upon the city attorney to represent the school district in the litigation in question. If the city of San Diego was in no wise "legally interested" in the funds belonging to the school district, the injection by the city of its attorney into the litigation, while in no sense a gratuitous act, could be of no other or different effect than would legally result from a like attempted interference upon the part of a private individual, similarly situated so far as lack of legal interest in the litigation was concerned.

[3-5] The question of whether it was the duty of the district attorney of the county of San Diego to defend in the action brought against the board of education is not involved in this controversy; but, if it were here involved, it need only be said that the record discloses the admitted fact that such district attorney "refused to represent the school district in such litigation and advised the representatives of the school district to employ private counsel therein." In such circumstances the only recourse left to the board of education was either to permit judgment to be entered against it, or to follow the suggestion of the district attorney and engage an attorney to care for its interest in the action in question. Faced by such a situation, the only concern of the school district in the premises was whether it possessed the corporate power to employ counsel. With reference thereto, in the absence of express authority, it is conceded, alike by judicial authority and by text-writers, that one of the implied powers of a corporation is to sue and to be sued. While every man is presumed to know the law and authorized to represent himself in legal proceedings, as a matter of common knowledge it is almost universally accepted that such a presumption is nothing less than legal fiction, and that as a matter of fact the trained lawyer who assumes to appear for himself in litigation to which he is a party is but poorly represented. If the corporation had the implied power to become a party to the action, the incidental power therewith connected is the right to have advice of counsel. If the counsel to which by statute it is legally entitled refuse to act, its plainly authorized remedy is to employ other counsel.

The case of Denman v. Webster, 139 Cal. 452, 73 P. 139, is cited by appellants herein as an authority to the effect that no implied power to employ counsel exists in a corporation of the character of that here considered. A reading of that case, however, discloses the fact, that, in terms, but one justice of the Supreme Court insisted that such was the rule, and even he admitted the existence of such power "under certain circumstances." Without writing an opinion thereon, a second justice of the Supreme Court concurred in the view expressed in the opinion by the first justice. In a concurring opinion by a third justice of the court, it is said that—

> "It [the school board] cannot in such a case employ other counsel until it has exhausted every means available to it to procure the services of the attorney provided by public authority to act for it without expense."

A fourth justice in effect concurred in such opinion. In a dissenting opinion, which was written by a fifth justice and concurred in by two other justices, it is said:

> "* * * It is quite apparent that in performing many of these duties [thereinbefore enumerated] the board may not be able to escape litigation. It may be sued on a contract for supplies where the contractor had violated the contract, and where it is the plain duty of the board to refuse payment; it may be sued to recover a school lot or other property under its control; it may be compelled itself to institute an action for the protection of such property, or to remove obstructions in the way of performance of its duties. The records of this court show numerous instances of litigation into which boards of education have been forced, and the right of such boards to sue and be sued has been universally recognized. See cases cited in the opinion of the court in Mitchell v. Board of Education, 137 Cal. 375 [70 P. 180]. From the nature of the duties imposed upon the board, as above stated, and its right to sue and its subjection to the burden of being sued, it has the clearly implied power, in certain cases at least, to employ an attorney to prosecute or defend an action or proceeding to which it is a party. And we think that the action described in the complaint was a proper case for the exercise of that power. * * *"

The implied power of a school board, at least "under certain circumstances," to employ counsel, thus becomes the unanimous opinion of the members of the court. As is expressly stated therein, the controversy before the court did not involve the school board, as a corporation, but concerned only certain members of the board in opposition to another person claiming to be a member thereof. The language of the prevailing opinion with reference thereto is as follows:

> "The contest here was in reality one between certain individuals claiming to be the only members of the board and another individual claiming to be also a member."

In the instant case the school board, as a corporation, was the only party interested in the litigation. Other than the statement in the concurring opinion that "it (the school board) cannot in such a case employ other counsel until it has exhausted every means available to it to procure the services of the attorney provided by public authority to act for it without expense," what circumstances could be more potent than the refusal to act by the attorney whose legally specified duty it was to do so is not pointed out in the Denman Case. It is manifest that, by a proper request that the district attorney perform his assumed duty and by his refusal to do so, everything that was practicable had been done which might have been done in the premises to procure the assistance and advice of such counsel as was presumably provided by statute. The only possible recourse remaining to the school board was that of some sort of a legal proceeding to compel the district attorney to perform his duty. But clearly such a course likewise would have involved the necessity of employing an attorney, which fact, with the element of certain and disastrous delay and in the end, uncertainty of successful outcome, presented obstacles which we think fairly brought the case within the situation denominated by the writer of the prevailing opinion in the Denman Case, namely, "certain circumstances," which warranted and justified the exercise by the corporation of its implied and incidental power of employing counsel.

The judgment is affirmed.

203 Cal. 676

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 9991.)★

Supreme Court of California. March 27, 1928.

Rehearing Denied April 26, 1928.

1. Constitutional law ⚷48—Court must give effect to statutes, unless clearly unconstitutional.

It must be the policy of the Supreme Court to give force and effect to the statutes of the state, unless clearly unconstitutional.

2. Admiralty ⚷21—Proceeding for compensation for death of spare skipper of pleasure-fishing vessel by drowning in navigable water held not within exclusive admiralty cognizance (Workmen's Compensation Act).

Proceeding under Workmen's Compensation Act (St. 1913, p. 279, as amended), for death of spare skipper of pleasure-fishing vessel by drowning in navigable waters *held* within purview of such act and not within exclusive cognizance of court of admiralty; action not being brought to recover damages for tort, but solely for compensation under such statute.

In Bank.

Proceeding under the Workmen's Compensation Act by Sarah Jane Brooke and another for compensation for the death of John James Uttley Brooke, employee, opposed by the Morris Pleasure Fishing, Inc., employer, and the London Guarantee & Accident Company, Limited, insurance carrier. To review an order of the Industrial Accident Commission awarding payment of burial expenses only, the insurance carrier brings certiorari. Award affirmed.

Superseding opinion of the District Court of Appeal annulling the award (256 P. 857).

E. R. Young, H. R. Kelly, and E. L. Williams, all of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

LANGDON, J. This is a proceeding in certiorari to review an award of the Industrial Accident Commission for payment of $150 for the burial expenses of John James Uttley Brooke an unmarried minor 19 years of age, who was drowned in Santa Monica Bay on April 8, 1926, while in the service of the Morris Pleasure Fishing, Inc. The petitioner was the insurance carrier of the employer; and the question presented is whether the case must be relegated to the exclusive cognizance of a court of admiralty, or may be brought within the purview of the Workmen's Compensation Act of this state.

On a petition to the Industrial Accident Commission filed by the mother and the stepfather of the deceased, hearings were had and findings made that Brooke, while employed as a spare skipper, met his death by drowning in an accident occurring in the course of, and arising out of, his employment; that he was not at the time engaged in maritime employment; and that both he and his employer were subject to the provisions of the Workmen's Compensation Act (St. 1913, p. 279, as amended). The commission further found that neither the mother nor the stepfather of the deceased was dependent upon him, and, accordingly, the award was limited to the reasonable expenses of burial, which were fixed at $150.

The evidence taken at the hearing showed the facts to be as follows: The Morris Pleasure Fishing, Inc., is a corporation which carries on the business of maintaining and operating from Santa Monica Bay a small fleet of fishing vessels for the accommodation of the public seeking recreation in deep-sea fishing. In the fishing seasons its practice has been to have excursions daily from Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, with fixed charges both for half-day and full-day trips. For use in this business the company has several vessels, ranging from 4 to 14 tons registry, equipped with gas engines and capable of cruising a distance of 500 miles. The business has been confined entirely to the maintenance of these pleasure-fishing vessels and the transportation of patrons to and fro by water, except that excursionists have also been supplied with bait. As one of the necessary incidents of its business the company employs seamen to navigate its vessels; and before and at the time of the accident which occasioned Brooke's death, he was in the company's employ as an apprentice navigator and seaman. In that capacity he made daily trips as required with the company's vessels, and at times substituted as "spare skipper" for one of the regular skippers. On April 8, 1926, one of the company's fishing vessels called "W. K.," of about seven tons registry, was moored, with no one aboard, in Santa Monica Bay about three-quarters of a mile to a mile from the pier. A storm having arisen, the vessel broke from her moorings early in the afternoon, and began to drift toward the shore. In an effort to save the vessel from destruction, Captain Morris, as Brooke's superior officer, had Brooke and another employee, named Gregory, put off from the pier with the captain himself, in a boat about 18 feet long, with the purpose in mind of boarding the "W. K." and returning her to her anchorage. But as they neared the drifting vessel, their boat was capsized by a heavy wave, and all three were drowned.

The petitioner here contends that Brooke's employer was engaged exclusively in a maritime industry, that its contract with Brooke was for maritime services alone, and that Brooke's life having been lost in such service in navigable waters of the United States, the rights and liabilities of the parties are to be determined by the general maritime law,

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★Rehearing denied.

and hence there was no jurisdiction in the Industrial Accident Commission to conduct any hearing or to grant any award.

The commission does not dispute the fact that the casualty occurred in navigable waters, but it contends that as the business of the employer was a pleasure business, there was not a maritime contract touching rights and duties pertaining to commerce or navigation in a way to invoke the rules of maritime law and exclude the case from the juridical competency of the state tribunals, and that the matter is one merely of local concern. It is asserted that the application of the state Compensation Act and the assertion of jurisdiction by the local courts in the instant case will not work any prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

The question involved here was carefully analyzed in the case of State ex rel. Cleveland Engineering Construction Co. v. Duffy et al., 113 Ohio St. 96, 148 N. E. 572, where the court says:

> "Under these contracts of employment do the rights and liabilities have a direct relation to navigation? And would the application of the local law (Compensation Act) materially affect any of the rules of the sea and thereby the uniformity which is essential to maritime law? * * * A careful examination of the range of work which the employees of plaintiff performed would seem to disclose nothing that had a direct bearing upon the maritime service, navigation, or maritime commerce, either interstate or foreign."

It is pointed out in the case last cited that there are two parallel lines of decisions, one line having its basis in the decision of the United States Supreme Court in the Jensen Case (Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900); the other having its basis in the Rohde Case (Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 42 S. Ct. 157, 66 L. R. A. 321, 25 A. L. R. 1008). The court further says:

> "A large number of cases may be cited which adopt the principle announced in Southern Pacific Co. v. Jensen, supra, but all that class of cases is founded upon some conflict of the law of the sea or maritime law with the local statute. These cases often relate to stevedores or longshoremen unloading the cargo of vessels or artisans working upon a vessel engaged in interstate or foreign trade; in fact, all of them have some direct bearing upon maritime law. On the other hand, the courts distinctly recognize a group of cases, of which Grant Smith-Porter Ship Co. v. Rohde, supra, is the leading case, all founded upon the principle that their provisions were found not to be in conflict with any essential feature of the general maritime law. Industrial Commission of N. Y. v. Nordenholt Corp., 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, is of this class; also Western Fuel Co. v. Garcia, Adm'r, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210."

It is true the decisions have made it rather difficult to ascertain the exact dividing line between casualties which are strictly maritime and those which are more properly designated as maritime or nonmaritime. It would seem that the rigor of the Jensen Case has been modified by subsequent cases and that the trend of the more recent cases is to permit the state law to operate where the employment has no direct relation to interstate or foreign commerce or navigation, notwithstanding the fact that the casualty occurs in navigable waters.

[1, 2] It must be the policy of this court to give force and effect to the statutes of the state unless they are clearly unconstitutional. The Compensation Act of this state does not conflict with any federal statute. The action was not brought to recover damages for a tort, but solely for compensation under our statute. We think the case is similar in principle to the cases of City of Oakland v. Industrial Accident Commission, 198 Cal. 273, 244 P. 353, and Alaska Packers v. Industrial Accident Commission, 200 Cal. 579, 253 P. 926.

The award of the Industrial Accident Commission is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.

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90 Cal. App. 266

PEOPLE v. RUSSELL. (Cr. 1570.)★

District Court of Appeal, Second District, Division 2, California. March 20, 1928.

Hearing Denied by Supreme Court May 17, 1928.

1. Forgery ⚿6—Defendant held not authorized to sign name of joint depositor on check as her agent.

Where husband and wife had bank account on which each was authorized to draw checks, and husband owed defendant money, and told him he might sign wife's name to check therefor, defendant was not justified in signing her name to check on theory that he was her agent.

2. Criminal law ⚿374, 1169(11)—In forgery prosecution, evidence defendant had drawn check, payment of which had been refused, held error and prejudicial, where no proof was made concerning want of funds or account in branch banks (Pen. Code, § 470).

Where in forgery prosecution, under Pen. Code, § 470, circumstances under which defendant signed name of another to and uttered a check made it doubtful as to whether he knew he violated law or honestly believed he had right to sign name of another, admission of evidence that defendant had drawn check on a bank which was presented and payment thereof refused was prejudicial error, where no proof

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★Hearing denied by Supreme Court.

was made concerning want of funds or account in branch bank.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Walter Russell was convicted of forgery, and he appeals. Reversed.

R. O. Stotter, of Long Beach, for appellant.
U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CRAIG, J. [1] The material facts as set forth in appellant's brief are that Laura Connerley and Guy Connerley, husband and wife, had a bank account with the Security Trust & Savings Bank in Los Angeles, upon which each was authorized to draw checks; that Guy Connerley owed defendant a certain amount of money and told the defendant Russell that he might sign the name "Lura Connerley" to a check therefor, "by Guy Connerley," or "Guy Connerley"; that Russell drew a check as charged in the information, and signed the name "Lura Connerley" to it.

Appellant's contention is that, since Guy Connerley could have authorized the signing of his own name, he had the right to authorize the signing of Laura Connerley's name. No authority is cited to sustain this novel proposition, and it does not appeal to us on principle. Under our statute (Pen. Code, § 470), forgery, the offense with which the defendant was charged and of which he was found guilty, is, among other things, committed by one who with intent to defraud signs the name of another person, knowing that he has no authority so to do, to any check. Under appellant's own statement of the case he had no authority to sign the name "Lura Connerley." The mere fact that both Guy and Laura Connerley had the right to draw checks on the same account would not authorize either to sign the other's name, much less to give some one else the right to do so, and counsel for appellant expressly disclaims an attempt to justify the signing of Mrs. Connerley's name upon the theory of agency for her.

[2] It was shown that the defendant had drawn a check upon the Bank of Italy at Long Beach, which was presented to the Long Beach office of that bank and refused payment. The check purported to be drawn on the "Belmont Heights Branch," although the name of another branch had apparently been crossed out. In the form of check used by the various Bank of Italy offices at Long Beach, a blank is provided in which the drawer may insert the number of the branch. This space was left blank. A witness, E. H. Appell, assistant cashier of the Long Beach office of the Bank of Italy, by whom the above facts were established, testified that there were eleven branches of the Bank of Italy in that city, that he ascertained that the check in question had been presented to the main office of the bank at Long Beach, and refused payment, by examining a record of rejected checks which showed that this check had been rejected. He admitted that this book had no reference to other branches of the Bank of Italy; that he had not examined the record of rejected checks from other branches, or obtained any other information from them as to whether or not the defendant had an account with either of them. The witness further stated that, as this check was drawn, it might have been presented to any branch of the bank at Long Beach, and, if the defendant had an account therein, would have been paid. He also testified that, although there were eleven branch offices at Long Beach, there is no central office where a list of depositors in all branches is kept, but that it is usual, if a check such as that here presented is offered to a branch in which the drawer has not an account, for the bookkeeper to telephone the other branches to ascertain if he may have an account in any of them, and if so, the check is paid by him.

A motion was made to strike out all testimony pertaining to this check and the check itself, which was denied. Upon this statement of the evidence the proof was insufficient to establish the commission by defendant of any offense having to do with the Belmont Heights branch check. It is obvious that to make the proof complete it would have been necessary to have introduced evidence tending to show that Russell had no account in any branch of the Bank of Italy at Long Beach. Respondent argues that the evidence showed that the defendant drew a check upon a nonexisting bank, but, if the testimony of the only witness by which this was sought to be proved is to be accepted, the check was in such form that it could not be said to have been drawn upon the particular branch known as "Belmont Heights Branch" alone, but really was drawn upon any branch of the Bank of Italy at Long Beach.

It follows that this evidence was inadmissible, and should have been stricken out. We think the error in this instance was prejudicial. The element of intent with which the check was signed for the making of which the defendant was under prosecution is in this case of unusual importance. If the jury believed that the defendant signed the name "Lura Connerley" with fraudulent and felonious intent, knowing he had no authority so to do, he was properly found guilty, but we think the circumstances under which the check was made and uttered were such as to make it extremely doubtful as to whether he knew that he was violating the law, or honestly believed that he had a right to sign that name. Of course, the purpose of permitting evidence of another offense of a similar character was to negative the idea that the defendant might have acted without fraudulent or felonious intent, and we think it highly probable that such evidence may have been determinative of that question in the minds of the jury. Hence the refusal of the court to grant the motion to strike was prejudicial to the substantial rights of the defendant.

The judgment is reversed.

I concur: THOMPSON, J.

WORKS, P. J. (concurring). I concur in the conclusion reached in the foregoing opinion to the effect that the trial court improperly admitted certain evidence, and I also concur in the judgment of reversal which is pronounced on that ground. Appellant presents the contention that the evidence was insufficient to support the verdict of guilt, and I think, with the evidence above mentioned out of the case, that the contention is well made, and that the insufficiency of the evidence should be assigned as an additional ground for reversal.

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90 Cal. App. 1

SUNMAID RAISIN GROWERS OF CALIFORNIA v. PAUL A. MOSESIAN & SON, Inc. (Civ. 3431.)★

District Court of Appeal, Third District, California. March 8, 1928.

Rehearing Denied April 7, 1928. Hearing Denied by Supreme Court May 7, 1928.

1. Damages 🔑163(3)—To enforce contract's provision for liquidated damages, there must be proof authorizing findings of impracticability of fixing damages otherwise.

To enforce clause of contract providing for liquidated damages, there must be proof of surrounding and attendant circumstances connected with execution of contract from which court may make findings of impracticability of fixing damages otherwise.

2. Damages 🔑83—Whether fixing actual damages for breach of contract is impracticable is fact question in each particular case.

Whether contract is such that, from nature of case, it would be impracticable or extremely difficult to fix actual damages sustained by breach, is fact question, which must be determined in each particular case.

3. Damages 🔑85—Regardless of agreement that fixing actual damages would be impracticable, stipulation for liquidated damages for contract's breach is unenforceable unless supported by facts.

Even where parties to contract by written stipulation agree that it would be impracticable or extremely difficult to fix actual damages, stipulation for liquidated damages for breach of contract cannot be enforced unless facts support it.

4. Sales 🔑418(3)—Measure of damages for refusal to sell grapes held difference between contract price and market price at nearest market (Civ. Code, §§ 3308, 3354).

Buyer's measure of damages for seller's breach of ordinary contract to sell grapes, in which seller was not accepted as member of co-operative association, under Civ. Code, §§ 3308, 3354, and where nothing had been paid on account of purchase price, is difference between value of property to buyer over amount which would have been due to seller under contract if it had been fulfilled, and value of property to buyer was price at which he might have bought such grapes in nearest market at such time after breach as would suffice, with reasonable diligence, for him to make purchase.

5. Damages 🔑85—Refusal to enforce liquidated damages provision of ordinary contract to sell grapes held proper, ascertainment of actual damages not being impractical (Civ. Code, §§ 3308, 3354).

In buyer's action for breach of ordinary contract to sell grapes, where nothing had been paid, under Civ. Code, §§ 3308, 3354, measure of damages was difference between price at nearest market and contract price, and trial court's finding that ascertaining damages suffered was not impracticable and, since no damages were proved, giving judgment for defendant seller regardless of provision in contract for liquidated damages was proper.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Sunmaid Raisin Growers of California, a corporation, against Paul A. Mosesian & Son, Inc. From a judgment for defendant, plaintiff appeals. Affirmed.

Harris, Johnson, Willey & Griffith, of Fresno, for appellant.

Barbour & Kellas, of Fresno, for respondent.

PLUMMER, J. Action by plaintiff to recover a certain sum alleged to be due as liquidated damages by virtue of a contract entered into between plaintiff's assignor and the defendant. The defendant had judgment, and the plaintiff appeals.

On or about the 25th day of April, 1923, the Sunmaid Raisin Growers, a corporation, the assignor of the plaintiff herein, and the defendant entered into a written agreement pertaining to the marketing of certain crops of raisins to be produced upon the lands of the defendant. The Sunmaid Raisin Growers, a corporation, was a corporation organized for profit, having a paid-up capital stock. The plaintiff in this action is a co-operative association organized for the marketing of raisin grapes.

The contract entered into between the Sunmaid Raisin Growers, a corporation, and the defendant, among other things, provided as follows:

★Rehearing denied. Hearing denied by Supreme Court.

> "The buyer agrees to properly manufacture and pack said raisins and thereafter sell them as rapidly as possible and pay the proceeds over to the sellers named in this and similar contracts, according to the quantities and varieties of raisins (or if Bleached Thompsons or Bleached Sultanas then according to the quantities and grades thereof) received from the respective sellers, first deducting any advance or advances previously made to them and each seller's pro rata share of all losses and expenses of the buyer incurred in its operations hereunder, including any loss incurred in handling and reselling the crop of 1922, and 7 per cent. on the capital stock of the buyer outstanding on December 31st in each year; and provided further that at the option of the buyer such payment of such excess may be made in capital stock of the buyer or in 7 per cent. preferred capital stock of the Sunmaid Growers' Association of Delaware, at par, fully paid up, at the rate of not over $4 per ton of raisins received from the seller by the buyer, and the balance in cash."

The contract further provided that the raisins purchased from the defendant should be pooled and sold with raisins of like quality purchased from other persons with whom the Sunmaid Raisin Growers' Corporation held similar contracts. There was also a provision in the contract permitting assignment by the corporation to a co-operative association in the event of the organization of such an association under the laws of the state of California. The paragraph in the contract relative to stipulated damages is as follows:

> "The parties hereto fully understanding and admitting that it will be impracticable or extremely difficult to fix the actual damages to the buyer, which will result from the breach of this contract by the seller, hereby expressly agree and stipulate that, in the event of the seller's neglect, failure, or refusal to deliver to the buyer the raisins purchased hereunder, the seller will pay to the buyer the sum of 3 cents per pound for all raisins covered hereby, and so undelivered, as liquidated damages for such breach."

The trial court found that it was not impracticable to ascertain the damages suffered, and, no damages having been proved, judgment was entered for the defendant.

The record shows that the appellant simply introduced a contract, and there rested its case on the question of damages without making any effort whatever to show the circumstances surrounding and attendant upon the execution thereof, upon which the court might base a finding of liquidated damages, the contention of the appellant being that the contract in and of itself is sufficient without further proof.

Before considering the contention of the appellant we may properly state that so far as the record discloses this is not a case which involves either the morale or prestige of a co-operative association. In a number of the cases involving the question of liquidated damages, where a member in a co-operative association has failed and neglected to deliver his crop, in allowing liquidated damages the standing of the co-operative association is considered, its prestige, the effect upon its members, if any of the members declined to perform the obligations imposed upon them by the co-operative contracts. The agreement in this case was not made with a co-operative association. It was made simply with a corporation organized for profit. There is nothing in the complaint, and not a scintilla of evidence in the record, showing that the defendant in this action is or was, at any time during the period involved, a member of the plaintiff co-operative association. So far as this action is concerned, it is simply one where a co-operative association is seeking damages from an outsider for refusing to be bound by the terms of a contract made with a corporation organized for profit, of which contract the plaintiff has become the assignee. The only evidence in the record as to membership by the defendant in the plaintiff co-operative association is found in the following sentence taken from the assignment under which the plaintiff holds, which excludes any idea of membership. It is as follows:

> "But second party shall not be deemed, by reason of this instrument or of anything contained herein, or on any other ground, or for any other reason, to have accepted any of said applications for membership."

This is in reference to the contract entered into between the plaintiff's assignor and the defendant, wherein the defendant was contracting for the handling of his grapes by the corporation in the manner set forth herein by the excerpt taken from said contract and the agreement of the defendant to deliver his grapes for a certain period of time. In fact, there is nothing in the record before us which brings this case within the decisions relative to controversies between nonprofit co-operative associations and members thereof.

[1] While a number of questions are suggested by a reading of the record, only one needs to be considered, and that is the failure of plaintiff to make out a case justifying the allowance of liquidated damages. There appears nothing in the record showing that the plaintiff was doing any business, handling raisins, expending money, incurring overhead expense, or that the failure by the defendant to deliver raisins would in any manner affect the standing or prestige of the corporation, or that the plaintiff was performing any of the acts such as appear in the record of the cases having to do with co-operative associations in this state. One of the most recent is that of the California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904, which illustrates fully how proof was made, laying the foundation for the enforcement of a clause in contracts relating

to liquidated damages. The law is well settled in this state that the allowance of liquidated damages or the enforcement of a clause in a contract providing for liquidated damages is a matter of pleading and proof. There must be proof of the surrounding and attendant circumstances connected with the execution of the contract, from which the court may make its findings of the impracticability of fixing damages otherwise.

[2] In Pacific Factor Co. v. Adler, 90 Cal. 110, 27 P. 36, 25 Am. St. Rep. 102, we find the following, which has been the accepted rule ever since the decision in that case. It is there said:

> "Whether a contract is such that 'from the nature of the case' it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof is a question of fact, which must be determined in each particular case; and for the purpose of determining this question the court must examine the attendant and surrounding circumstances under which the contract was entered into, as well as the terms of the contract itself. Parties cannot, by their arbitrary agreement, preclude such examination by the court, or avoid the provisions of the statute" (citing Patent Brick Co. v. Moore, 75 Cal. 205, 16 P. 890; Eva v. McMahon, 77 Cal. 472, 19 P. 872).

In Dyer Bros. Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445, the court, in considering a contract providing for liquidated damages and the application of sections 1670 and 1671, Civil Code, in relation thereto, ruled as follows:

> "Whether or not the damage would be impracticable or extremely difficult of precise appraisal is largely a question of fact. * * * A provision in a contract which fixes the amount of the damage in advance of a breach is void unless the parties seeking to recover the sum agreed upon shows, by pleading and proof, that the provision is within the single exception to the general rule" (citing a number of cases).

And then continues:

> "The complaint in the case at bar, after enumerating the circumstances wherein plaintiffs sustained loss occasioned by defendants' breach, alleges: 'That at all times it was and is impracticable and extremely difficult to fix the amount of damage or loss to plaintiffs or to prove the same.' This allegation, which, of course, is admitted by the demurrer, renders the complaint sufficient for the purpose of bringing the case within the exception provided by section 1671 of the Civil Code. * * * Whether plaintiffs will be able to sustain this allegation by proof is immaterial upon a consideration of the merits of the demurrers."

[3] And as said in Stark v. Shemada, 187 Cal. 785, 204 P. 214:

> "Even where the parties to the contract for liquidated damages have by written stipulation agreed that it would be impracticable and extremely difficult to fix the actual damages, if the facts do not support such stipulation it cannot be enforced."

In the case of McInerney et al. v. Mack, 34 Cal. App. 153, 166 P. 867, the rule is a little more fully set forth. It is there said:

> "In such an action as this, as a matter of defense [this was a case where the defendant relied upon a contract fixing liquidated damages], defendant must show to the court by proper pleadings and competent proof that the contract falls 'within' the law permitting liquidated damages. This does not depend entirely upon the contract itself. Facts must be pleaded and proved from which the court can say as a matter of law that the contract for liquidated damages is valid because 'from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose.'" (A number of cases are there cited supporting the rule stated.)

The rule which we have just quoted is again set forth and affirmed in the case of Hanlon Drydock, etc., Co. v. McNear, 70 Cal. App. 204, page 215, 232 P. 1002, 1007. The following decisions likewise support the rule that proof must be made, and that the contract itself is not sufficient: Poultry Producers of Central California v. Murphy, 64 Cal. App. 450, 221 P. 962, citing the case to which we have referred on page 455 (221 P. 964); Anaheim C. F. Association v. Yeoman, 51 Cal. App. 759, 197 P. 959; Thomas v. Anthony, 30 Cal. App. 217, 157 P. 823; Los Angeles Olive Growers' Association v. Pacific Surety Co., 24 Cal. App. 95, 140 P. 295. See, also, 8 Cal. Jur. 853.

[4] There is a marked distinction between cases such as the one with which we are dealing, where the defendant entered into a contract for the sale of grapes with a corporation organized for profit, and one where the contract exists between members of a co-operative organization. The life and continuance of the latter corporation is a matter of consideration in fixing damages in the event of a breach of any of its members to comply with his contract or the by-laws or articles of incorporation of the co-operative association. In the case at bar we are simply dealing with an ordinary contract for the sale of grapes. By the very terms of the instruments which we have referred to herein, the defendant was not accepted as a member of the co-operative association, and there is no proof in the record whatever of such membership ever having been established. This lays the foundation which makes applicable the following quotations from the different decisions having to do with the ordinary sale of personal property and those pertaining to co-operative associations.

In the case of Anaheim C. F. Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959, supra, the court, in considering the elements which parties would have in view in contracting for liquidated damages, uses the following language:

"The association was organized for the purpose of the better handling of citrus fruits through the co-operative and joint effort of its members. From the nature of the organization and the statement of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the co-operation of its members, mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more advantageous marketing facilities. These results would be dependent directly upon the performance by the members of their agreement to deliver their fruit into the hands of the association for the purposes declared. Defendant sought to show at the trial that the damage which would accrue to the association by reason of any of its members failing or refusing to market their fruit through the association could be easily and exactly ascertained, and that such damage would consist wholly of a proportionate amount of overhead operating cost. By the line of questioning pursued, it was made clear that the association would suffer an actual monetary loss by reason of the failure of defendant to deliver his fruit at the association packing house for market, as he had agreed to do, but in the very nature of the case we do not think that such damage should be the only damage considered to have been suffered by the plaintiff. Other elements have already been suggested. The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern."

And as said in California Bean Growers' Association v. Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904:

"If growers refuse to deliver their beans to the association, it may find it impossible to fulfill its own contracts for the sale of beans and thereby become liable in damages to the buyers thereof. If large quantities of beans are withheld by the growers and sold directly by them, the market for beans may be undermined to the detriment of all members of the association. Such conduct on the part of the growers may well imperil the very life of the association or destroy it and defeat the purposes for which it is organized."

Nothing of this kind appears in the record before us, the plaintiff electing to stand upon the contract and the assignment thereof without offering a scintilla of proof to show a situation such as was presented in the two cases just referred to.

Sections 3308 and 3354 of the Civil Code lay the basis for determining the damages, if any, suffered by the plaintiff in this case, section 3308, Civil Code, providing:

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled."

And section 3354, Civil Code, specifies that:

"In estimating damages, except" in certain cases, "the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

The case of May v. Hunt, Hatch & Co., 75 Cal. App. 283, 242 P. 735, is a case directly in point involving the breach in the sale of grapes, and there the court said:

"Where buyer paid part of purchase price, on seller's breach, buyer was entitled, under section 3308, Civil Code, to recover the excess of value of property to him, over amount which would have been due seller had contract been fulfilled," etc.

In the case at bar nothing was paid on account of the purchase price, and therefore section 3354, Civil Code, is made applicable. In the recent case of S. L. Jones & Co. v. Bond, 191 Cal. 551, 217 P. 725, where the circumstances disclosed a breach to deliver property agreed to be sold, the court said:

"The measure of the damage caused by a breach of an agreement to sell personal property, not paid for, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled, and in estimating such damages the value of the property to the buyer is to be deemed the price for which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put in his possession. Civ. Code, §§ 3308, 3354."

The opinion in that case then proceeds to set forth the manner in which proof was made.

[5] This being a case involving a breach for the sale of personal property in not making delivery, as agreed, and not involving anything further, nothing is presented which would authorize our holding that the court was in error in making the finding attacked herein.

Appellant relies upon the case of Wright v. Rodgers, 198 Cal. 137, 243 P. 866. An examination of the opinion in that case shows that it is not an authority for appellant's contention and in no wise limits the application of the rule which we have set forth and which is supported by the decisions cited, and also others from which we might quote. The case of Wright v. Rodgers turns upon section 3387 of the Civil Code relative to presumptions attendant upon a breach of contract for the transfer of real property. That section itself, when it comes to dealing with a transfer of personal property, is an authority against the contention of the appellant in this case. As to real property, the case of Wright v. Rodgers holds, in accordance with the section, that adequate compensation cannot be presumed, but that when a breach of an agreement to transfer personal property is under consideration, adequate compensation can be made—which necessitates, of course, proof that the contract for liquidated damages, in order to be enforceable, must, by the evidence introduced by the party relying thereon, show the impracticability of determining actual damages. The appellant not having introduced any proof upon which the trial court could have based a finding awarding liquidated damages, it follows that the judgment must be and the same is hereby affirmed.

We concur: FINCH, P. J.; HUGHES, Justice pro tem.

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90 Cal. App. 10

SUNMAID RAISIN GROWERS OF CALIFORNIA v. K. ARAKELIAN, INC.

(Civ. 3443.)★

District Court of Appeal, Third District, California. March 8, 1928.

Rehearing Denied April 7, 1928. Hearing Denied by Supreme Court May 7, 1928.

1. Sales ⚷418(1)—On failure to prove one sued for breach of sale contract was member of co-operative organization, principles applicable to breach of ordinary sale contract applied.

On failure to show that defendant, sued for breach of contract to sell raisins, was accepted as member of co-operative organization, principles applicable to breach of ordinary contract for sale applied, as respects damages.

2. Damages ⚷163(3)—Buyer, not showing actual damages or impracticability of fixing them, may not recover liquidated damages for seller's breach.

Buyer suing for seller's breach of contract to sell raisins, not showing actual damage or impracticability of fixing actual damages prescribed by Civ. Code, § 3308, *held* not entitled to recover liquidated damages provided by contract.

Appeal from Superior Court, Madera County; John L. Hudner, Judge.

Action by the Sunmaid Raisin Growers of California, a corporation, against K. Arakelian, Inc. From a judgment for plaintiff, defendant appeals. Reversed.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellant.

Harry M. Creech, of San Francisco, and Harris, Johnson, Willey & Griffith, and M. E. Griffith, all of Fresno, for respondent.

PER CURIAM. The plaintiff was given judgment against the defendant for $12,387.06 as liquidated damages for failure to deliver 206,451 tons of raisins produced in the year 1923. The defendant has appealed from the judgment.

The contract upon which the action is based contains substantially the same terms as the one involved in the case of Sunmaid Raisin Growers of California v. Paul A. Mosesian & Son, 265 P. 828, this day decided by this court. The last sentence in the contract reads as follows:

> "The execution of this contract by seller is also an application by the seller for membership to buyer whenever buyer may be authorized to receive the same."

The contract was entered into between the Sunmaid Raisin Growers, a capital stock corporation, and the defendant. That corporation assigned the contract to the plaintiff, a nonprofit co-operative corporation, together with about 15,000 similar contracts, by a blanket assignment. The instrument by which the assignment was effected contained covenants to be performed by the plaintiff and was signed by both the plaintiff and its assignor. It contained the following provision:

> "But the second party shall not be deemed by reason of this instrument or anything contained herein, or on any other ground, or for any other reason, to have accepted any of said applications for membership."

In the oral argument counsel for appellant said:

> "Arakelian was never a member of this corporation, this co-operative association, so-called; absolutely no proof to the effect he ever was a member of it at all. * * * To uphold the decision * * * to the effect that plaintiff was entitled to stipulated damages is to say flatly that, when a contract entered into between a capital stock company and a producer * * * provides for stipulated damages, that is enough."

In reply to this contention, counsel for respondent said:

> "We submit that Arakelain was a member of this association. He was accepted. He applied for membership by reason of the provisions of the contract itself."

[1, 2] A careful search of the record fails to disclose any proof that the plaintiff ever accepted the defendant as a member, or that the defendant ever became a member of either the plaintiff or its assignor. The complaint does not allege, and the court did not find, that the defendant was ever a member of either corporation. The case must be decided, therefore, on principles applicable to the breach of a contract executed by parties between whom no relation exists except that of buyer and seller. The measure of damages or a breach of such a contract by the seller is prescribed by section 3308 of the Civil Code. Ordinarily, it is neither impracticable nor dif-

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★Rehearing denied. Hearing denied by Supreme Court.

ficult to fix the actual damages in such a case. In this case there is no proof tending to show actual damage nor the impracticability of fixing the actual damages, except the nature and terms of the contract and the fact that the plaintiff entered into many similar contracts with other growers. Other considerations enter into the problem when a member of a nonprofit co-operative corporation breaks his contract to deliver his products to the corporation. These considerations are fully discussed in the Mosesian Case, and it is unnecessary to repeat what is there said. On the authority of that case it must be held that the plaintiff herein did not show that it would be impracticable or difficult to fix the actual damages, if any, which it suffered from the alleged breach of the contract by the defendant, and it follows that the judgment for liquidated damages cannot be affirmed.

The other grounds urged for a reversal relate to the alleged insufficiency of the evidence to justify the findings of the court on certain other issues. Since the evidence bearing upon those issues may be materially different upon a retrial of the case, it would serve no useful purpose to discuss the evidence further.

The judgment is reversed.

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90 Cal. App. 220

FRIEL v. RAWLINGS. (Civ. 6143.)

District Court of Appeal, First District, Division 2, California. March 19, 1928.

1. Executors and administrators 🔑213—Executor must reject claim against estate as to items barred by statute (Code Civ. Proc. §§ 337, 1499).

Where numerous items in claim filed against estate for services rendered deceased in her lifetime were barred by Code Civ. Proc. § 337, executor, under section 1499, had no alternative but to reject the claim as to such items.

2. Limitation of actions 🔑53(1)—Limitation as to particular items is avoided by joining all claims in cause of action on open book account.

Bar of statute of limitations as to particular items is avoided by asserting cause of action on an open book account, last items of which are not barred.

3. Executors and administrators 🔑449—In action on claim presented solely on money demand for services, containing certain outlawed items, refusal to admit book account on ground of variance, held not error, where plaintiff declined to amend complaint (Code Civ. Proc. §§ 337, 1499, 1500, and § 1880, subd. 3).

In action against estate based on claim presented on money demand for services rendered, in which certain items were barred under Code Civ. Proc. § 337, refusal of court to admit evidence of book account, not referred to in original claim, was not error, in view of sections 1499 and 1500, where plaintiff's counsel failed to take advantage of court's offer to permit amendment of complaint to support items not yet barred, and exclusion was not based on section 1880, subd. 3, there being material variance between claim as presented to executor and cause of action on book account.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Cecelia A. Friel against Thomas A. Rawlings, as executor of the estate of Lucinda E. Duffy Rawlings, deceased. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. R. Wilder and Ray H. Enter, both of Los Angeles, for appellant.

Thos. P. White and Vincent C. Hickson, both of Los Angeles, for respondent.

BURROUGHS, Presiding Justice pro tem. The trial court granted a motion for a nonsuit, and this is an appeal from the judgment entered thereon.

Plaintiff presented her claim to the executor of the estate of Lucinda E. Duffy Rawlings, deceased, which claim was in form as follows:

Estate of Lucinda E. Duffy Rawlings, Deceased, to Cecelia A. Friel, Dr.

To services rendered by Cecelia A. Friel to Lucinda E. Duffy Rawlings, at the special instance and request of said Lucinda E. Duffy Rawlings, as per itemized bill and voucher hereto attached, marked Exhibit 'A' and made a part hereof.
Total $3,527 93

Voucher—Exhibit A.

Los Angeles, Cal., April 1st, 1924.

Estate of Lucinda E. Duffy Rawlings to Cecelia A. Friel, Dr.

To services rendered at the special instance and request of Lucinda E. Duffy Rawlings, as follows:

Fumigating and housecleaning, April 20 to April 24, inclusive, 1919, @ $3.50 day......	$ 17 50
Nursing, housework, general care deceased's property April 25 to September 3, inclusive 1919, @ $125 per mo. Entire time at premises No. 4419 E. 1st, Los Angeles...........	533 28
Nursing, September 4, 1919, to February 1, 1920, inclusive, @ $125 per month. Entire time at premises No. 4419 E. 1st, Los Angeles	616 65
Grading yard, helping to construct house, wiring and remodeling on rear house 4419½ E. 1st street; paperhanging, painting and varnishing deceased's home—October 1920	200 00
Board of deceased, September 3, 1919, to February 1, 1920 @ $10 per week also light-gas-water all bills—4418 E. 1st St...	220 00
August 6, 1920, to July 9, 1921, @ $75.00 per mo., housework and nursing (part time)	832 50
Housework and part time nursing, from September 1, 1921, to May 1, 1922 @ $2.00 per da.	480 00
Nursing part time September 1, 1922, to March 15, 1923, @ $2.00 per day..............	392 00
Nursing August 10, 1923, to December 1, 1923, @ $2.00 per da.	236 00
Total amount due	$3,527 93

The claim was rejected by said executor, and in due time plaintiff commenced this action. The cause was tried upon the amended complaint and the answer thereto. So far as material to this decision, it is alleged in said complaint "that said Lucinda E. Duffy Rawlings in her lifetime became indebted to this plaintiff upon an open book account for the reasonable value of services, work, and labor performed by this plaintiff for and at the special instance and request of said Lucinda E. Duffy Rawlings."

As a second cause of action it is alleged that "within four years last past at the county of Los Angeles, state of California, the defendant, as executor aforesaid, became indebted to this plaintiff on an open book account in the sum of $3,527.93."

Defendant by his answer denied the rendition of the services alleged or their value, and, as an affirmative defense, pleaded the bar of section 337 of the Code of Civil Procedure. Upon the trial of the action the plaintiff was called as a witness in her own behalf, and her counsel endeavored to prove by her that she kept a book of accounts containing the account here sued upon. Under objections, the court refused to allow such proof, and this ruling is here assigned as prejudicial error.

It may be conceded that, if, as claimed by the appellant, the court's ruling was based upon the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, the objection would be well taken, for it has been held many times that, under said section, although a claimant against an estate of a deceased person may not testify as to any matters of fact concerning such claim occurring before the death of such deceased person, notwithstanding such inhibition, the foundation for the introduction of such account books may be laid by the testimony of the plaintiff. Among the cases so holding is Cowdery v. McChesney, 124 Cal. 363, 57 P. 221.

However, in ruling upon this offer of testimony, the court said:

> "As to your offer of proof, you can prove by her that she kept books, but you cannot prove by her entirely the correctness of those books. You may prove she kept books. No; you cannot do that because you cannot recover upon a book account."

Further conversation between the court and counsel developed the fact that the court refused to permit evidence of the book account, because the claim presented to the executor as the basis of the action was a money demand for services rendered, but without any claim or reference to a book account, and that therefore there was a material variance between the claim as presented to the executor and the cause of action stated in the complaint. For the reasons hereinafter given we have reached the conclusion that this ruling of the trial court was correct.

McGrath v. Carroll, 110 Cal. 79, 42 P. 466, was an action based upon a claim against an estate. The claim was in the form for money had and received. Upon its face it was barred by section 337 of the Code of Civil Procedure, and it was rejected by the executor. In the complaint plaintiff set up that the moneys were received and held by deceased "in trust for the use and benefit of the plaintiff." The Supreme Court held that, as the claim presented was a simple demand for money lent, and no hint or suggestion made of a trust, and the debts set out were all long barred by the statute of limitations, the executors had no discretion but to reject said claim, citing in support thereof section 1499 of the Code of Civil Procedure, and it was held that the action was unsupported by the claim presented.

Etchas v. Orena, 127 Cal. 588, 592–593, 60 P. 45, 47. The claim there presented was quantum meruit, but the proof was of the reasonable value of services rendered pursuant to an alleged broken promise to provide for the plaintiff by will. In reversing a judgment for plaintiff, the court said:

> "The claim, as presented and passed upon by the executor, was the foundation of the plaintiff's cause of action. She could not come into court and allege and prove any other or different cause of action from that stated in the claim. The executor was entitled to have the claim presented in sufficiently intelligible form to enable him to pass upon it legally. If it was founded upon a promise or agreement, under the terms of which continuous services were performed, to be paid for at the death of deceased, the claim should have so stated."

In Lichtenberg v. McGlynn, 105 Cal. 45, 47, 38 P. 541, 542, it is said:

> "The holder of a claim against the estate of a deceased person can bring an action therefor against the executors only after it has been first presented to such executors. Code Civ. Proc. § 1500. If his claim is rejected, either by them or by the judge of the superior court, he must bring a suit for the purpose of establishing its validity against the estate. In such action he can recover only upon the claim which has been so presented and rejected, and is not entitled in that action to recover against the executors for any other cause of action."

The foregoing is also approved in Morrison v. Land, 169 Cal. 580, 147 P. 259; Ruble v. Richardson, 188 Cal. 150, 204 P. 572. Indeed, by these and many other decisions, the ruling above stated has become firmly established.

[1] Viewing the instant case in the light of the foregoing decisions, the claim as presented was for services rendered deceased in her lifetime. The first six items were barred by section 337 of the Code of Civil procedure, and the executor had no alternative but to reject the claim as to these items. Sec-

tion 1499, Code Civ. Proc.; McGrath v. Carroll, supra.

[2] The cause of action upon an open book account avoided the bar of the statute of limitations. This of itself is sufficient to demonstrate that the cause of action stated in the complaint was different from the one upon which the claim presented to the executor was predicated.

[3] As to the last three items of the claim which were not barred by section 337 of the Code of Civil Procedure, the court offered to allow the plaintiff to amend her complaint and offer evidence in support of said items, but this counsel for plaintiff declined to do. The court said:

> "I told you I would allow you to amend—that is entirely up to you."
>
> "Mr. Wilder: Yes; I understand. I wish the record clear to show that we do offer at this time to prove, by an account which was kept by the plaintiff in this action, the various items referred to in the amended complaint which go to make up the entire claim."

Having failed to take advantage of the offer of the court to amend his complaint and present evidence thereunder, we are satisfied that the ruling of the court upon the evidence as offered was sound, and must be sustained.

There are several other points made for a reversal, but we are of the opinion that the foregoing covers each of said separate specifications of error.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

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90 Cal. App. 83

RIPLEY IMPROVEMENT CO. v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK et al. (Civ. 5789.)

District Court of Appeal, Second District, Division 1, California. March 12, 1928.

1. Mortgages 🔑338—Cause of action to recover sum paid to secure release of wrongful pledge of bonds held for money had and received, as against contention owner's claim did not authorize action to restrain pledgee from selling owner's property under trust deed (Code Civ. Proc. §§ 438, 440).

Where bonds after release from pledge to bank were left with bank by owner, and such bank without owner's consent pledged them to another bank to secure a loan, and owner paid value of bonds to second bank to secure them so as to perform its contract for selling bonds, owner's cause of action seeking return of sum paid to secure bonds *held* not one for conversion, but rather for money had and received, as against contention that owner's claim could not be set up as a counterclaim under Code Civ. Proc. § 438, or cross-demand under section 440, and hence was not available to enable owner to enjoin bank's sale of owner's real property under deed of trust.

2. Banks and banking 🔑153—Pledgee of bonds unlawfully pledged by bank depositary cannot exact payment of value before surrendering them to owner.

Where bonds pledged to bank by owner had been released from pledge, but were allowed to remain with bank, which pledged them to another bank to secure loan without owner's consent, second bank had no right to exact payment of value of such bonds from owner as condition of their delivery.

3. Limitation of actions 🔑28(1)—Action by owner of bonds, wrongfully pledged by depositary, for money it was required to pay to obtain them from pledgee, held action for money had and received, and not for conversion, within statutes of limitations.

Where bonds after being released from pledge to bank were left with bank by owner, and such bank wrongfully and without owner's consent pledged them to another bank to secure loan, owner of which paid value thereof to second bank to secure them in order to be able to perform contract for selling such bonds had right of action for money had and received against second bank, which was not barred by limitation period provided for bringing action for conversion.

4. Corporations 🔑425(5)—Corporation's president's unauthorized consent to pledge of corporation's bonds held not to estop corporation to enjoin sale under trust deeds by pledgee.

Where after corporation's bonds were wrongfully and without its consent pledged by bank with which they were left to another bank, corporation's president without authority wrote letter to officer of pledgee bank giving consent to pledge, corporation which had paid pledgee bank value of bonds to obtain them in order to be able to perform contract to sell them was not estopped by president's letter to enjoin pledgee bank to foreclose trust deeds securing note by corporation, on theory that pledgee bank had been lulled into sense of security until lapse of year within which under its contract with bank wrongfully pledging bonds it could recoup losses that might be incurred in taking over assets and paying liabilities of such bank.

5. Estoppel 🔑110—Estoppel must be properly pleaded.

When estoppel is relied on, it must be properly pleaded.

6. Corporations 🔑513(4)—In suit to enjoin sale under trust deeds, answer held not sufficient to allege estoppel of plaintiff to set up wrongful pledge of its bonds to defendant.

In suit to enjoin sale under trust deeds, where plaintiff corporation's bonds left with bank were wrongfully and without its consent pledged to defendant bank to secure loan, and plaintiff paid defendant value of bonds in order to secure them to be able to keep contract to sell them, answer alleging that plaintiff wrote letter to defendant stating it was willing that bonds should remain as pledge *held* insufficient to raise issue of estoppel to set up transaction in question.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Ripley Improvement Company against the Hellman Commercial Trust & Savings Bank and another for an injunction. From a judgment for plaintiff, defendants appeal. Affirmed.

Page & Hurt and Arthur F. Coe, all of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

HAHN, Justice pro tem. The action which gives rise to this appeal is one wherein plaintiff, formerly Blythe Construction Company, sought to enjoin the sale of certain lands held under trust deeds as security for the payment of two promissory notes, one for the sum of $10,000 and one for $15,000, executed by plaintiff to the defendant People's Trust & Savings Bank of Riverside. Subsequent to the filing of the suit the $10,000 note was disposed of, and the case went to trial upon the $15,000 note and the property described in the trust deed securing it. This note was dated August 14, 1918, and made payable three years after date. Judgment was rendered in favor of plaintiff, enjoining the sale of the property described in the trust deed securing said note, and also canceling the said note on the ground that the same had been fully satisfied and paid. Defendants appeal.

The following statement as to the material matters bearing on the issues involved is fully and fairly supported by the evidence as it appears in the record in the case.

Prior to August 14, 1918, plaintiff had become indebted to the defendant People's Trust & Savings Bank, a banking institution located in the city of Riverside, Cal., in the sum of $45,000, and as security for the payment of this indebtedness plaintiff executed a trust deed covering a 1,500-acre tract of land in Riverside county. As additional security for the payment of this indebtedness, plaintiff pledged with the said People's Bank 38 bonds of the California Southern Railroad Company of the par value of $1,000 each. On August 14, 1918, plaintiff, having reduced this indebtedness to $25,000, arranged with the People's Bank for a cancellation of the $45,000 note upon the execution by it of two new notes, one for $10,000 and one for $15,000, the latter being the only one involved in the controversy. This note was secured by a trust deed covering a portion of the 1,500-acre tract, which had been held as security by the bank with the $45,000 note. In arranging for the execution of the new notes, it was agreed between plaintiff and the People's Bank that the $38,000 in bonds would be released and returned to the plaintiff corporation. The old note was canceled and a reconveyance of the property made to plaintiff upon the execution of the new notes and trust deeds, but for some reason the bonds were neither delivered by the People's Bank to plaintiff nor demanded by the plaintiff. Plaintiff at that time was conducting its banking business with the People's Bank, and, as testified to by its president, felt that the bonds were safe in the bank's possession.

In July, 1919, the People's Bank, being indebted to the defendant Hellman Trust & Savings Bank in the sum of $41,500, which indebtedness was in fact evidenced by notes executed by Florence Hoxie and Flora Odell, admitted dummies for the People's Bank, deposited with the Hellman Bank as security for the aforementioned indebtedness the $38,000 of bonds, belonging to the plaintiff company. This use of the bonds by the People's Bank was without the consent or knowledge of the plaintiff. Nor was the Hellman Bank aware that the bonds belonged to the plaintiff or that the People's Bank had no right to hypothecate them. Not until July, 1921, did plaintiff discover that the bonds were held by the Hellman Bank as security for an obligation of the People's Bank. Immediately following this discovery, A. E. Warmington, the president at that time of the plaintiff company, took the matter up with the vice president of the Hellman Bank and also with the president of the People's Bank. Without any authority from the board of directors of the company, Warmington wrote a letter to the Hellman Bank at the request of its vice president, which reads as follows:

"December 24, 1920.

"Hellman Commercial Trust & Savings Bank, Los Angeles, Cal. Attention Mr. Emanuel Cohen, Vice President. Gentlemen: Some time ago we deposited with the People's Trust & Savings Bank at Riverside, Nos. 166 to 200 both inclusive and Nos. 241 to 243, both inclusive, class B bonds of the California Southern Railroad Company, having a par value of $1,000 each and a total par value of $38,000, as partial security for advances made to us by the bank.

"Although this obligation has been paid in full the bonds were not returned to us, but on the contrary we are informed that these bonds have been pledged to you as security for loans as follows:

"Thirty (30) of said bonds attached as collateral to a note executed by Florence O. Hoxie under date of July 31, 1919, and

"Eight (8) of said bonds attached as collateral to a note executed by Flora L. Odell under date of July 31, 1919.

"These debts have been acknowledged as due and owing by the People's Trust & Savings Bank, said bank by resolution guaranteeing the payment of aforesaid notes at a regular meeting of the board of directors of said bank, held on November 8th, 1920, a certified copy of which is in our hands; therefore, in view of such guaranty, you are advised that we are now willing and do hereby consent that these bonds remain with you as a pledge securing said notes.

Very sincerely, Blythe Construction Company, A. E. Warmington, President."

Some time prior to the discovery by the plaintiff company that its bonds had been unlawfully deposited with the Hellman Bank, the plaintiff had executed an option giving to the Santa Fé Land Improvement Company the right to purchase the bonds in question. On November 14, 1921, the Santa Fé Land Improvement Company demanded the bonds, and as they were still in the possession of the Hellman Bank, plaintiff found it necessary to pay to the Hellman Bank the sum of $38,000 in order to secure these bonds. It appears from the complaint and findings that the selling price of the bonds was in excess of their par value.

In May, 1920, at a time subsequent to the execution of the note and mortgage herein involved, and prior to the discovery by the plaintiff that its bonds had been unlawfully deposited with the Hellman Bank, the People's Trust & Savings Bank became financially involved. With the consent of the state banking department, and in conformity with the provisions of section 31 of the California State Bank Act (St. 1909, p. 95 as amended), the People's Bank in effect made an assignment to the Hellman Trust & Savings Bank. This arrangement was evidenced by two contracts, one dated May 21 and the other dated May 22, 1920. One of the agreements provides for the sale and assignment by the People's Bank to the Hellman Bank of what might be termed its good paper and securities, the same to be selected by the state superintendent of banks from the assets of the People's Bank. The total of the face value of the notes and securities so selected was not to exceed the total amount of the deposit liabilities of the commercial department and savings department of the People's Bank. The Hellman Bank on its part agreed to pay all of the deposit liabilities of the People's Bank. It was further agreed that the remaining assets of the People's Bank, aside from the securities deposited with the state treasurer to guarantee the faithful performance of the trust department, were to be assigned and transferred to two trustees, one selected by the People's Bank and one selected by the Hellman Bank. These assets, characterized as "rejected assets," were to be held and used to recoup the Hellman Bank for any losses it sustained within one year from the date of the assignment in any of the securities or notes which were directly transferred to it upon selection by the superintendent of banks. It was also provided that all securities deposited with the state treasurer were to be available to recoup any losses suffered in the securities directly transferred to the Hellman Bank. The arrangement contemplated the transfer by the People's Bank of its lease on its banking room to the Hellman Bank, and that the Hellman Bank would establish one of its branches in the banking quarters for the purpose of continuing the banking business. The ultimate end contemplated was the liquidation of the People's Bank. Pending the liquidation, the People's Bank continued to occupy quarters in the same banking room with the Hellman Bank. The contract further provided that upon the expiration of one year from the date of the agreement, all of the surplus assets left in the hands of the trustees as well as such as were on deposit with the state treasurer were to be transferred back to the People's Bank.

The $15,000 note and trust deed herein involved were included in the list of securities selected by the superintendent of banks and transferred directly to the Hellman Bank. Subsequent to this transfer, at the request of the People's Bank, plaintiff consented to the substitution of the Hellman Bank as trustee in the trust deed in stead and place of the People's Bank. It may explain, in part at least, the conduct of plaintiff after learning of the misuse of its bonds, to note that the president of the company testified that it was his understanding that all of the transactions between the two banks involved simply an arrangement for the Hellman Bank to act as trustee for the People's Bank in accomplishing its liquidation, and upon this belief, plaintiff made all interest payments and one payment of $1,000 on account of the principal of said note with checks drawn in favor of the People's Trust & Savings Bank.

It may also be noted at this point that according to his testimony, the president of the plaintiff company was induced to write the letter of December 24, 1920, to the Hellman Bank by the representations made by the president of the People's Bank and a vice president of the Hellman Bank that the assets of the People's Bank available for payment of its obligations was considerably in excess of its liabilities, and that in the liquidation of the bank's affairs the Hellman Bank would be paid the $41,500 then owing to it as a balance of the amount for which the bonds were pledged, and that thereupon the bonds would be delivered over to the plaintiff. It does not appear that any of the other officers or directors of the plaintiff corporation consented to or had knowledge of the writing of this letter by Warmington, its president.

Unfortunately, the affairs of the insolvent bank did not turn out as the parties anticipated. The plaintiff company, finding it necessary to secure the bonds before the claim of the Hellman Bank had been paid, concluded that their best course under the circumstances was to pay to the Hellman Bank the $38,000 par value of the bonds and thus secure them for delivery to the Santa Fé Land Company. Following this incident, plaintiff evidently awoke to a realization of its precarious position in relation to the bond matter and the trust deed note, and a controversy arose when the Hellman Bank endeavored to force payment of the balance of $14,000 due on the note. Plaintiff claimed that the Hellman Bank had unlawfully exacted from it the payment of $38,000 before delivering up the bonds, and out of that sum in the bank's possession it demanded that the note be satisfied and canceled. Upon the bank's refusal to meet plaintiff's demands, and in order to enjoin the bank's threat to proceed with the foreclosure of the trust deed, plaintiff filed this action.

Appellants in their brief urge four points upon which they base their argument for a reversal of the judgment. These contentions are stated in the following language:

"(1) The plaintiff has not the right to offset its claim against the effort of the Hellman Commercial Trust & Savings Bank to foreclose its trust deed, for the reason that under the authorities an unsecured claim cannot be set off against an effort to enforce a mortgage or trust deed, but can only be set off against an effort to collect a deficiency due after the foreclosure and sale have been made.

"(2) The plaintiff cannot set off its claim against the effort of the Hellman Commercial Trust & Savings Bank to foreclose the trust deed for the reason that its claim arises out of an unliquidated cause of action arising in tort from the conversion of the plaintiff's bonds and cannot be set off against a contract claim under the laws of the state of California.

"(3) The plaintiff cannot set off its claim against the effort of the Hellman Commercial Trust & Savings Bank to foreclose its trust deed, for the reason that the plaintiff's claim at the time the action was brought was barred by the statute of limitations, and it is settled by the decisions that a claim which is barred by the statute of limitations cannot be asserted as a set-off.

"(4) The plaintiff cannot set off its claim as against the effort of the Hellman Commercial Trust & Savings Bank to foreclose its trust deed, for the reason that by its conduct it has lulled the Hellman Commercial Trust & Savings Bank into a sense of security and has caused a loss to the Hellman Commercial Trust & Savings Bank which the Hellman Bank could have avoided if it had been notified of the claim of the plaintiff."

[1, 2] Under the first two points, appellants urge that plaintiff's claim is not one that may be properly set up as a counterclaim in an action or proceeding to foreclose the trust deed, and therefore such a claim would not be available to enable the plaintiff in the instant case to enjoin the foreclosure of the trust deed. This is urged upon the theory that while plaintiff may have a right of action arising out of the conversion of the bonds, it is not such an action as would constitute a cross-demand under section 440, Code Civ. Proc. In support of this view, appellants cite McKean v. German-American Savings Bank, 118 Cal. 334, 50 P. 656; and Moore v. Gould, 151 Cal. 723, 731, 91 P. 616. In addition appellants urge that plaintiff's claim cannot be set up as a counterclaim under section 438, Code of Civil Procedure, for if it be considered as a counterclaim, the statute of limitations has run against it.

Plaintiff's cause of action is not one for conversion, but rather for money had and received. Neither the allegations of the complaint nor the prayer look to a recovery of the value of the bonds. The action is one in effect which seeks a return to the extent of $14,000, which the plaintiff claims it paid to defendant the Hellman Bank both by reason of duress and mistake of law. If the plaintiff is correct in its theory, it follows that the Hellman Bank had in its possession more than $14,000 belonging to plaintiff. The Hellman Bank being also a creditor of the plaintiff, plaintiff has a right to request and demand the application of its funds in the hands of the Hellman Bank to extinguish its obligation to it.

It is not contended by the appellants that the bonds in question at the time they were turned over to the Hellman Bank by the People's Bank were not the property of the plaintiff, or that when the Hellman Bank received them, it had a legal right to their possession. While it is urged that by reason of the letter written by the president of the plaintiff company to the Hellman Bank, the plaintiff is estopped from making claim to the bonds, we are of the opinion that at no time did the Hellman Bank have any right to retain the bonds in question and had no legal right to exact the payment of $38,000 from the plaintiff as a condition to delivery of the bonds to plaintiff. Hence it readily follows upon equitable considerations that at the time of the commencement of the instant case appellant Hellman Bank had in its possession belonging to the plaintiff in excess of $14,000, and which sum plaintiff had a legal right to demand should be credited upon its indebtedness to the Hellman Bank as evidenced by the trust deed note in question.

We find nothing in the decisions in the cases of McKean v. German-American Savings Bank and Moore v. Gould, supra, that conflicts with this conclusion. The first of these cases deals with the question of the right of a bank to appropriate money on deposit belonging to a mortgagor, to the mortgage debt before recourse is had to the mortgage security; and the second holds that a mortgagor may not in an action to foreclose on a mortgage debt set up in his answer unliquidated claims for legal services. The right of the plaintiff to the redress prayed for upon the facts as they appear in the instant case so clearly applies to the considerations that control the equity side of the court that the citation of authorities seems unnecessary to support the contentions of respondent.

[3] Under the third point, appellants urge that plaintiff's complaint is barred by the statute of limitations. This contention is based upon appellants' theory that the only action available for the plaintiff is one in conversion, and that the right of action began when

the People's Bank failed to deliver the bonds when plaintiff executed the $10,000 and $15,000 notes in exchange for the old $45,000 note, which was in part secured by the bonds. We do not deem it necessary to discuss the questions raised in the briefs of counsel as to when the right of action for conversion arose, for, as we have indicated, the allegations of the complaint clearly indicate the action is one for money had and received, and the findings support such a theory. We take it that it would be readily conceded by appellants that the statute had not run against the plaintiff to bring an action for money had and received.

[4] In their fourth and last point appellants urge that upon the principle of estoppel respondent is not entitled to the relief prayed for in the complaint and granted by the judgment. In support of this contention it is pointed out that the president of the plaintiff corporation wrote the letter hereinbefore referred to and thus lulled appellant Hellman Bank into a sense of security until the year had elapsed within which under its contracts with the People's Bank it could recoup its losses that might be incurred in taking over the assets and paying the liabilities of the People's Bank.

[5, 6] The first answer to this contention is that the appellants did not properly raise the issue of estoppel in their answer. When estoppel is relied upon it must be properly pleaded. Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154; Frank v. Crescent Wharf, etc., Co., 50 Cal. App. 272, 195 P. 97. It is true there is a brief allegation in the answer alleging that plaintiff on December 24, 1920, wrote a letter to the defendant Hellman Bank stating that the defendant People's Bank had acknowledged its liability for the indebtedness to the Hellman Bank which was secured by the bonds in question, and that it was willing that the bonds should remain with the Hellman Bank as a pledge securing said indebtedness. This allegation does not begin to meet the requirements of a pleading raising the issue of estoppel. There is no allegation that there was either any consideration that passed to the plaintiff for such a letter, or that by reason of the writing of such a letter the Hellman Bank had in any wise been injured, or had been led or induced to waive any claim or advantage it had or might have had against the People's Bank. In fact, the statement falls considerably short of what would be required to raise an issue of estoppel.

The second answer is that the letter in question was not the letter of the plaintiff corporation. It was written by the president of the corporation without any authority from the board of directors. Nor does it appear that any other officer or member of the board of directors had any knowledge of the writing of the letter or in any manner consented to it, or approved it or ratified it.

Various other points and legal questions are raised in the briefs of both appellants and respondent, but we deem the points discussed as determinative of the case, and hence a consideration of the other questions are unimportant.

For the foregoing reasons, the judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

90 Cal. App. 249

STARKEY v. MARKET STREET RY. CO.★

(Civ. 6217.)

District Court of Appeal, First District, Division 1, California. March 20, 1928.

Rehearing Denied April 19, 1928. Hearing Denied by Supreme Court May 17, 1928.

1. Carriers 🔑316(3)—Allegation and proof of specific negligence of street railway precluded application of doctrine of res ipsa loquitur.

In action for injuries alleged to have resulted when plaintiff was thrown from a street car while in the act of boarding it, doctrine of res ipsa loquitur *held* inapplicable, in view of pleading and evidence to effect that car came to a complete stop, and it was negligently and suddenly started without warning, while plaintiff was in the act of boarding it.

2. Trial 🔑296(3)—Abstract instruction on res ipsa loquitur held not erroneous, though inapplicable, in view of other instructions precluding application to particular case.

Instruction on doctrine of res ipsa loquitur as an abstract principle of law, with subsequent limitation by other instructions with particularity to effect that abstract principle did not apply to the particular case, but that negligence was a fact which must be proven by plaintiff, *held* not erroneous, though inapplicable, since jury could not have been misled by abstract instruction on such doctrine, in view of such other instructions.

3. Carriers 🔑321(23)—Instruction authorizing recovery for injury received in boarding street car while in motion held erroneous under pleadings.

Where only issue in action for personal injury sustained in attempt to board a street car was defendant's negligence in starting and putting in motion a standing car while plaintiff was in the act of boarding it, instruction advising jury that it could find for plaintiff, if it found that he boarded the street car while it was in motion, *held* erroneous, though contradictory instruction that burden of proving allegation of negligence was on plaintiff was also given.

4. Trial 🔑194(18)—Instruction that slackening speed of street car constituted invitation to board car held erroneous as being question of fact.

In action for injury sustained in attempt to board street car, instruction that slackening of

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★Rehearing denied. Hearing denied by Supreme Court.

speed constituted an invitation for plaintiff to board street car *held* erroneous, in that such question was a question of fact and not of law.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Alexander M. Starkey against Market Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

Reed M. Clarke, of San Francisco (Otto G. Kuklinski, of San Francisco, of counsel), for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered on the verdict of the jury awarding plaintiff $4,000 damages for personal injuries sustained by him by reason of his being thrown from a car of appellant street railway while in the act of boarding it.

The complaint alleges that on or about October 16, 1924, while plaintiff was waiting to board one of defendant's west-bound cars on Mission street, at the intersection of Thirteenth street, he signalled the car to stop, whereupon the car, in approaching such intersection, slowed down, and *came to a complete stop* with the rear platform opposite the place where he was standing; that he grasped the handrail of the car, attempting to board it, and placed both feet upon the step of the car, and was in the act of boarding the car to the platform thereof, when the defendants, and each of them, carelessly, negligently, recklessly, and prematurely, and without warning, and without permitting or affording plaintiff a reasonable or any opportunity to reach a position of safety, *started* the car suddenly and violently, and at excessive speed, by reason whereof he was thrown with great force and violence to the pavement and injured. The answer specifically denies these allegations of the complaint, and as to further answer and defense pleads contributory negligence.

The testimony of plaintiff follows the allegations of the complaint; he testifying that the car had come to a stop before he attempted to board it, while plaintiff's witness Edward H. Mills, a police officer, who was standing at the intersection of the streets where the accident occurred and witnessed the accident, testified that the car had not come to a stop when plaintiff boarded it. It was in motion, traveling about eight miles an hour, and did not stop for about half a block past Thirteenth street. The witnesses called by defendant, including the motorman, conductor, and three passengers, all testified that the car was in motion when plaintiff attempted to get on, their testimony as to the speed of the car ranging from 8 to 14 miles an hour.

The foregoing is a sufficient statement of the issues and evidence to afford an understanding of the errors assigned, which are as follows: The court erred in instructing the jury on the doctrine of res ipsa loquitur; in giving instructions which permitted the jury to find for plaintiff if he attempted to board a moving street car; assuming that plaintiff had given a signal and erroneously instructed the jury that a reduction of speed was an invitation to board the car, and that the evidence is insufficient to sustain the verdict of the jury in regard to the negligence charged against defendant; and affirmatively shows that plaintiff's injuries were approximately caused, and contributed to, by his own negligence and assumption of risk.

At the request of plaintiff the court instructed the jury:

> "When a thing which causes injury is shown to be under the management of the defendants or either of them, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from a want of care,"

—and further:

> "The effect of the doctrine, when applied to passenger cases, is that proof of the injury to the passenger through the operation of the car, or through any other instrumentality under the exclusive management and control of the carrier, while he was being carried as such, creates a prima facie case, or presumption of negligence on the part of the carrier, which the carrier is called upon to meet or rebut. This presumption that the injury was caused by the negligence of the carrier, which is raised upon the proof that the plaintiff was thus injured while being carried as a passenger, is itself a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence in reference to the negligence and in the absence of contributory negligence, necessitates a verdict in favor of the plaintiff."

[1] These instructions on the doctrine of res ipsa loquitur are not applicable to the issues framed by the pleadings, nor to the case as presented by the facts, and should not have been given to the jury, as the complaint, after alleging that the car came to a *complete stop* at the point where plaintiff was standing, and that plaintiff grasped the handrail and placed both feet upon the step of the car and was in the act of boarding it, alleges:

> "When the defendants and each of them carelessly, negligently, recklessly, and prematurely, and without warning and without permitting or affording the plaintiff a reasonable or any opportunity to reach a position of safety, *started* said car suddenly, violently and at excessive speed."

Appellant has cited us to a number of cases in support of its contention that the doctrine of res ipsa loquitur has no application to the present case. Among the cases cited, Marovich v. Central California Traction Co., 191 Cal. 295, 305, 216 P. 595, 606, is more nearly analogous to the case presented here. In that case the court instructed the jury—and which instruction was held to be erroneous—as follows:

> “ ‘If you believe that Katherine Marovich was killed while riding as a passenger on the street car of the defendant by defendant's operation of any of its instrumentalities, then I instruct you that the defendant is called upon to show either that her death was occasioned by inevitable casualty which human foresight could not have prevented, or was due to contributory negligence on her part, and if you further believe that the defendant has not done this, your verdict should be for the plaintiff.' This instruction should not have been given under the issues as framed. The general rule is that ‘where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply.' ”

It is true that this court, in Atkinson v. United Railroads, 71 Cal. App. 82, 234 P. 863, in a case where the decedent was killed while riding as a passenger on one of the cars of the United Railroads, in reviewing the authorities on the res ipsa loquitur doctrine, said:

> “In adopting a rule for this state, we are of the opinion that it was not intended to declare an absolute and unqualified rule, that is, one so drastic as to deny plaintiffs in all cases, and under all circumstances, the benefit of the doctrine of res ipsa loquitur, merely because they have voluntarily gone further than the law required them to go, in particularizing the specific acts of negligence upon which they relied for a recovery; but that it was intended that the more liberal rule should be followed which restricts plaintiff, in his proof and recovery, to the specific acts alleged, and relieves the defendant from the burden of exculpating himself from any other acts of negligence than those alleged, but which does not, so far as those particular acts of negligence are concerned, deprive plaintiff of the benefit of the doctrine of res ipsa loquitur. This conclusion is based, primarily, upon the fact that admittedly the rule, as enforced in this state, is not without qualification, for in Connor v. Atchison, T. & S. F. Ry. Co. [189 Cal. 1, 207 P. 378, 26 A. L. R. 1462], supra, it is said: ‘However, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine.' Zerbe v. United Railroads of San Francisco, 56 Cal. App. 583, 205 P. 887. And again, in Roberts v. Sierra Ry. Co., supra, wherein it is held that notwithstanding allegations of specific acts, the presence of additional allegations of general negligence justifies the application of said doctrine. Secondly, we find nothing in the holding or the reasoning of any of the three cases relied upon by appellant which conflicts with the liberal rule we believe was intended to be declared and followed. The case of Connor v. Atchison, T. & S. F. Ry. Co., supra, was one wherein the judgment was reversed, not because the trial court instructed the jury that the doctrine of presumed negligence did apply, but because of its refusal to instruct the jury that such doctrine did not apply; and such doctrine did not apply for the obvious reason that the statement of plaintiff's cause of action and the proof offered in support thereof showed that the accident was caused by negligent acts which did not give rise to the doctrine of res ipsa loquitur.”

And we think in the present case the allegation of negligence and proof offered in support thereof showed that the accident was caused by a negligent act which did not give rise to the doctrine of res ipsa loquitur.

The instructions complained of here, however, were statements of abstract propositions of law, and were limited, not only by other abstract instructions, but also directly and expressly by specific instruction. As an example of the abstract instructions limiting such instructions, the jury was instructed:

> “In civil cases the affirmative of the issue must be proven. The affirmative here is upon the plaintiff as to all affirmative allegations of the complaint,”

—and, after correctly instructing the jury as to the meaning of preponderance of evidence, the court continued:

> “Before the plaintiff can recover in this action it must first appear by a preponderance of the evidence that the defendants or their servants were guilty of some act of negligence which contributed approximately to the accident. It must also appear that the plaintiff was without fault or negligence on his part which may have contributed proximately to the accident.”

Besides these instructions as to the burden of proof, the court later in its instructions, at the request of defendant, instructed the jury:

> “In a case as here presented there is no legal presumption of negligence, but negligence is a fact and like other facts alleged by the plaintiff must be proven by him to entitle him to recover.”

[2] It appears, therefore, that the court first instructed the jury on the doctrine of res ipsa loquitur, but later, and after instructing it that the burden of proof was upon the plaintiff to establish the negligence charged by a preponderance of the evidence, instructed it that the doctrine of res ipsa loquitur did not apply. Since the instruction complained of was one on an abstract principle of law, was limited by other instructions, and the jury was instructed with particularity that the abstract principle announced did not apply as follows: “*In the case here presented there is no legal presumption of negligence,* but negligence is a *fact*, and, like other facts alleged by plaintiff, must first be proven by him to entitle him to recover,” we do not think the jury could have been misled by the abstract instruction on the doctrine of res

ipsa loquitur, or that the giving of such instructions prejudiced the substantial rights of appellant. We comment upon these instructions, however, so that, upon a retrial of the case, which must be ordered upon other grounds, the objectionable instructions will not again be given.

[3] We feel impelled to reverse the case because of the giving of the following instructions advising the jury that it could find for the plaintiff, if it found that he boarded the street car while it was in motion. The following instructions were given at the request of plaintiff:

> "If you find from the evidence in this case that, notwithstanding the fact that the plaintiff had boarded the street car in question while the same was in motion, the proximate cause of the injuries sustained by plaintiff was the sudden starting of the car after plaintiff had boarded the same and before he had an opportunity to reach a place of safety on said car, I instruct you that the fact that plaintiff had boarded the car while the same was in motion will not bar his recovery. I instruct you that plaintiff was not guilty of negligence in attempting to board the car in question merely because said car was moving at said time, if the circumstances were such that a person of ordinary caution would not have been deterred from attempting to board it. I instruct you that, if you find from the evidence in this case that, after plaintiff had signaled to said car, the same slackened speed in response to said signal, such slackening of speed was an invitation on the part of the servants of the defendants who were operating said car for the plaintiff to board said car. I instruct you that, if you find from all of the evidence in this case that the plaintiff had reason to believe, and did believe, that said street car was stopping for the purpose of permitting him to board the same as a passenger thereof, and if you further find from the evidence that a person of ordinary prudence and caution, under the circumstances shown by the evidence, would have attempted to board said car, then the plaintiff is not guilty of contributory negligence, by reason of the fact that he boarded said car while the same was in motion."

The gist of the action was the *starting and putting in motion a standing car* while plaintiff was boarding it. This was the only issue presented by the pleadings and the evidence. A recovery, therefore, based upon any other ground or theory, cannot be sustained.

In Hanton v. Pacific Electric R. Co., 178 Cal. 616, 174 P. 61, the court instructed the jury that:

> "If plaintiff attempted to board a moving car and was injured as a direct or proximate consequence thereof, then he was guilty of contributory negligence and cannot recover herein."

Appellant contended that the instruction was erroneous because the court failed to insert before the word "attempted" the word "negligently"—that the attempt to board a moving car is not as a matter of law contributory negligence per se. The court there says:

> "We have no fault to find with the contention of appellant as a proposition of law, but the instruction as appellant claims it should have been given was not warranted either under his complaint or the case as made. Instructions are properly addressed to the theory of the case as pleaded and made. Plaintiff did not allege in his complaint that with due care and caution he attempted to board a moving train and for some alleged reason was injured through the negligence of defendant. Plaintiff specifically alleged as his cause of action that he attempted, as a passenger, to board a standing car of defendant and that when he had partially done so the car was negligently started forward and he thrown from it and injured. The defense of defendant was that plaintiff attempted to board a moving car and fell while making the attempt. The entire evidence of the case was addressed to this issue and the instruction complained of was properly addressed to this issue. Plaintiff, having alleged that the car was standing still and that defendant negligently started it up while he was boarding it, would not have been permitted to prove that in fact the car was moving when he attempted to board it, because to do this would be to permit him to sue on one theory and recover on another. Necessarily, if the car was moving when he tried to board it, this disproved the allegation of the complaint that it was standing still, and swept away the only alleged negligence upon which the cause of action of plaintiff was predicated. Neither the pleading nor the evidence warranted instructing the jury as plaintiff contends it should have been, but, on the contrary, the instruction that was given was entirely proper under both."

In Patterson v. Westchester Elec. Ry. Co., 26 App. Div. 336, 49 N. Y. S. 796, involving an instruction on this point, the court says:

> "The averments of the complaint upon which the action is predicated are, in substance, that the defendant stopped its car for the plaintiff to alight therefrom, and while she was in the act of alighting the defendant carelessly and negligently caused the car to suddenly start with a jerk, without any warning to the plaintiff, and that by reason of such act she sustained the injuries of which complaint is made. * * * Upon these averments, and the proof, the only issue of negligence which the defendant was called upon to meet consisted in the starting of the car after it had stopped for the purpose of permitting the plaintiff to alight therefrom. The evidence given upon the part of the defendant was directed to this issue, and that alone. Its proof tended to establish that in fact the car did not stop, but that plaintiff attempted to alight while the car was in motion, and that such injuries as she sustained were the result of such act, and were not occasioned by reason of any sudden starting of the car. In this state of the issue, the defendant requested the court to charge that, if the jury believed 'that this plaintiff stepped from the car while the same was in motion, your verdict must be for the defendant.' The court refused so to charge, and the defendant's counsel duly excepted. The defendant was entitled to have the charge made as requested. It bore directly upon the only issue of negligence in the case,

and, if it was true that the plaintiff did step from the car while it was in motion, such act would furnish a complete answer to the case which she presented to support her cause of action. Pierce v. Railway Co., 21 App. Div. 427, 47 N. Y. S. 540."

In El Paso Electric Ry. Co. v. Boer (Tex. Civ. App.) 108 S. W. 201, in an action where it was alleged that the car was standing still when plaintiff started to alight therefrom, the court uses this language:

> "This allegation would not admit of proof or authorize the submission as an issue that the car was in motion when plaintiff started to alight from it and that its speed was suddenly increased; for the pleadings, * * * raise no such issue. * * * If the car was moving when plaintiff first attempted to leave it, such fact necessarily showed that it was not standing when he made the attempt, and thereby disproved the only act of negligence alleged as plaintiff's cause of action."

Respondent, in support of the judgment, urges that the court will take into consideration the pleadings themselves, the evidence offered by both parties, and the theories of the parties. That is true, but here the complaint alleges that the car had stopped when plaintiff boarded it. The evidence that the car was in motion was offered by defendant to controvert the allegation that it was stopped, and the theories of the parties are unmistakably stated in the opening statements of counsel. Mr. Clarke, counsel for plaintiff, in his statement to the jury said:

> "That he (plaintiff) stood there for a few moments, and the car came along, which *stopped;* that he started to get on the car * * * that the car *started* and took him a very short distance."

Mr. Appel, counsel for defendant, said:

> "Mr. Starkey, the plaintiff in this case, * * * attempted to board a *moving* suburban car. * * * We will show you that at the time and place in question Mr. Starkey, as the rear of the street car passed where he was located on Thirteenth street and Mission street, attempted to jump on that street car when it was *going at a speed of from 8 to 10 miles an hour.*"

Respondent calls our attention to the fact that, at appellant's request, the court instructed the jury that plaintiff could not recover, unless the injuries sustained were occasioned by the carelessness or negligence of defendant or employees, as charged in the complaint, and directs us to the following instruction:

> "In the complaint of plaintiff it is alleged, among other things, that at the time and place in question said car in approaching said intersection slowed down and came to a complete stop with the rear platform of said car opposite the place where plaintiff was so standing; that plaintiff grasped the handrail of said car for the purpose of boarding said car by the rear step and platform thereof, and placed both feet upon the step of said car at said rear entrance, and was in the act of boarding said car to the platform thereof when the defendant carelessly, negligently, recklessly, and prematurely, and without permitting or affording the plaintiff a reasonable or any opportunity to reach a position of safety, started said car suddenly, violently, and at an excessive speed, by reason whereof said plaintiff was then and there and thereby thrown with great force and violence to the pavement of said street. I instruct you that the burden of proving said allegation is upon the plaintiff in this case, and, unless you find that he has proven said allegation by a preponderance of the evidence, you cannot find a verdict in his favor, and your verdict must be in favor of the defendant, Market Street Railway Company."

Respondent's contention that the jury was instructed in the instructions quoted that plaintiff cannot recover, unless he has proven the allegations of his complaint by a preponderance of the evidence, is answered by the following language in Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599:

> "It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

[4] As to appellant's next contention that the court erred in instructing the jury that, if it found from the evidence that plaintiff had signalled the car and it slackened its speed, "such slackening of speed was an invitation on the part of the servants of the defendants who were operating the car, for the plaintiff to board said car," it may be said that, even if such slackening of the speed of the car were within the issues, the portion of the instruction quoted should not have been given, as the question as to whether such slackening of speed was an invitation to plaintiff to board the car was a question of fact and not of law.

The questions disposed of render unnecessary discussion on the remaining point urged.

The judgment is reversed.

We concur: TYLER, P. J., KNIGHT, J.

90 Cal. App. 41

KENDIS v. COHN et al. (Civ. 6182.)★

District Court of Appeal, First District, Division 1, California. March 10, 1928.

Hearing Denied by Supreme Court May 7, 1928.

1. Landlord and tenant 🔑40—Contemporaneous agreements as to subletting held with lease to constitute part of contract between parties (Civ. Code, § 1642).

Vital portions of instruments relative to subletting executed at same time as lease *held*, with lease, to constitute part of contract between parties, under Civ. Code, § 1642.

2. Landlord and tenant 🔑76(1)—Covenants against assignment without lessor's written consent are fair and reasonable.

Covenants against assignment of lease without written consent of lessor are regarded as fair and reasonable, since restraints on use or alienation of granted premises may be imposed as reasonable recognition of owner's right to deal with property as he pleases, provided restraints are not unlawful or against public policy.

3. Landlord and tenant 🔑76(3)—Covenant in lease making provision against assignment without consent binding on lessees and their assigns held to prevent assignment by assignee.

Under covenant in lease making condition against assignment of lease without lessor's consent binding on lessees "and also upon their assigns," in case of assignment with written consent of lessors, such covenant is continuing covenant, and assignee could not assign lease without consent of lessors.

4. Landlord and tenant 🔑80(1)—Under issue whether plaintiff was subtenant or assignee of lessee, fact that instrument under which he took possession was labeled sublease will not alone constitute it such.

That instrument under which plaintiff went into possession of demised premises was labeled by parties as sublease would not alone constitute it such, if there was transfer of whole leasehold, leaving no reversionary interest; issue having been raised whether plaintiff was subtenant or assignee.

5. Landlord and tenant 🔑80(1)—Sublease to operate as assignment must transfer entire term of lessee.

Sublease, in order to operate as assignment, must transfer to sublessee entire term of original lessee in whole or some part of demised premises.

6. Landlord and tenant 🔑80(1)—One possessing demised premises under instrument reserving to original lessee right of re-entry and forfeiture on breach of contract held "subtenant."

One taking possession of demised premises under instrument reserving in original lessee right of re-entry and forfeiture on breach of contract *held* to be "subtenant" and not assignee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subtenant.]

7. Landlord and tenant 🔑76(3)—Waiver as to one subletting of condition against subletting held not to discharge condition.

Waiver of condition against subletting as to one subletting *held* not to discharge condition; such condition being continuous covenant.

8. Landlord and tenant 🔑44(1)—"Construction" of covenants in leases depends on parties' intention as indicated by express language of lease.

Extent, effect, and operation of covenants in leases, that is, their "construction," depends on intention of parties, as that intention is indicated by express language of lease.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Construe —Construction.]

9. Landlord and tenant 🔑41—Acts of parties under doubtful covenant in lease will be considered to show intention of parties.

Where meaning of language of covenant in lease can be considered doubtful, court will call in aid of acts done under it as clue to intention of parties.

10. Landlord and tenant 🔑76(3)—Authority given by lessees to subtenant to assign without obtaining lessors' consent held not to authorize such assignment, where lessors did not sign agreement.

Subtenant cannot claim right to assign contrary to covenant in lease on ground that she was given such right by original lessees, where agreement between lessees and subtenant was not signed by lessors.

11. Contracts 🔑188—One not party to contract is not liable thereon.

Party cannot be charged on contract to which he is not a party.

12. Landlord and tenant 🔑40—Rule that agreements made at execution of lease are considered part of same transaction cannot be applied to contracts between different parties to create obligation not intended.

Rule that agreements entered at time lease is executed form parts of same transaction cannot be applied to any set of contracts entered into between different parties, where such application would create contractual obligation, where none existed or was intended.

13. Landlord and tenant 🔑80(1)—Lessee's agreement to sublet held not part of transaction in which lease was executed, though entered into on same day.

Agreement to sublet, made between original lessees and subtenant on same day that lease was executed, but subsequently, *held* not part of transaction in which original lease was executed.

14. Landlord and tenant 🔑76(3)—Lessees cannot authorize subtenant to assign without lessors' consent, contrary to stipulation in lease.

Original lessees cannot grant to subtenant greater estate in property than they themselves have, and so could not grant right to assign without lessors' consent, contrary to stipulation in lease.

★Hearing denied by Supreme Court.

15. Landlord and tenant 🔑76(3)—Lessors, by accepting surrender of lessees' interest in lease, held not to bind themselves to lessees' contract with subtenant authorizing assignment by subtenant without lessors' consent.

Lessors, by accepting surrender of lessees' interest in lease after sublease, *held* not to have bound themselves to contract between lessees and subtenant, whereby subtenant was authorized to assign lease without lessors' consent, contrary to stipulation in original lease.

16. Landlord and tenant 🔑76(3)—Covenant in lease that lessees may, with lessors' written consent, assign to any person of good repute and satisfactory to lessors, held not to create covenant on part of lessors.

Clause in lease following restriction on lessees' right to assign, and providing that lessees' may, with lessors' written consent, assign to persons of good repute and satisfactory to lessors, *held* not to create covenant on part of lessors to consent to assignment if party of good repute and satisfactory to them is proposed.

17. Landlord and tenant 🔑76(3)—Under provision for lessee's assignment to person satisfactory to lessors, lessors are sole judges of their own satisfaction if acting in good faith.

Under provision in lease that lessee may with lessors' written consent assign to any person of good repute and satisfactory to lessors, lessors are sole judges of their own satisfaction, subject only to limitation that they must act in good faith.

18. Appeal and error 🔑907(3)—On appeal on judgment roll alone, it is presumed that evidence supported facts found.

Where appeal is taken on judgment roll alone, and there is total absence of any transcript of evidence or bill of exceptions, it will be presumed that evidence offered in support of finding was sufficient to support facts found.

19. Appeal and error 🔑931(1)—Findings of trial court are construed to uphold judgment.

Findings of fact made by trial court are to receive such construction on appeal as will uphold rather than defeat its judgment thereon.

20. Appeal and error 🔑907(3)—Where different inferences may be drawn from facts found, reviewing court on appeal on judgment roll will not draw inferences to defeat judgment.

Where different inferences may be drawn from facts as found, reviewing court will not on appeal from judgment on judgment roll alone draw inferences contrary to that drawn by trial court or which will have effect to defeat judgment thereon.

21. Appeal and error 🔑1122(1)—In absence of finding or evidence of bad faith, reviewing court will not make such finding.

Bad faith is question of fact to be determined by jury or by trial court, and, in absence of finding of bad faith, reviewing court will not, in absence of evidence, make such finding.

22. Libel and slander 🔑131—Malice in making slanderous statements is essential to action for slander of title.

Malice, express or implied, in making of slanderous statements, is essential ingredient in action for slander of title, without proof of which it fails.

Appeal from Superior Court, Los Angeles County; Walter Perry Johnson, Judge.

Action by Minnie Kendis against A. B. Cohn and others for a declaratory judgment as to rights relative to an assignment of a lease and for damages. From the judgment, defendants appeal. Reversed.

Newby & Palmer, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellants.

Lissner, Roth & Gunter, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. Appellants on or about July 12, 1918, were the owners in fee of certain real property situated in the city of Los Angeles, consisting of an apartment house of 122 rooms and the land upon which the apartment house stood. On that date appellants leased the premises to W. A. Barker and C. H. Barker for a period of 15 years at a monthly rental of $975. The lessees, W. A. Barker and C. H. Barker, however, never took possession, but immediately and as a part of the same transaction the appellants and the original lessees entered into an agreement by which it was provided that the said lessees could execute a sublease to respondent, Minnie Kendis, for a term not exceeding the term provided in the original lease, conditioned that the terms and obligations of the original lease were fully kept and performed.

Subsequent to this agreement, but on the same day this agreement was entered into and the original lease was executed, the original lessees and respondent entered into an agreement styled "sublease," whereby the lessees demised to respondent all of the premises described in the original lease for the term provided in such lease, and upon the same terms, conditions, and covenants as contained therein. In this sublease, respondent "agreed to pay the rent and to fully keep and perform all of the terms and conditions of the original lease on the part of said lessees to be kept and performed in the same manner and at the times in said lease set forth."

On the day of the execution of the above instruments, the original lessees agreed with respondent that respondent might at any time thereafter assign her interest in the premises without obtaining the consent of the lessees in the original lease or any other person. There is, however, no finding that appellants had any notice of this agreement. Thereafter respondent entered into possession of the premises, and ever since has been in the lawful possession thereof.

On May 17, 1922, W. A. Barker, one of the original lessees, died, and the other lessee, Charles Lawrence Barker, was duly appointed executor of his estate. He and the heirs and distributees of the estate executed and delivered to appellants for a valuable consideration a written surrender of all their right, title, and interest in and to the demised premises. This surrender was made and accepted without the knowledge or consent of respondent.

On March 27, 1924, respondent obtained a prospective purchaser, one Arthur L. Roberts, for her interest in the premises and of all the furniture for the sum of $110,000. This prospective purchaser was found by the court to be a fit, suitable, proper, and responsible person of good character and repute. The court further found that Roberts was presented to appellants by respondent, who informed them of the proposed sale of Roberts, and asked that they recognize and accept him as the assignee of respondent's interest in the demised premises, and that they give their consent to such assignment, but that appellants, in order to prevent the respondent from effecting a sale of the lease and respondent's furniture without additional benefits to themselves in the form of increased rental and a surrender of the original lease and sublease, arbitrarily and unreasonably, and in contravention of the rights of respondent in the premises, refused to accept Roberts as the assignee of respondent or to give their consent to an assignment to him or to in any way investigate his qualifications in respect to his character or his reputation or honesty. Upon the refusal of appellants to recognize Roberts as a qualified assignee of respondent and give their consent to the assignment to him, he withdrew his offer to purchase said premises and furniture, and did not proceed further with the proposed purchase.

On April 2, 1924, respondent filed an action against appellants, the complaint containing three counts—the first for a judgment declaratory of the rights of the parties relative to the assignment of the lease; the second for damages for arbitrarily refusing to consent to an assignment of the lease by respondent to her purchaser; and the third for damages for slander to title. The court found and entered judgment that respondent was not entitled to any relief sounding in damages, but was entitled to relief declaring her rights in regard to the lease. The court declared these rights to be as follows:

> "That the appellants, by their consent to the assignment to respondent of said lease, forever waived and discharged the provision in said lease, permitting the appellants at their option to terminate the lease if there was any assignment of said lease, whether voluntary or involuntary, or by operation of law, or otherwise, without the written consent of the appellants, but the covenant of the lessee not to assign without the written consent of the lessor remains binding on the respondent as a covenant, but without any condition of forfeiture for breach thereof. That the right on the part of the appellants or any of them or their successors in interest to terminate said lease, or to declare a forfeiture of respondent's rights thereunder, or to obtain possession of the premises, on account of breach of said covenants, by any legal process or in any other manner, was lost. That all other provisions and covenants of said lease remained and still remain in full force and effect. That appellants, their administrators, executors, successors, and assigns, have by said appellants' acts and conduct forever relinquished and lost the right to declare or enforce a forfeiture or termination of said lease. That, in the event the respondent assigns said interest without the consent of the defendants or their successors in interest, said assignment shall nevertheless be valid, and the appellants, by reason thereof, shall not have the right or power to re-enter into possession or retake or obtain possession of said premises. That, by reason of said surrender to appellants, paragraph 3 of the agreement between the lessees and the appellants is no longer of any effect. That the appellants in said lease did not positively consent to the assignment of said lease in any case. That, in the event the respondent applies for the consent of the defendants to any proposed assignment, and the said appellants arbitrarily or unreasonably fail, neglect, or refuse to examine into or determine the qualifications of the proposed assignee fairly and in good faith with reasonable diligence, the respondent may make and has in such event the legal right to make an assignment without express permission to the person proposed, provided he is a responsible person of good character and repute; and no liability for any damages for breach of any covenant against assignment without the consent of the said appellants will be incurred by reason of such assignment. That the respondent has the right to conduct the apartment house business on the premises."

Appellants have appealed from all that portion of the judgment which defines and determines respondent's rights in regard to the original lease, and respondent has appealed from certain portions of the judgment defining the rights of the parties in the instruments in question and from the judgment that she take nothing by way of damages from appellants; this latter appeal by respondent herein being No. 6183, and entitled "Minnie Kendis, Plaintiff and Appellant, v. A. B. Cohn, Lulu B. Cohn, M. B. Cohn, and Hattie B. Cohn, Defendants and Respondents," and is submitted by stipulation on the same transcript and briefs filed herein, both appeals being taken on the judgment roll alone. The appeals raise the general question, What are the rights of the parties in regard to the lease when it is construed with the agreements or instruments executed with it, and when construed in the light of the circumstances surrounding it?

The vital portions of the lease to be considered or construed, and which is designated Exhibit A, are:

> "Said lessees further covenant and agree to pay said lessors the said rent at the time and in the manner herein reserved, and shall not assign, pledge, hypothecate, or otherwise dispose of this lease nor any portion of the term of this

lease, and shall not sublet the premises nor any portion thereof, without the written consent of the said lessors first had and obtained; and any assignment of this lease, whether voluntary or involuntary or by operation of law or otherwise, without such written consent of said lessors, shall, at the option of said lessors, terminate the lease, and the lessees hereby waive notice of the exercise of such option.

"Said lessees may, with the written consent of the said lessors, assign said lease to any person or persons of good character and repute and satisfactory to the lessors, upon furnishing good and sufficient security to be approved by said lessors.

"No failure or omission on the part of the lessors to insist upon or to enforce any of the terms, agreements, covenants, or conditions of this lease for one or more breaches or infractions in the past, whether by the lessees or their sublessees or tenants, shall be deemed a waiver of such terms and agreements, covenants, or conditions, but such right of enforcement shall continue for any and all breaches or infractions, when such waiver shall be by an agreement in writing, and shall expressly refer to all future breaches or infractions.

"Said lessees hereby covenant and agree that their sublessees, tenants, successors, and assigns shall be bound by and shall fully and strictly comply with each and all of the terms, covenants, agreements, and conditions of this lease, except that such sublessees, tenants, or assigns shall pay their rent to said lessees.

"It is expressly agreed that each and all of the terms, covenants, agreements, and conditions of this lease are material, essential, and substantial, and without which the said lessors would not have executed the same.

"This lease and all its covenants, agreements, and conditions shall bind said lessors, their heirs, executors, administrators, and assigns, and shall bind said lessees, their heirs, executors, administrators, and successors, and also their assigns, in case of an assignment of said lease by and with the written consent of the lessors."

[1] The vital portions of the instruments necessary to an understanding of the questions here presented, executed at the same time as the lease, and with the lease constituting a part of the contract between the parties (Civil Code, § 1642; Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 P. 810; McAuliff v. McFadden, 42 Cal. App. 505, 511, 183 P. 870; Bailey v. Security Trust Co., 179 Cal. 540, 177 P. 444; Merkeley v. Fisk, 179 Cal. 748, 178 P. 945), are as follows:

Exhibit B (memorandum of agreement entered into this 12th day of July, 1918, between A. B. Cohn and Lulu B. Cohn, his wife, and M. B. Cohn and Hattie B. Cohn, his wife, parties of the first part, and W. A. Barker and C. H. Barker, parties of the second part):

"Said parties of the first part (appellants) have agreed to accept Mrs. A. P. Kendis (respondent) as the subtenant and the sublessee of said second parties during the term of said new lease so executed, and it is understood that the said Mrs. A. P. Kendis shall pay all rents under said subleasing and subtenancy to second parties, and shall be the sublessee of said second parties under said new lease and for a term not exceeding 15 years—provided the terms and obligations of said new lease entered into between the parties hereto are fully kept and performed as provided therein, and that, in the event the said Mrs. A. P. Kendis (respondent) shall not fully comply with all of the terms and conditions thereof on the part of the lessees to be kept and performed, or shall fail to pay the rent or observe the other obligations thereof, then and in that event the said second parties herein may, at their option, terminate such subtenancy and place in charge of said premises as their subtenants or otherwise some other suitable and proper person satisfactory to said first parties."

Exhibit C (made this 12th day of July, 1918, by and between W. A. Barker and C. H. Barker, parties of the first part, and Mrs. A. P. Kendis, party of the second part):

"That the said original lessees in said indenture of lease hereinbefore referred to have sublet to said Mrs. A. P. Kendis (respondent) and said A. P. Kendis (respondent) does hereby hire from said original lessees the said apartment house property upon all of the terms, covenants, conditions, and agreements in said original lease set forth, and does hereby agree to pay rent and to fully keep and perform all of the terms and conditions of said lease on the part of said lessees to be kept and performed, in the manner and at the times in said lease set forth, a copy of which said lease is hereto attached and made a part hereof as fully as if the provisions thereof were herein set forth in full."

On the same day, and following the execution of Exhibit C, the Barkers, the lessees in the original lease Exhibit A, executed a written agreement with respondent by the terms of which they agreed that respondent "might, at any time hereafter assign her interest in the aforesaid property acquired by and through said Exhibit C without obtaining the consent of said W. A. Barker and/or C. H. Barker, or any other person."

The trial court, in construing these instruments, determined that respondent was an assignee of the Barkers and not a subtenant, and, the original lessors having consented to an assignment of the lease by the original lessees to respondent, they waived the condition in the lease against assignment, and respondent was therefore permitted to assign the lease to a purchaser from her.

The question as to the effect to be given a consent by a lessor to an assignment by his lessee on the right to make subsequent assignments first arose in England in 1578, in the Dumpor's Case, 4 Code, 119, 76 Eng. Reprint 1110. In that case the president and scholars of the College of Corpus Christi, in Oxford, made a lease for years of land to one Bolde, with a proviso that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors. Afterwards the lessors by their deed licensed the lessee to demise the land or any part of it to any person or persons quibuscunque. Two years later the lessee assigned the lease to one Tubbe, who by his last will devised it to his son. The son entered and afterwards died intestate and during the ordinary course of administration the lease was assigned to the defendant. The president and scholars entered for condition broken, to wit, assignment without their consent, and made a lease to plaintiff for 21 years, who entered upon defendant, who re-entered, upon which re-entry an action of trespass was brought.

Upon these facts it was held by the court that a condition in a lease that the lessee or his assigns should not alien without the special license of the lessors was determined by an alienation by license, so that no subsequent alienation was a breach of the condition; the reason given for this decision being:

> "That the alienation by license to Tubbe had determined the condition, so that no alienation which he might afterwards make could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that same estate should remain subject to the proviso after. And, although the proviso be that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force of the said proviso the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so, if the lessors dispense with one alienation, they thereby dispense with all alienations after, for, inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe were absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition, and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for, if the lessor dispense with one, all the others are at liberty."

The holding of Dumpor's Case may in brief be resolved into the formula doubly stated: That *a condition* against assignment without the license of the lessor *is entire and cannot be apportioned* by the act of the parties; and that a license given and an assignment made pursuant thereto destroys the whole condition, leaving the assignee or any subsequent assignee at full liberty to assign the lease to whomever they please.

The Dumpor's Case doctrine has been criticized by both English and American jurists. It was approved in Whitchcake v. Fox, 80 Eng. Rep. 1129, decided about in 1614. From that time until 1807 it finds no support in English judicial decisions. In 1807 it was approved in Brummel v. McPherson, 14 Ves. Jr. 173; Lord Eldon, however, remarking:

> "Though Dumpor's Case always struck me as extraordinary, it is the law of the land to-day. When a man demises to A, his executors, administrators, or assigns, with an agreement that if he, his executors, administrators, or assigns, assign without license, the lessor shall be at liberty to re-enter, it would have been perfectly reasonably originally to say, a license granted was not a dispensation with the condition; the assignee being by the very terms of the original contract restrained as much as the original lessee."

In Does v. Bliss, 4 Taunt. 735, Sir James Mansfield said:

> "The profession has always wondered at Dumpor's Case, but it has been law so many centuries that we cannot now reverse it."

The American profession has received the rule of Dumpor's Case with no greater enthusiasm than their English brethren. In 1 Washburn, Real Property, 379, the author says:

> "Dumpor's Case has always been, it is believed, a stumbling block in the way of the profession."

In Moss v. Chappell, 126 Ga. 196, 207, 54 S. E. 968, 973 (11 L. R. A. [N. S.] 398) the Supreme Court of Georgia says:

> "The doctrine of that case [Dumpor's Case] that a condition is not divisible, seems to us to be purely artificial, and not founded upon any sound reason."

In North Chicago Street R. Co. v. Le Grand Co., 95 Ill. App. 435, the court uses this language:

> "A decision regarded by the English bench and bar so unreasonable as to warrant resort to legislation to eliminate it from the body of English law, will hardly be followed in this state."

In Investors' Guaranty Corp. v. Thomson, 31 Wyo. 264, 225 P. 590, 37 A. L. R. 1071, decided by the Supreme Court of Wyoming, the court refused to follow the rule declared in Dumpor's Case. The court there said that, in view of the fact that there were, as yet, no decisions in that state following Dumpor's Case, and as the English statutes had changed the rule, Wyoming was not required to and did not follow the rule as originally declared. Referring to the California case of German-American Savings Bank v. Gollmer, 155 Cal. 683, 688, 102 P. 932, 24 L. R. A. (N. S.) 1066, the court says:

> "In German-Am. Sav. Bank v. Gollmer, supra, it was said that a condition against assignment is in all cases necessarily single in its nature. But why is it? Three centuries of legal lore have never answered that question, though frequently asked, for the simple reason that no answer, to stand the test of logic and reason, can be given."

Appellants urge that the Dumpor's Case has never been accepted as good law, and many adverse criticisms of its doctrine have been made by both English and American jurists, and that the rule it announces is not at the present time followed in this state.

[2] It has long been settled that restraints upon the use or alienation of granted prem-

ises may within certain limits be lawfully imposed, which is a reasonable recognition of the owner's rights to deal with property as he pleases, provided the restraints are not unlawful or against public policy. Broadway Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254. Consequently, covenants against assignment of a lease without the written consent of the lessor are regarded as fair and reasonable. The lessor may place any restriction within these limits on the right of the lessee to select his tenant for him. E. H. Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo. App. 229, 113 S. W. 253. The rule in Dumpor's Case contravenes these rules of law, and denies the lessor the right to select his own lessee and protect his reversionary estate. The rule in Dumpor's Case has virtually been overturned by another doctrine established in regard to conditions. This is the doctrine of continuous conditions, which has long been applied both in this country and in England. Thus it is well settled that the waiver of a condition as to one subletting does not discharge the condition. Goodwin v. Grosse, 56 Cal. App. 615, 206 P. 138; Miller v. Newton-Humphreville Co. (N. J. Ch.) 116 A. 325; Doe v. Bliss, 4 Taunt. 735; Farr v. Kenyon, 20 R. I. 376, 39 A. 241; Seaver v. Coburn, 10 Cush. (Mass.) 324; Harmon v. Dickerson (Mo. App.) 184 S. W. 139.

The question presented, then, is, Have the California courts, as intimated in the Wyoming case cited, bound themselves to the doctrine announced in the Dumpor's Case?

Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80, is the earliest California case reported touching this question. There, in February, 1851, A leased to B the premises in dispute for a term of six years. The lease contained a provision that the lessee should not assign to any person without obtaining the consent of the lessor. B assigned the leasehold to C with the consent of A, and C assigned to D without the consent of A. The Dumpor's Case, however, is not mentioned in the opinion of the court. The court held that the assignment to C with the consent of A (lessor) was "sufficient to abrogate the covenant against assignment," and said:

> "It is questionable whether, in any case, such a covenant would be enforced so as to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law."

It is apparent that there are two grounds upon which the decision may be based—one, the rule in regard to the abrogation of the covenant; the other, the rule of restraint against alienation. The case may be sustained upon this second ground announced in the opinion, for by the provisions of the lease the only party restrained from assigning the lease was the *lessee*. *The assigns are not mentioned.* There can be no doubt on these facts that the covenant or condition was single and bound no other party or parties than the lessee. The case, therefore, comes within the rule "that forfeitures of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction." Randol v. Scott, 110 Cal. 590, 42 P. 976; Jameson v. Chanslor-Canfield Oil Co., 176 Cal. 1, 167 P. 369; Spangler v. Spangler, 11 Cal. App. 321, 104 P. 995.

McGlynn v. Moore, 25 Cal. 384, 395, 396, cited, was a case in which the lessors claimed a forfeiture by reason of a breach by lessees of their covenant to build a warehouse, as specified in the lease, within two years. Provision was made in the lease for the re-entry of the lessor, "if default shall be made in any of the covenants on the part and on behalf of the said parties of the second part to be kept or performed," and under it the lessor had the right of re-entry for a forfeiture incurred in consequence of a breach of the covenant to build. The question arose as to whether or not the receipt of rent after a knowledge of the breach of the covenant to build waived the lessor's right to re-enter the premises for condition broken. The court held that the covenant to build was single, which would admit of only one breach, and that receipt of rent by the lessor after that breach lost him the right to re-enter or forfeit the lease because of it. It is true the court *in dicta* states that covenants against assignments "are not continuing covenants, because the parties contemplated by such covenants to provide for the doing or the omission of a single act." This language was entirely unnecessary to the decision of the case and is therefore mere *dictum*. The holding in the McGlynn Case is clearly expressed in Stevinson v. Joy, 164 Cal. at page 283, 128 P. 753, where it is said:

> "It appeared that after the failure to build the warehouse the landlord accepted rent. This court declared that this acceptance of rent, with full knowledge of the facts, constituting a breach of the covenant was a waiver of the forfeiture, unless the covenant to build was a continuing covenant. *It determined upon the language of the lease that it was not a continuing covenant.*" (Italics ours.)

In German-American Sav. Bank v. Gollmer, 155 Cal. 683, 102 P. 932, 24 L. R. A. (N. S.) 1066, the covenant against assignment without the consent of the lessor bound the lessee only, as was the case in Chipman v. Emeric, supra, commented upon, and Randol v. Tatum, 98 Cal. 390, 33 P. 433, cited. While the court does parenthetically remark that a condition against assignment is necessarily single in its nature, the language is clearly unnecessary to a decision of the case. The condition against assignment, being binding only on the lessees, was personal to them, and obviously there could be but one breach, and a waiver of that breach would wipe out the condition. The Gollmer Case has been cited through the reports of this state, but we find no case in which it is cited as sustaining the doctrine of Dumpor's Case. If, however, it was intended in the earlier cases to intimate that the doctrine announced in Dumpor's Case under analogous facts would be followed in this state, such intimation was not carried out, for in the somewhat recent case of Rothrock v. Sanborn, 178 Cal. 693, 174 P. 314, a different rule is announced. In that case there was the usual provision against assignment without the consent of the lessor, with forfeiture attached if such assignment were made. After the execution of the original lease, the lessees with the consent of the lessors assigned to Mr. and Mrs. Kendis. It was also provided in the consent that, before the lease could again be assigned, the consent of the lessors must be obtained. "And we hereby consent that the said lease may be transferred by the said Mr. and Mrs. A. P. Kendis to Mrs. Nell L. Rothrock. This consent shall not be treated in any way as waiving any of the provisions of said lease, nor shall the same be assigned or transferred by the said Mrs. Nell L. Rothrock to any person, without our consent first being had and obtained, and then only according to the provisions of paragraph XII of said lease." Paragraph XII provided a stipulated sum to be paid as a consideration for consent to a transfer of the lease. In that case it was necessary to provide that consent for the assignee to assign should be obtained by reason of the failure to make in the original lease the covenants, conditions, etc., binding upon the heirs, assigns, etc., of the lessees. That was a typical case for the application of the rule in Dumpor's Case; yet nowhere in the opinion does the Dumpor's Case nor the rule set forth in it appear; the court enforced against the assignee a provision of the lease restraining an assignment except upon the consent of the lessors. The court not only failed to apply the rule in Dumpor's Case—that is, that a covenant against assignment without the consent of the lessor is indivisible and unapportionable and is beyond the capacity of the contracting parties to qualify or control—but held adversely thereto. This case permits the parties to apportion the condition by contracting in regard thereto. It applies the rule that the plain provisions of the lease must control (Perry v. Gross, 172 Cal. 468, 156 P. 1031), subject to the rule of law that, where forfeitures are provided for in the lease, a strict construction will be invoked against forfeitures, and that forfeitures will only be sustained where they are clearly and unequivocally provided for. As was said in De Angeles v. Cotta, 62 Cal. App. 691, 217 P. 821:

> "'It has been said * * * that covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessees. But this means only that the scope of the term "assignment" will not be enlarged by the courts, and that the covenant will not be considered as violated by any technical transfer that is not fairly and substantially an assignment.' White v. Huber Drug Co., 190 Mich. 212, 157 N. W. 60. 'This does not mean that the courts may make for the parties *a different contract from what they have agreed upon or resort to a strained and unnatural construction to defeat or nullify their clearly expressed purpose or intention.*'" (Italics ours.)

In the present case, the original lease provides that the lessees "shall not assign, pledge, hypothecate or otherwise dispose of this lease nor any portion of the term of this lease, and shall not sublet the premises nor any portion thereof without the written consent of the said lessors first had and obtained," and further that "this lease and all its covenants, agreements, and conditions shall bind said lessors * * * and shall bind said lessees, their heirs, executors, administrators and successors *and also their assigns, in case of an assignment of said lease* by and with the written consent of the lessors."

[3, 4] It must follow from the holding in Rothrock v. Sanborn, supra, under the covenant in the lease here making the condition as to assignment of the lease binding upon the lessees "and also upon their assigns" in case of assignment with the written consent of the lessors, that such covenant is a continuing covenant, and that therefore respondent could not assign the lease without the consent of appellants.

The form of the instrument under which the respondent went into possession of the demised premises is of such a character that it presents the question as to whether or not the result of it is to make respondent a subtenant or an assignee of the original lessees. It will be noted that the parties themselves have labeled the instrument a sublease, but this fact alone would not constitute it such if there is a transfer of the whole leasehold leaving no reversionary interest as in the case here. Jeffers v. Easton, 113 Cal. 345, 45 P. 680; Jordan v. Scott, 38 Cal. App. 739, 177 P. 504.

[5] The exact test for determining when an instrument is a sublease or an assignment is prescribed by the court in Barkhaus v. Producers' Fruit Co., 192 Cal. 200, 205, 206, 219 P. 435, 437. It is there said:

> "It is elementary that a sublease, in order to operate as an assignment, must transfer to the sublessee the entire term of the original lessee in the whole or some part of the demised premises. * * * The term thus referred to is not measured alone by the length of time for which it runs, but is measured as well by the extent of the premises which it covers and the nature and extent of the estate or interest therein which it embodies. * * * The term to be transferred to his assignee by such a tenant must be for a period of time at least equal

to the remainder of the term of the original lease. * * * 'If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions *with a right of entry* [italics ours], or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term.'"

And in Dunlap v. Bullard, 131 Mass. 161, the court says:

> "To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or * * * term. * * * The grant of an interest, therefore, which may possibly endure to the end of the term, is not necessarily a grant of all the estate in the term. * * * *If the smallest reversionary interest is retained, the tenant takes as sublessee, and not as assignee.*" (Italics ours.)

[6, 7] Here under the right of re-entry and forfeiture on breach of a contract reserved to the original lessee in the instrument labeled by the parties themselves a sublease, under the authorities quoted, it would seem the instrument is constituted a sublease and not an assignment, and, the condition against subletting being a continuous covenant, the waiver of the condition as to one subletting does not discharge the condition. Goodwin v. Gross, supra; Miller v. Newton-Humphreville Co., supra; Farr v. Kenyon, 20 R. I. 763, 39 A. 241; Harmon v. Dickerson (Mo. App.) 184 S. W. 139. It follows, therefore, whether the instrument in question be an assignment or a sublease, the same result obtains, and, while respondent has the right to quiet and undisturbed possession of the premises under the terms of the lease upon complying with its terms, she would not be licensed to assign or sublet without the consent of appellants.

[8, 9] The extent, effect, and operation of covenants in leases—that is, their construction—depends upon the intention of the parties as that intention is indicated by the express language of the lease. Rothrock v. Sanborn, supra; Perry v. Gross, 172 Cal. 468, 156 P. 1031; De Angeles v. Cotta, supra; Pedro v. Potter, 197 Cal. 751, 242 P. 926, 42 A. L. R. 1165. It may also be said that the construction of the condition of the lease against assignment placed upon it by the parties themselves as evidenced by their acts and conduct is important, and, if the meaning of the language of an instrument can be considered doubtful, the court will call in the aid of the acts done under it as a clue to the intention of the parties. Hill v. McKay, 94 Cal. 5, 29 P. 406; Rockwell v. Light, 6 Cal. App. 563, 92 P. 649; Dollar v. International Banking Corp., 10 Cal. App. 83, 101 P. 34; Vulcan Iron Works v. Cook, 15 Cal. App. 410, 114 P. 995; Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P. 598; Kennedy v. Lee, 147 Cal. 596, 82 P. 257; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275; Woodard v. Lumber Co., 171 Cal. 513, 153 P. 951; Retsloff as Trustee v. Smith (Cal. App.) 249 P. 886. As was said by Lord Chancellor Sugden: "Tell me what you have done under a deed and I will tell you what that deed means." Here there can be no doubt but that the lessors and lessees in drawing the lease intended that the conditions of the lease, including the one against assignment without the consent of the lessors, were to be binding on the lessees and their assigns, as the lease contained the express provision protecting against assignment by providing that the conditions of the lease shall be binding on the assignees, even though the lease is assigned with the written consent of the lessors.

Respondent believed it was necessary to obtain the consent of appellants before she could assign the lease. The court found that an application for such consent was made but was refused by appellants with the statement that no assignment could be made without their consent. If there were any doubt as to what the parties to the contract understood their rights to be in regard to the survival of the conditions of the original lease and particularly the condition against assignment without consent, the application of respondent to appellants to consent to an assignment and appellants' refusal dispels such doubt. As was said in Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275:

> "It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that, whatever is done by the parties contemporaneously with the execution of the contract, is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them seeks a construction at variance with the practical construction they have placed upon it."

[10-12] Respondent contends that there is no restraint against assignment applicable to her for the reason that the Barkers having granted to her the right to assign her interest without obtaining their consent or the consent of any other person, appellants are therefore estopped to deny, because of the Barkers' contract, her right to assign her lease without their consent. This asserted proposition has no foundation in legal reason or principle. In the first place, appellants did not sign the agreement entered into between the Barkers and respondent whereby the latter was given the right to assign the lease without first obtaining the consent of any person. There is lacking, therefore, as between appellants and respondent, that privity of contract which is essential in order to charge a party on a contractual obligation. It is a proposition of law, so well established as to be almost axiomatic, that a party cannot be charged upon a contract to which he is not a party. Respondent recognizes this principle, but maintains that, since the contract between the Barkers and herself was entered into on the same day as the other instruments, Exhibits A, B, and C, the contract formed a part of the same transaction, and hence the defendants were bound by it as effectively as though they had agreed thereto. This rule of interpretation cannot be applied to any set of contracts entered into between different parties and by such application made to create, in contravention of fundamental principles of law, a contractual obligation where none existed or was intended by the parties. If this were the case, it would be possible for courts, on the assertion that they are interpreting a contract, to create one where none existed.

[13] In the second place, the above rule can only apply to Exhibits A, B, and C, and cannot include the agreement made the same day but subsequently between the Barkers and respondent. This is obvious for the reason that the only contract in which there is a unification of interest among the Barkers, respondent and appellants is embraced in these three exhibits. This is apparent from the fact that Exhibits A and B are signed by the Barkers and appellants, and Exhibit C is signed by the Barkers and respondent, and Exhibit C expressly incorporates therein Exhibit A and makes it a part thereof, and respondent contracts to perform all the terms and conditions of the original lease. Thus, while appellants have not signed Exhibit C, they have, we think, been included therein by the contracting parties sufficiently to make it possible to apply to it the rule of interpretation stated. If this permission from the Barkers to respondent to assign her interest without the consent of any person had been incorporated in or made a part of any one of the above-named exhibits, there might be plausibility in the argument advanced by respondent. In Exhibit B, however, instead of there being any intimation that the Barkers might assign or sublet their lease to another person and give to that person the unqualified right to assign without first obtaining the consent of any person, there is the expressed declaration that respondent may sublease the premises provided the terms and obligations of the lease entered into between the Barkers and appellants are fully kept and performed.

[14] In the third place, it is evident that the Barkers could not grant to respondent, in contravention of the rights of appellants, a greater estate in the property than they themselves had. Nor could respondent, by virtue of her contract with the Barkers, assign her lease without first obtaining the consent of appellants, for her rights are measured by those of the Barkers. Having taken with actual notice of the terms and conditions of the original lease, respondent, when she entered into the contract with the Barkers, by the terms of which she was to be permitted to assign her lease without the consent of any person, had knowledge of the fact that the lease could not be assigned without the written consent of appellants. It must be taken, therefore, that she knew that her contract with the Barkers was qualified by the right of appellants to insist that an assignment could be validly made only after their consent had been obtained, or, in other words, it must be taken that she knew that her contract was subject to the restrictive provisions in the original lease.

[15] It is evident from the foregoing that, unless appellants have, by accepting the surrender of the Barkers' interest in the lease, bound themselves to the contract between the Barkers and respondent, they have not forfeited nor waived nor contracted away their right to insist that their permission be obtained before the lease is assigned. We think, however, that the effect of the surrender of Barkers' interest in the property to appellants does not subject them to that contract.

In Cesar v. Virgin, 207 Ala. 148, 92 So. 406, 24 A. L. R. 715, which was a case involving in part a lease from A to B of a business house for a period of 5 years, by the terms of the original lease it was not to be assigned nor the premises sublet without the consent in writing of the lessors, nor were the premises to be used for any other than mercantile purposes. B sublet a portion of the premises to C for use and occupation as a shoe-shining and hat-cleaning establishment and for no other object or purpose. C assigned to D. B then voluntarily surrendered his original leasehold interest to A. A sought to forfeit the lease because of the violation of several covenants in the lease, among which was the one not to use the premises for other than mercantile purposes. D brought an action to be relieved of the forfeiture. In discussing the effect of the surrender of the head lease to A on the terms in the sublease which permitted the subtenant in violation of the covenants of the head lease to use the premises for other than a shoe-shining and hat-cleaning establishment, the court said:

> "But complainants claim under a sublessee, and it is true in general that a lessee cannot surrender his term to the prejudice of his assignee or subtenant (Brock v. Desmond, 154 Ala. 634, 45 So. 665, 129 Am. St. Rep. 71), and that third persons who have acquired interests in the premises may have relief against a forfeiture when their right would be defeated thereby (Morey v. Hoyt, 62 Conn. 542, 26 A. 127, 19 L. R. A. 611). This, however, assumes that the sublease does not offend against the

rights of the original lessor, for a sublessee is charged with notice and bound by all the conditions of the original lease. * * * The act of the original lessee in surrendering his lease was not the surrender of any right, but an assent to the right of his landlord under the terms of the original lease. * * * As we said in Bancroft v. Vizard [202 Ala. 618, 81 So. 560] supra, the assignee becomes responsible to the original lessor on the covenants of the original lease on the ground that he makes himself a privy in estate with the original lessor, if the lessor chooses to pursue him. But in this case we apprehend that it is not a matter of consequence whether complainants be held for assignees or sublessees. In neither case can they have a better right than their lessor. In neither case have they been able to deprive defendant, original lessor, of the benefit of the covenants, other than the covenant for rent, upon consideration of which she entered into the original contract of lease."

[16] Respondent asserts:

"If it be assumed that the restriction against assignment was not extinguished and the plaintiff was obligated to obtain the consent of the defendants, then the defendants breached their agreement to give their consent."

This contention is based on the following clause in the senior lease, which, after restricting the right of the lessees to assign, provides:

"Said lessees may, with the written consent of said lessors, assign said lease to any person or persons of good character and repute and satisfactory to the lessors, upon furnishing good and sufficient security to be approved by said lessors."

In answer to this contention of respondent that appellants have breached their agreement by refusing to consent to an assignment by respondent to Arthur L. Roberts, who was a person of good character and repute, and that therefore respondent has suffered damage, appellants assert that the only possible effect that this latter proviso can have upon the absolute covenant of the lessee not to assign without the consent of the lessor is to qualify such covenant and to read into it a provision that the lessors will not withhold their consent if a person satisfactory to themselves is proposed, that the effect of the proviso is not to create a covenant on the part of the lessors to the effect that they will consent to an assignment, if a party of good character and repute and satisfactory to them is proposed.

Appellants' contention finds support in the authorities. In the recent New York case of Sarner v. Kantor (1924) 123 Misc. Rep. 469, 205 N. Y. S. 760, in discussing this question the court says:

"Plaintiff alleges unreasonable refusal to consent to a sublease, and demands damages and the return of the deposit under the lease. Plaintiff cannot recover unless this fourth clause ['nothing herein contained shall permit the landlord to unreasonably withhold his consent to any sublease'] is a covenant by defendant not unreasonably to withhold his consent to a sublease. The purpose of the provision is to protect the lessee against liability for damages or risk of forfeiture, if consent of the lessor is improperly withheld. 1 Tiffany, Landlord & Tenant, § 152, p. 933; 2 Underhill, Landlord & Tenant, § 632, p. 1063. Nowhere does the lessor expressly covenant not to withhold his consent unreasonably. The only covenant is by plaintiff not to sublet, and it is plaintiff's own covenant that is qualified by the condition that the lessor shall not unreasonably withhold his consent. The cases of Sear v. House Property and Investment Society, L. R. 1880–81, 16 Ch. Div. 387, and Treloar v. Bigge, L. R. 1873–74, 9 Exch. 151, are controlling."

In the case of Sear v. House Property and Investment Society (L. R. 1880–81, 16 Ch. Div. 387), cited by the New York court, the English court said:

"The question is one of construction of the language of the deed. Do the words contained in the clause, 'but such consent not to be unreasonably withheld,' amount to a contract upon the part of the lessor that he will not unreasonably withhold his consent, or do they merely amount to a qualification of the covenant in which they are found, and which was entered into by the lessee, so that if the consent be unreasonably withheld, the lessee assigning does not break his covenant. If I were to decide the question quite irrespective of authority, I should say that a fair reading of the covenant that the words referred to merely qualify the obligation contained in the clause itself—that the lessee would not assign without consent. The words are inserted in the lessee's covenant, and they are put in the form which looks more like a qualification than a contract."

In Andrew v. Bridgman, [1908] 1 K. B. 596–598, the court said:

"It has long been settled that the effect of a proviso of that kind is not to impose an obligation on the lessor to give a consent, but, in case it is reasonably withheld, to release the lessee from the obligation of the covenant and to enable him to assign without obtaining any license."

In opposition to the views here expressed, respondent has cited the case of Broadway & 94th St., Inc., v. C. & L. L. Co., 116 Misc. Rep. 440, 190 N. Y. S. 563. That case is clearly distinguishable from the present case and cases here cited. In that case, which was decided on a demurrer to a complaint alleging that the proposed lessee was acceptable to the lessors, it is true that a promise of positive action on the part of the landlord was raised by implication. But it is to be noted that there the tenant had complied with certain onerous obligations, that he fitted up the premises as a first-class restaurant, which was made a condition precedent to consent by the landlord, and it was therefore held that there was a reciprocal obligation resting on the landlord to act affirmatively in reference to the assignment desired. Here no such condition existed.

We think the trial court's decision that such provisions in leases do not create covenants on the part of the landlord is correct. But, even assuming that there was some sort of a covenant created by the provision in the lease, that covenant could only be one in which the defendants agree to consent to an assignment of the lease when "any person or persons of good character and repute and *satisfactory to the lessors*" are procured.

[17] The findings in the case do not say that Roberts was a person who was satisfactory to the appellants. They merely state that "said Arthur S. Roberts, at all times mentioned in plaintiff's complaint, was and now is a fit, suitable, proper and responsible person of good character and repute." The general rule in cases where the agreement calls for performance by one party to the satisfaction of the other is that the party to be satisfied is the sole judge of his own satisfaction, subject only to the limitation that he must act in good faith. Here, as found by the court, there was no bad faith on the part of appellants. This left them free to insist that the assignee shall be a person satisfactory to themselves, because this was a case involving the individual judgment of appellants. As was said in Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 702, 182 P. 428, 429:

> "When one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not."

It cannot be assumed or implied, therefore, from the finding quoted, that Roberts was a fit, suitable, proper, and responsible person of good character and repute and that appellants were in fact *satisfied or ought to have been satisfied.* The appellants being the sole judge of a satisfactory person, there must be, in order to show a breach of the covenant, if there be such a covenant, an affirmative finding that appellants were actually satisfied, but still failed to consent, or acted in bad faith in claiming that they were not satisfied.

We conclude from the foregoing that there was not only no covenant on the part of the defendants to agree to the assignment, but that, even assuming that there was such a covenant, respondent has failed to show that there was a breach thereof. Furthermore, there was not only no covenant on the part of the lessors to consent to an assignment, but there was also no such qualification of the lessee's restrictive covenant, which, as the lower court decided, would give the respondent the right to assign her lease without the consent of appellants, if the latter should unreasonably withhold their consent to an assignment. Tiffany v. Pacific Sewer Pipe Co., supra.

The trial court found that Roberts was a person of good character and repute, and that appellants arbitrarily and unreasonably refused to accept him as an assignee. This finding is not only opposed to the terms of the lease, since appellants never covenanted that they would not arbitrarily and unreasonably withhold their consent, but is opposed to the express terms of the lease; that is, the right of appellants to be satisfied with the proposed assignee and their right even unreasonably to insist upon being satisfied. Tiffany v. Pacific Sewer Pipe Co., supra; White v. Huber Drug Co., 190 Mich. 212, 215, 157 N. W. 60. To reach the result it did, the court has been compelled to read into the lease terms not put there by the parties and to strike therefrom terms actually contained therein. Of course, under a covenant such as we have here, if an assignee were presented who was of good character and repute and was in fact satisfactory to the lessor, but such lessor in bad faith and in order to prevent the lessee from effecting an assignment without additional benefits to himself withheld his consent, the lessee would be at liberty to assign and would be relieved from the obligation of the covenant.

[18-22] As to the damages alleged to have been suffered by respondent by reason of appellants' refusal to consent to an assignment of the lease to Roberts, and regarding which the court found "that plaintiff has not sustained monetary damage by reason of any matters or things set forth in the second or third cause of action pleaded in the complaint herein," and from the judgment on such finding, respondent herein has appealed in the case of Minnie Kendis, Plaintiff and Appellant, v. A. B. Cohn et al., Defendants and Respondents (No. 6183, Cal. App.) 265 P. 855, it may be said that this appeal is taken on the judgment roll alone, and there is therefore a total absence of any transcript of the evidence or bill of exceptions. Under such circumstances it will be presumed that the evidence offered in support of the findings was sufficient to support the facts found. Harmon v. De Turk, 176 Cal. 758, 761, 169 P. 680; O'Meara v. Hables, 163 Cal. 240, 241, 124 P. 1003; Cutting Fruit Pk. Co. v. Canty, 141 Cal. 692, 695, 75 P. 564; Ross v. McCarthy, 54 Cal. App. 568, 570, 202 P. 161. It is a well-settled rule that findings of fact made by the trial court are to receive such construction as will uphold rather than defeat its judgment thereon. Paine v. San Bernardino, etc., Co., 143 Cal. 654, 656, 77 P. 659; Randisi v. Simone, 26 Cal. App. 661, 147 P. 1176. And, if different inferences may be drawn from the facts as found, this court will not upon an appeal from the judgment on the judgment roll alone draw an inference contrary to that drawn by the trial court or which will have the effect to defeat

the judgment. Breeze v. Brooks, 97 Cal. 72, 77, 31 P. 742, 22 L. R. A. 257; Gould v. Eaton, 111 Cal. 639, 644, 44 P. 319, 52 Am. St. Rep. 201; People's Home Sav. Bk. v. Rickard, 139 Cal. 285, 291, 73 P. 858; Akley v. Bassett, 68 Cal. App. 270, 292, 228 P. 1057. It follows, therefore, that the findings that appellants did not act maliciously and without probable cause, and that respondent has not sustained monetary damage upon this appeal upon the judgment roll alone are conclusive upon this court. Bad faith is a question of fact to be determined by the jury or by the trial court, and, the court not having found that appellants acted in bad faith, this court will not in the absence of evidence make such a finding. Hamaker v. Bryan, 178 Cal. 128, 129, 172 P. 391. Malice, express or implied, in the making of slanderous statements, is an essential ingredient in an action for slander of title, without proof of which it fails. 16 Cal. Jur. 161; Fearon v. Fodera, 169 Cal. 370, 380, 148 P. 200, Ann. Cas. 1916D, 312.

It follows that the judgment must be reversed, and it is accordingly so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

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90 Cal. App. 796

Minnie KENDIS, Plaintiff and Appellant, v. A. B. COHN, Lulu B. Cohn, M. B. Cohn, and Hattie B. Cohn, Defendants and Respondents. (Civ. 6183.) ★

District Court of Appeal, First District, Division 1, California. March 10, 1928.

Hearing Denied by Supreme Court May 7, 1928.

Appeal from Superior Court, Los Angeles County; Walter Perry Johnson, Judge.

Lissner, Roth & Gunter, of Los Angeles, for appellant.

Newby & Palmer, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondents.

CAMPBELL, Justice pro tem. This is an appeal from portions of the judgment entered declaratory of the rights of the parties relative to the assignment of a certain lease and adjudging that plaintiff take nothing by way of damages. The questions presented on this appeal are passed upon in the case of Minnie Kendis, Plaintiff and Respondent, v. A. B. Cohn, Lulu B. Cohn, M. B. Cohn, and Hattie B. Cohn, Defendants and Appellants (No. 6182) this day decided by this court, 265 P. 844, and, on the authority of that case, the judgment here is reversed and affirmed as the questions here presented are determined in that case; respondents to recover their costs on this appeal.

We concur: TYLER, P. J.; KNIGHT, J.

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90 Cal. App. 260

JOHNSON v. BOADWAY BROS.★
(Civ. 5046.)

District Court of Appeal, Second District, Division 2, California. March 20, 1928.

Hearing Denied by Supreme Court May 17, 1928.

1. Corporations 🔑81—Evidence held to show sufficient substantial injury warranting rescission of conditional stock subscription contract.

In action for rescission of stock subscription contract, evidence showing that plaintiff purchased stock on condition that a building was to be erected at certain place and department store opened therein and representation that it would enhance value of plaintiff's property, and that store was not established, *held* sufficient to show a substantial injury.

2. Corporations 🔑81—Defendant, refusing written tender of stock by plaintiff seeking rescission of subscription contract without specifying reason for refusal, cannot claim tender was invalid (Civ. Code, § 1691, subd. 2; Code Civ. Proc. §§ 2074, 2076).

Where plaintiff in action for rescission of stock subscription contract, by a written instrument, tendered stock precisely as plaintiff received it and agreed to indorse it if desired, which was not accepted, nor reason given for such refusal, *held*, that, under Civ. Code, § 1691, subd. 2, and Code Civ. Proc. §§ 2074, 2076, defendant cannot claim that tender was invalid.

3. Corporations 🔑81—Evidence held to support judgment for plaintiff in action to rescind stock subscription contract.

In action for rescission of stock subscription contract, evidence that plaintiff was induced to purchase stock on representation that building was to be erected near plaintiff's property and department store conducted therein, thus enhancing value of plaintiff's property, and that department store was not established, *held* sufficient to justify denial of nonsuit and to support judgment for plaintiff.

4. Corporations 🔑81—Action for rescission of stock subscription contract held not premature (Civ. Code, § 1691).

Where plaintiff purchased stock under stock subscription contract in summer of 1922, under representation that department store was going to be established near his property which would be in operation by Christmas, *held*, under Civ. Code, § 1691, that action for rescission brought by plaintiff in February, 1923, at which time no building had been erected, was not premature.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Olof Johnson against Boadway Bros. for the rescission of a stock subscription contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul S. Honberger and Lewis C. Preston, both of Los Angeles, for appellant.

G. R. Dexter and Howard B. Henshey, both of Los Angeles, for respondent.

★Hearing denied by Supreme Court.

STEPHENS, Justice pro tem. This is an action wherein the plaintiff asks a judgment in rescission of a certain stock subscription payment contract and for the return of $5,000 paid thereon. Judgment went for plaintiff as prayed, and defendant appeals upon a bill of exceptions and upon the judgment roll.

There is little conflict between the parties in the evidence. Defendant was a corporation engaged in the department store business in Pasadena. In the summer of 1922 it sold its own preferred stock for the announced purpose of securing a lease on designated property in Hollywood, a district within the corporate limits of Los Angeles, and to procure the erection and equipment of a suitable building upon the leased ground for the establishment therein of a department store. Such a lease was executed August 7, 1922. Prior to the actual execution of the lease a stock-selling campaign was conducted in Hollywood, with Mr. O. E. Boadway, vice president of the defendant corporation, in active charge, and a number of business men of Hollywood, one of them, Mr. B. Y. Taft, being very active. The plan was publicly and directly to plaintiff announced that the enterprise would enhance the value of property in the vicinity of the store. Plaintiff owned property on Hollywood boulevard near by, and believing this new business would increase the value of his holding he subscribed in the sum of $5,000. This sum was put in escrow, and later, after the escrow had been declared off, he was requested to release the money, but he would not do it until after being shown an instrument dated August 31, 1922, wherein it was recited, under "whereas" clauses, that $50,000 provided for by the contemplated lease had not been deposited in escrow; that pending same the lease had been withheld by lessor; that a bond had been executed to lessor in lieu of deposit; that, therefore, the lease would be retained by the lessor to be delivered and become effective when bona fide subscriptions equal to $200,000 at par had been received and had been approved by the lessor, the lessor retaining the option to deliver the lease at any time under any condition of subscription; that if within 30 days thereafter such subscriptions had not been obtained and paid for in cash lessor reserved the right to terminate the agreement and lease. The instrument also contained the following:

> "* * * Said corporation undertakes and agrees to give all of said 'Hollywood subscribers' * * * the right and option to rescind the subscription of each subscriber within 30 days after the termination of this agreement and the cancellation of said lease, and to receive back upon such conditions everything of value paid or turned over to said corporation, together with all evidences of indebtedness given to said corporation."

Thereafter on the 14th day of February, 1923, plaintiff served his notice of rescission and on February 20th brought this action. There is evidence to the effect that Boadway told plaintiff that the business would be established by Christmas, 1922; that Taft represented to plaintiff that Mr. Greenwood, a local banker, had agreed to take $1,000 of the stock. There were also other representations as to the stability of Boadway Bros. Up to the time of the commencement of the action (and not since) no building had been commenced. All of the money subscribed, including plaintiff's subscription, went into the general fund of defendant corporation and was used in the general conduct of its business in Pasadena, Long Beach, and San Diego.

A meeting was held in Mr. Taft's office in January, 1923, concerning which plaintiff testified:

> "I had definite information at the mass meeting in January, 1923, that the defendant did not intend to establish and equip and maintain a store on that particular corner."

A receiver in bankruptcy was in charge of defendant's business from November, 1922, to February 3, 1923. They were never adjudged bankrupt. On February 3, 1923, there was a change in the personnel of defendant's officers. The corporation became the Tooker-Jordan Company. A statement of condition of the business as of February 3, 1923, was introduced in connection with Mr. Jordan's (the new vice president) testimony that the business was in a good condition. The lease herein referred to was rescinded July 20, 1923.

[1] The first point urged by appellant was under the subhead: "No damage or injury is alleged or shown." Plaintiff purchased the stock upon condition that a building would be erected at a certain place and a department store opened therein. The evidence is strongly convincing that this was the controlling motive and condition of plaintiff's investment. There was evidence to support the finding that this consideration failed. Mr. Justice Shaw, in Withers v. Moore, 140 Cal. 591, at p. 600, 74 P. 159, 162, quoted from page 399 of Anson on Contracts with approval, as follows:

> "The difficulty which has always arisen, and must needs continue to arise with regard to conditions precedent, consists in discovering whether or no the parties to a contract regarded the particular term as essential. If they did, the term is a condition; its failure discharges the contract."

See, also, Fountain v. Semitropic L. & W. Co., 99 Cal. 677, 34 P. 497. It seems to us that the allegations of the complaint are sufficient and the proof ample upon which to base a finding that the establishment of the store was the controlling condition of the contract and the failure to establish the same was a substantial injury.

[2] The second point urged by appellant was under the subhead: "No valid tender of stock." The point made here is that the stock when tendered was not indorsed. The stock, just as it had been received by him, was tendered by plaintiff with the notice of rescission, which stated that plaintiff would indorse it if desired. Subdivision 2 of section 1691 of the Civil Code is as follows:

> "He [the party rescinding] must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

The evidence shows that by a written instrument the tender was to restore the stock precisely as plaintiff had received it, and that if this were not sufficient he would upon request indorse it over. An offer in writing to deliver a written instrument, if not accepted, is equivalent to actual production. Code Civ. Proc. § 2074. Here an offer was made of the stock as received as well as to deliver indorsed if desired, but neither was accepted. There was no specification as to why the tender was refused (section 2076, Code Civ. Proc.), and this is but another reason why the tender as made cannot now be successfully claimed as invalid.

[3] The third point urged by appellant was under the subhead: "Defendant's motion for nonsuit should have been granted." It is true that the trial court was abrupt in its ruling on the motion for nonsuit and should have permitted counsel to fully state the grounds of the motion whether or not it desired to hear argument. However, we believe there was sufficient evidence before the court to require a response by evidence from the defendant, and we do not believe there was any ground upon which the court could have ordered a nonsuit. It appears from the evidence that a large sum of money was subscribed for the purpose of leasing land and erecting a building for the purpose of conducting thereon and therein a department store. That the land was leased was of no importance. Even if a building had been erected, that would perhaps have been of no importance, except that both of these were necessary for the important thing—the establishment and maintenance of a department store. This was not done. Instead, the funds were commingled with the business already being conducted in other cities by defendant. The company later went into the hands of a receiver, and it later changed management and name. The affairs of the company, by the statement in evidence as of February 3, 1923, did not reveal a cash on hand account equal to the establishment of the enterprise. In fact, it revealed but $1,249.15 in cash. This, in connection with the other facts as hereinbefore stated—which, of course, appears more in detail in the record—was substantial evidence for the court to deny the nonsuit and upon which to predicate fraud, as was done in the findings.

[4] The fourth point urged by appellant was under the subhead: "The action was premature." The enterprise was to have gone on with rapidity. It was represented that it was to be in operation by Christmas. Instead, the vicissitudes related under the last-treated subhead were known by plaintiff. It appears to us that not only was plaintiff not premature in his action, but had he delayed he would have been in grave danger of legally waiving any objection to his investment being used in the general conduct of the business instead of for the real purpose—the establishment of a business in Hollywood. Section 1691 of the Civil Code reads, in part:

> "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: (1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind. * * *"

The fifth point urged by appellant was under the subhead: "Findings of fact not supported by the evidence." We have expressed ourselves sufficiently on this point under the other points already treated. We think the complaint was sufficient and that the evidence supports the findings of fact and the judgment.

We do not attach the same importance to the agreement of August 31, 1922, as does the appellant. It was entered into by Edward O. Palmer, one of the lessees, and Boadway Bros. and without the knowledge of plaintiff until after its execution. It could not bind plaintiff, although we do not think it would have changed matters had he signed it. Its importance is that it reasserts that one of the conditions in the inducement to buy the stock was the establishment of a business as hereinbefore related.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 306

HALSEY v. SEARS. (Civ. 4608.)

District Court of Appeal, Second District, Division 1, California. March 21, 1928.

Appeal and error 🔑105—Order denying motion to dismiss action held not appealable (Code Civ. Proc. §§ 581b, 963).

Under Code Civ. Proc. § 963, providing for appeals from superior court in certain cases, order denying motion to dismiss action under section 581b was not appealable.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Gerald C. Halsey, executor of last will and testament of Peter Radonich, deceased, against W. A. Sears. From an order of the superior court denying defendant's motion to dismiss the action under Code Civ. Proc. § 581b, defendant appeals. Appeal dismissed.

Max B. Jamison, of Porterville, for appellant.

Geo. W. Smith, of Santa Cruz, and Frank Lamberson, of Visalia, for respondent.

YORK, J. Appeal from an order denying appellant's motion to dismiss under section 581b of the Code of Civil Procedure. A similar case was originally filed in Santa Cruz county, and a change of venue granted to the superior court of Tulare county, and, upon the plaintiff failing to pay the filing fee of the action within one year after the case was transferred, such case was dismissed on motion of defendant and appellant herein on April 3, 1922. Plaintiff and respondent then filed the instant case in the superior court of Santa Cruz county, which was transferred again to the superior court of Tulare county, and this last filed case, known as No. 14227 in the superior court of Tulare county, is the case now before the court. The defendant and appellant filed a motion to dismiss the action "filed anew." This motion was denied by the court, and, from the order denying this motion, the defendant and appellant appeals.

Under section 963 of the Code of Civil Procedure it is contended by respondent that the order denying the motion of dismissal in this case is not an appealable order. This section provides an appeal may be taken from the superior court in certain cases:

> "1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court; * * * 2. * * * from any special order made after final judgment. * * *"

But we can find no provision providing for any appeal from an order either granting or denying a motion to dismiss. If the order had been an order granting the motion to dismiss, and a judgment had been rendered thereon, an appeal would, of course, lie from such final judgment, but in the case at bar it is apparent that the question which appellant is attempting to raise in this court cannot be raised until a judgment has been rendered in the case.

The appeal is therefore dismissed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 357

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5922.)

District Court of Appeal, Second District, Division 1, California. March 23, 1928.

Master and servant 🔑417(7)—Award to doctor for medical services rendered injured employee, based on conflicting evidence, cannot be disturbed (Workmen's Compensation, Insurance, and Safety Act 1917).

Where, in awarding compensation under Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 831) to doctor who rendered medical service to an injured employee, evidence before Industrial Accident Commission was conflicting, appellate court could not interfere.

Proceeding by George S. Von Wedelstaedt, M. D., for compensation for medical services rendered an injured employee, opposed by the Federal Mutual Liability Insurance Company, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation insurance carrier petitions for certiorari. Award affirmed.

Willis I. Morrison, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

YORK, J. Respondent George S. Von Wedelstaedt, M. D., was awarded compensation for services rendered to a man injured who was a salesman in the employment of Schlueter's, Distributors Maytag Washers, a corporation. The employee was injured while playing baseball as a member of a team known as "Schlueter's Baseball Team." Their players wore uniforms furnished and paid for by Schlueter's, with the name "Schlueter's" across the breast of each uniform. This team was composed exclusively of employees of Schlueter's. The employee, one Mocabee, was playing in such a baseball team at the time of his injury, and this baseball team was organized and composed by Schlueter's solely of its own employees for two purposes; namely (a) to advertise the employer's name and business, and (b) recreation for its employees with increased morale. The commission found as follows:

"Findings of Fact.

"(1) Odell Mocabee, defendant employee, while employed as a salesman and baseball player on November 7, 1926, at Los Angeles, Cal., by Schlueter's, Distributors Maytag Washers, a corporation, sustained injury occurring in the course of and arising out of and incidental to said employment as follows: While playing in a game of baseball and sliding into a base, he sustained a Pott's fracture of the left leg, more fully described as a complete fracture of internal malleolus and diagonal fracture of fibula of left leg. At said time said employer's insurance carrier was Federal Mutual Liability Insurance Company, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance, and Safety Act of 1917.

"(2) The defendant herein had notice or knowledge of said injury within the time required by law and failed or refused to furnish any medical treatment therefor, and the applicant herein is entitled to the reasonable value of the medical treatment he has furnished for said injury, which value is hereby fixed in the sum of $105.50, which should be paid directly to said applicant by said insurance carrier.

"The above constitutes a part of the medical expenses in the above-entitled case, and jurisdiction is hereby reserved to issue supplemental award to allow for bills not included herein."

"Award.

"Award is hereby made in favor of George S. Von Wedelstaedt, M. D., applicant, against Federal Mutual Liability Insurance Company, a corporation, defendant, of the sum of $105.50, payable forthwith.

"It is ordered that all payments herein awarded shall bear interest at the rate of 7 per cent. per annum until paid, beginning with the date of this award; and

"It is further ordered that the employer herein be dismissed from this proceeding and discharged from liability herein.

"Thos. M. Hunter, Referee.

"It is ordered that the above decision be and it is hereby approved and confirmed and filed in the office of the Industrial Accident Commission, and the parties notified thereof.

"Dated at San Francisco, Cal., this 29th day of August, 1927. Industrial Accident Commission of the State of California, John W. Carrigan, J. E. Olmsted, Commissioners.

"Attest: F. B. Lord, Secretary. [Seal.]"

The only question here involved is whether or not Dr. Von Wedelstaedt was entitled to payment for his medical services rendered. On the evidence before the commission they could have found as contended by petitioner for this writ of certiorari, but it is equally true that they had evidence to support each of their findings of fact herein, and, that being true, we cannot interfere with the award rendered. Ryan v. State Industrial Commission et al., 128 Okl. 25, 261 P. 181; Kish v. Cal. State Auto. Ass'n, 190 Cal. 246, 212 P. 27; Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 P. 25.

The award is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 191

PITINO–CAPASSO FRUIT CO. v. HILLSIDE PACKING CO. et al. (Civ. 3436.)

District Court of Appeal, Third District, California. March 16, 1928.

1. Appeal and error ⚷113(1), 782—Direct appeal from order denying motion to vacate judgment does not lie and will be dismissed (Code Civ. Proc. § 663).

Direct appeal from order denying motion to vacate judgment, under Code Civ. Proc. § 663, will be dismissed, since appellate court has no appellate jurisdiction.

2. Appeal and error ⚷356—Appeal held dismissed, were notice of appeal was filed more than 60 days after judgment was entered (Code Civ. Proc. § 939, as amended by St. 1915, p. 205).

Where clerk's transcript showed that judgment appealed from was entered not later than October 6, and that notice of appeal was not filed until December 31, appeal will be dismissed, in absence of any motion for new trial, since 60-day period for taking appeal, provided by Code Civ. Proc. § 939, as amended by St. 1915, p. 205, is mandatory.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Pitino-Capasso Fruit Company against the Hillside Packing Company and another for damages for breach of contract. From the judgment, and from an order denying a motion to vacate the judgment, plaintiff appeals. Appeal dismissed.

Charles A. Bank, of Los Angeles, for appellant.

C. W. Braswell, of Long Beach, for respondents.

BUCK, Justice pro tem. This is an action by a vendee against his vendor to recover damages alleged to have been sustained for a breach of an alleged contract of sale. Defendant had judgment, and plaintiff appeals from the judgment and also from the order denying plaintiff's motion to vacate the judgment under the provisions of section 663 of the Code of Civil Procedure.

[1] Respondent urges in his reply brief a preliminary objection to the hearing of these appeals upon the ground that this court has acquired no jurisdiction to consider them. To this contention appellant makes no reply either by brief or oral argument. As regards the attempted direct appeal from the order

made pursuant to section 663 of the Code of Civil Procedure, it is clear that this court has no appellate jurisdiction. Modoc Co-op. Ass'n v. Porter, 11 Cal. App. 270, at page 274, 104 P. 710. See, also, Kline v. Murray, 79 Mont. 530, 257 P. 465; Lindgren v. Weaver (Cal. App.) 252 P. 669.

[2] As regards the attempted appeal from the judgment, section 939 of the Code of Civil Procedure, as amended in 1915 (St. 1915, p. 205), provides that such an appeal must be taken within 60 days from the entry of the judgment. Section 940, Code Civ. Proc.; Estate of Scott, 124 Cal. 671, 675, 57 P. 654; Steward v. Spano (Cal. App.) 255 P. 532; Wilson v. Durkee, 20 Cal. App. 492, 129 P. 617. The clerk's transcript shows that the judgment appealed from was entered in the judgment book not later than October 6, 1925. There is no record of any motion for a new trial herein. Aspegren & Co. v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400. Furthermore, the clerk's transcript shows that the notice of appeal was not filed until December 31, 1925. Since the time for filing is mandatory, the appeal herein from the judgment must be also dismissed. Smith v. Questa, 58 Cal. App. 1, at page 4, 207 P. 1036; Steward v. Spano, supra.

Appeal dismissed.

We concur: HART, Acting P. J.; PLUMMER, J.

90 Cal. App. 345

TURNER v. MARSHALL et al. (Civ. 6155.)

District Court of Appeal, First District, Division 2. California. March 22, 1928.

Evidence 🔑383(7)—Recitals in trust deed held conclusive against contention that notice of sale was published in city other than where property was situated (Code Civil Proc. § 692).

Trust deed, providing that, in event of sale of property described therein by trustee, recitations in trustee's deed of any matters affecting regularity or validity of such sale shall be conclusive proof of truthfulness of such recitals, and trustee's deed at sale under trust deed containing recital that notice had been given as required by deed of trust, *held* conclusive, as against contention that deed was void because notice of sale, under Code Civ. Proc. § 692, was published in a newspaper not published in city where real property was situated.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Avery E. Turner against Percy W. Marshall, Alice C. Marshall, his wife, and others. Judgment for plaintiff, and named defendants appeal. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellants.

Porter & Sutton, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. This is an action to quiet title to real property situated in South Pasadena, Cal. Plaintiff purchased the property involved in this litigation at a trustee's sale under a trust deed executed by the Marshalls as grantors, the plaintiff being in no wise interested in the lien indebtedness. At the time of the trial of the action, in addition to the Marshalls, several other defendants claiming judgment and attachment liens were separately represented. The judgment was in favor of the plaintiff and against all of the defendants. The defendants Marshall are the sole appellants.

It is the contention of these appealing defendants that the trustee's deed is void by reason of the fact that the notice of sale was published in a newspaper printed and published in the city of Los Angeles and not published in a newspaper printed and published in South Pasadena, where it is conceded the real property was situated. It is not disputed that the publication was made in a newspaper published in the city of Los Angeles, and that no notice of publication was had in any newspaper published in South Pasadena. It is also further contended by the appellants that they had fully consummated an option to purchase this same property from the plaintiff after his purchase of the same at the trustee's sale. With respect to this matter, the court found that the defendants Marshall paid the plaintiff the sum of $1,251.83, for which plaintiff executed and delivered to said defendants an option to purchase said property for the sum of $8,500 at any time before July 20, 1923; that the option to purchase said property was never consummated by said defendants or any one else in their behalf; that the option expired on July 20, 1923; and that all rights of the defendants therein were lost and terminated. These findings are fully supported by the evidence as disclosed by the record. Section 692 of the Code of Civil Procedure of California provides as follows:

> "Before the sale of property on execution or under power contained in any deed of trust, notice thereof must be given as follows:
>
> * * * * * * *
>
> "3. In case of real property: By posting a similar notice particularly describing the property for twenty days, in three public places of the township or city where the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation printed and published in the city or township in which the property is situated. * * *"

In support of their contention that this failure to publish in a South Pasadena newspaper voided the sale appellant cites authorities largely from foreign jurisdictions. To some extent these authorities are in point, but, in view of the fact that the very question at issue has been definitely and clearly determined by our Supreme Court adversely to the contention of appellants herein, the question is no longer open to debate. It must be borne in mind that the plaintiff is a bona fide purchaser for value, with no notice of any defects in the proceedings leading up to the sale, and in no wise interested in or concerned with the loan indebtedness secured by the trust deed and that the defendants are the grantors and trustors named in said trust deed, and were the owners of the property at the time the trustee's deed was executed and delivered; further, the trust deed contains the usual provision that, in the event of the sale of the property described therein by the trustee, the recitations in the trustee's deed of any facts or matters affecting the regularity or validity of such sale shall be conclusive proof of the truthfulness of such recitals; that the trustee's deed contained a recital that notice had been given as required by the deed of trust.

In the case of Mersfelder v. Spring, 139 Cal. 593, 73 P. 452, the Supreme Court says:

> "But whatever may be the force of the argument as noted, these questions, though interesting, can arise only in cases where no authority is given by the deed to the trustee to bind his principal by his recital or by his deed, or, to use the language of the counsel, only 'in the absence of a stipulation in the trust deed making the trustee's deed evidence of its own validity.' But here we have the express stipulation that the recitals in the deed of default and publication shall be conclusive proof of those facts, and that the 'deed, * * * with such recitals therein, shall be effectual and conclusive against the said party of the first part,' etc.; which is in express terms to give the trustee the authority to bind his principal by the mere execution of a deed containing the prescribed recitals. This provision would not, perhaps, preclude the inquiry in an equitable proceeding into the fairness of the sale, or into other matters which on equitable principles might entitle the party injured to relief; but it must be taken as conclusive in a case involving only the legal title, such as the case at bar."

In Roberts v. Colyear, 179 Cal. 669, 180 P. 937, the court said:

> "The defendant objected to the admission of this instrument [deed], in the absence of independent proof that the debtors were, in fact, in default. The court overruled the objection. The ruling was correct. The trustee's deed was competent and sufficient evidence to show that the title of the Reiters had passed to the plaintiff. * * * The recitals are relied upon as binding the interest of the trustors. To this extent, at least, they are effective. Savings & Loan Soc. v. Deering, 66 Cal. 281, 5 P. 353; Carey v. Brown, 62 Cal. 373; Mersfelder v. Spring, 139 Cal. 593, 73 P. 452. The deed containing them is admissible in an action of ejectment, as against the grantor or other person in possession, and no further evidence is necessary to show that the plaintiff has succeeded to such title and right of possession as the trustor had when he made his deed of trust."

In Seccombe v. Roe, 22 Cal. App. 139, 133 P. 507, the court said:

> "It is claimed by appellant, however, that such deed of trust containing the provision that, in the event of a sale of said premises, or any part thereof, and the execution of a deed thereto under the trust, then the recitals therein of any default payments, publication of notice of sale, demand that such sale should be made, postponement of sale, terms of sale, purchaser, payment of purchase money, and of any other fact or facts confirming the regularity or validity of said sale, shall be conclusive proofs of such matters and of all other facts recited therein against the said first parties, defendants are estopped to claim irregularity connected with the sale. That this would be the effect as to a purchase by a third party and a conveyance to him by the trustee, must be conceded upon the authority of Mersfelder v. Spring, 139 Cal. 593, 73 P. 452."

In the case of Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 P. 15, the Supreme Court said:

> "If the recital in the trustee's deed is conclusive on Cottle and his successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this court. Simson v. Eckstein, 22 Cal. 593; Carey v. Brown, 62 Cal. 374; Mersfelder v. Spring, 139 Cal. 595, 73 P. 452."

There is one suggestion in the appellants' brief of latent fraud in connection with the option contract. There is not, however, any evidence in the record or any pleading to support any assumption of wrongdoing on the part of the plaintiff.

It follows that, from the foregoing, the judgment of the superior court should be affirmed, and it is so ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

90 Cal. App. 351

LEWIS v. MARSHALL et al. (Civ. 6159.)

District Court of Appeal, First District, Division 2, California. March 23, 1928.

1. Appeal and error 🔑843(1)—Appellate court will not review academic question not supported by finding or ruling during trial.

The appellate court will not, on appeal, review an academic question not supported by any finding nor by any ruling made during course of trial.

2. Quieting title 🔑34(1)—Generally, facts constituting fraud, relied on in suit to quiet title, must be alleged.

As a general rule, when a cause of action to quiet title depends on proof of fraud, facts constituting the fraud must be alleged.

3. Quieting title 🔑40—Where defendant relied on deed, plaintiff could at trial attack it for lack of consideration or fraud without further pleading, since reply or replication is neither authorized nor required.

Where, in action to quiet title, defendant relied on deed from plaintiff's husband as a defense, plaintiff could, at the trial, without further pleading, attack deed for lack of consideration, for forgery, or on the ground that it was obtained fraudulently, since plaintiff was neither required nor authorized to file a further pleading in nature of a replication.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Maud Lewis against Mary J. Marshall and another. From the judgment, named defendant appeals. Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

James W. Bell, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to quiet title to certain lots in Los Angeles. The defendant Mary Marshall filed an answer in which she denied the material allegations of the plaintiff's complaint and as a separate defense she alleged that she was the owner of the property under and by virtue of a deed made by Edward B. Lewis on the 19th day of July, 1924. The defendant Maurice Nathanson filed an answer in which he denied the material allegations of the plaintiff's complaint, and then as a separate defense he alleged that he held a mortgage lien in the sum of $500. A trial was had in the trial court before the court sitting without a jury. The court made findings of fact in favor of the defendant Nathanson and against the defendant Marshall, and in favor of the plaintiff. From a judgment entered thereon the defendant Marshall has appealed under section 953a of the Code of Civil Procedure.

Before stating the points made by the defendant it may be well to recite that Edward B. Lewis is an emancipated, illiterate negro of the age of 70 years or thereabouts, and that according to the evidence he was able merely to write his name and was unable to read intelligently. In 1899 he married the plaintiff, and thereafter they lived together until about the first of the year 1924, when they had a disagreement and separated, and at the same time made a property settlement between themselves. He was during all these times an employee of Los Angeles on a fixed wage. At the time of the separation the defendant and her husband were living nearby. Immediately after the separation of the Lewises, a course of conduct commenced which, among other things, included the following: The defendant moved a house onto one of the lots in suit. She entered into a contract to purchase lands in San Bernardino county for the principal sum of $3,000. The contract is a long one, and in the beginning it is recited that Mary J. Marshall is the purchaser. However, at the end it is signed by Mary J. Marshall and by Ed Lewis. It was the theory of the plaintiff that Ed Lewis was induced to sign under the fraudulent representation that he and the defendant were purchasing jointly, whereas it was the theory of the defendant that Lewis signed as a witness. On its face the instrument shows that Mr. Drummond acted as the witness of all of the signers. At the same time, and as a part of the same transaction, Ed Lewis executed a mortgage on the lots in suit in the sum of $500. He borrowed $280 on his life insurance. Of these sums $700 was turned over to the defendant and was used by the defendant in making installment payments on the San Bernardino property. At about the same time Ed Lewis assigned his life insurance to the defendant's husband. The defendant claimed that on July 19, 1924, Ed Lewis executed a deed of the lots in suit to the defendant. Ed Lewis claimed he did not do so. It is an admitted fact that no consideration passed from the defendant to Lewis, except the defendant testified that the deed to her was made pursuant to her statement:

> "Mr. Lewis, if you are in a mind to transfer this property over to me, you can live with us as long as you care, as long as I have a home, you can stay with us."

She claimed no other consideration. At another time she testified she made no promise. During the trial it was the theory of the plaintiff that the deed was not made on said promise, but was but one step in a broad scheme under which the defendant attempted to and did overreach the grantor; moreover, if the foregoing promise was ever made to him, that it was never lived up to and that it was made without any intention of performing it. After she received the deed the defendant continued to live on the property for about six months and then moved to San Bernardino. Later Mr. and Mrs. Lewis became reconciled, and Mrs. Lewis returned to her former home, a deed was made by Mr. Lewis to her, and thereafter this action was commenced.

[1] The first point which the defendant makes is that an oral promise, though it cannot be performed within one year, is a valid consideration for the immediate conveyance of real property. The point is not supported by any finding nor by any ruling made during the course of the trial. We are not advised that the trial court found that the promise was ever made, and the point is purely academic.

[2, 3] The second point made by the defendant is that when a cause of action to quiet title depends upon proof of fraud, the facts constituting the fraud must be alleged. The soundness of the contention will not be questioned as a general rule; however, there are exceptions depending upon the particular facts. Moore v. Copp, 119 Cal. 429, 51 P. 630. Until the defendant Marshall filed her answer the plaintiff could not know that the defendant was going to rely upon the deed pleaded in the answer of the defendant. After that answer had been filed the statute neither authorized nor required the plaintiff to file another pleading in the nature of a replication. However, at the trial the plaintiff was entitled to attack the deed held by the defendant on the ground that it was not supported by any consideration (Colton L. & W. Co. v. Raynor, 57 Cal. 588), or that it was forged (Cutler v. Fitzgibbons, 148 Cal. 562, 563–564, 83 P. 1075), or that it was obtained through fraud (Sterling v. Smith, 97 Cal. 343, 32 P. 320; Wolf v. Gall, 176 Cal. 787, 169 P. 1017).

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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90 Cal. App. 349

Ex parte JACKSON. (Cr. 1620.)

District Court of Appeal, Second District, Division 2, California. March 22, 1928.

1. Criminal law 🔑1211—Six months in city jail and fine of $500 for unlawful possession of intoxicating liquor after prior conviction held excessive (Volstead Act, tit. 2, § 29 [27 USCA § 46]).

Sentence of imprisonment in city jail for term of 6 months and fine of $500, with provision that, on default of payment of fine, defendant should be further imprisoned in city jail at rate of one day for every $5 of fine, for unlawful possession of intoxicating liquor, after prior conviction of similar offense, *held* excessive, under Volstead Act, tit. 2, § 29 (27 USCA § 46), providing that for offense of which defendant was convicted fine of not less than $100 "or" more than $1,000, or by imprisonment of not more than 90 days, should be imposed.

2. Criminal law 🔑1211—Statute providing for fine "or" imprisonment for second offense contemplates alternative penalties (Volstead Act, tit. 2, § 29 [27 USCA § 46]).

Under Volstead Act, tit. 2, § 29 (27 USCA § 46), providing for fine of not less than $100 or more than $1,000, or by imprisonment of not more than 90 days for second offense, word "or" is used to denote that penalties provided are in alternative.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

Application for writ of habeas corpus by Willard Jackson to be directed to chief of police of the city of Los Angeles to secure petitioner's release from custody, after conviction of possessing intoxicating liquor, with a prior conviction of a similar offense. Petitioner discharged.

John F. Groene, of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors all of Los Angeles, for respondent.

THOMPSON, J. The petitioner was convicted of the offense of unlawful possession of intoxicating liquor after a prior conviction of a similar offense, and on September 6, 1927, was sentenced to imprisonment in the city jail for a term of 6 months, and was fined the sum of $500, with the provision that, in default of payment of the fine, petitioner should be further imprisoned in the city jail at the rate of one day for every $5 of the fine. The petitioner has been confined, since the 6th day of September, to at least February 14, 1928, when at the oral argument an order was made that petitioner might be released upon giving bail in the sum of $100. The National Prohibition Act, ordinarily called the Volstead Act, in title 2, § 29 (27 USCA § 46) provides the penalties for the offense of which petitioner was convicted as follows:

> "Any person * * * who * * * violates any of the provisions of this chapter, * * * shall be fined * * * for a second offense not less than $100.00 nor more than $1,000.00, or be imprisoned not more than ninety days. * * *"

[1] It is, of course, obvious that the sentence of imprisonment imposed upon the petitioner is in excess of that provided by law, and is to that extent, at least, void.

[2] It is also immediately apparent that, unless it can be said that the word "or" in the statute is used in such a manner that it has not its ordinary meaning, the court has

not the power for this offense to both imprison and fine. Ordinarily, the word "'or' is said to be a co-ordinating particle that marks an alternative generally corresponding to either as either this or that. In other words, it means one or the other of two propositions. * * * In the Penal Code of this state the word 'or' is quite frequently used in giving an election to the court imposing sentence as to whether it will simply require the payment of a fine or prescribe imprisonment in the county jail." The language just quoted is found in People v. Lamb, 67 Cal. App. 263, 227 P. 969, where the court was discusssing the use of the word "or" in the act now under consideration. There is nothing in connection with the use of the word to indicate that it should be read as conveying anything other than its ordinary meaning. Therefore the penalties provided are in the alternative. It is obvious that the petitioner is illegally restrained.

Writ granted, and petitioner discharged from custody.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 242

MOORE v. CITY OF SAN DIEGO et al.★
(Civ. 5943.)

District Court of Appeal, Second District, Division 1, California. March 19, 1928.

Hearing Denied by Supreme Court May 17, 1928.

1. Municipal corporations ⚷124(1)—Act providing for consolidation and abolition of municipal offices held unimpaired whether later act be declared unconstitutional or valid (St. 1895, p. 219, as amended; St. 1913, p. 499, §§ 1, 8).

St. 1895, p. 219, as amended, providing for consolidation and abolition of municipal offices and that their duties may be performed by certain county officers, *held* not impaired by St. 1913, p. 499, § 1, providing that duties of officers of city governed under charter may be taken over by corresponding county officers, and section 8, providing for alternative method by which duties may be performed by county officers, irrespective of whether latter act is unconstitutional or valid, since, if declared unconstitutional, Act of 1895 is unimpaired thereby, and, if it is declared valid, it provides only for the alternative method.

2. Mandamus ⚷69—Question of change of system for collecting taxes and of fiscal year calling for exercise of city's council's discretion cannot be directed by mandamus (St. 1895, p. 219, as amended).

Where, under St. 1895, p. 219, as amended, initiative ordinance was passed providing that duties of assessing property and collecting taxes performed by assessor and tax collector of San Diego should thereafter be performed by county assessor and county tax collector, *held* question whether system for doing work of levying and collecting taxes other than by existing laws was necessary, or whether it was advisable to change fiscal year as authorized by city charter, were matters within discretion of common council of the city such that mandamus could not issue to direct legislation to that end.

3. Mandamus ⚷69—Mandamus will issue to require council to perform acts in consolidation of municipal offices, where duties under statute are administrative only (Acts 1895, p. 219, as amended).

Where acts required by common council of city to be performed by them to put into effect ordinance enacted under St. 1895, p. 219, providing for consolidation and abolition of municipal offices, were administrative in nature only, and were such duties as were specifically provided for by act, mandamus was proper to compel them to perform.

Application for writ of mandate by John H. Moore against the City of San Diego and others. Peremptory writ to issue as to performance of administrative duties.

F. G. Blood, of San Diego, for petitioner.

Jas. E. O'Keefe, City Atty., Stephen Connell, Dist. Atty., and E. S. Lovett, Deputy Dist. Atty., all of San Diego, for respondents.

HOUSER, J. From the record herein it appears that under the provisions of an act to provide among other things, for the "consolidation and abolition of certain municipal offices, and to provide that their duties may be performed by certain officers of the county" (Stats. 1895, p. 219, and amendments thereto; Deering's Gen. Laws [1923 Ed.] Act 8464), as well as pursuant to the provisions of the charter of the city of San Diego (chap. 4, art. I; section 32, chap. 1, art. VI), a properly signed initiative ordinance was filed with the city clerk of said city of San Diego, which in effect provided that the duties of assessing the property and collecting taxes provided by law to be performed by the assessor and the tax collector of said city should thereafter be performed by the county assessor and the county tax collector respectively of the county of San Diego—said county being the county in which said city of San Diego is situated. Thereafter, and on the 4th day of May, 1927, and in due course of law (without election by the people), the city council of the city of San Diego passed and adopted the said initiative ordinance which, on the 10th day of May following, was signed and approved by the mayor of the city. On May 12, 1927, a certified copy of such ordinance was filed with the county auditor of the county of San Diego, and thereafter, to wit, on the 13th, 14th and 16th days of May, 1927, in pursuance of the law in such cases made and provided, the ordinance was duly published in a newspaper. It further appears that the city council of the city of San Diego and each of its members, as well as each of the other individual respondents

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★Hearing denied by Supreme Court.

herein, has neglected and refused, and so continues in such neglect and refusal, to take any action, or to do or perform any act or acts required to be done or performed by them or either or any of them in furtherance of such consolidation of offices as provided either by the statute, or by the provisions of the charter of the city of San Diego, to which reference has been had. Wherefore, the petitioner herein has prayed that this court issue its peremptory writ of mandate, commanding said respondents and each of them, in their and each of their respective capacities, as provided by law, to specifically comply with the requirements of the statute and the provisions of the charter of the city of San Diego applicable to the situation as hereinbefore set forth. The respondents have demurred to the petition, and urge that because of certain alleged defects occurring in the initiative ordinance and in proceedings subsequent to its adoption, as well as the unconstitutionality of a statute later in its enactment than the statute under the provision of which the proceedings relating to the ordinance in question were instituted, the respondents were and are entirely justified in the legal position assumed by them and each of them.

At the outset, therefore, in order that a better understanding of the situation herein involved may be had, it is desirable that some examination may be had of each of the statutes, as well as of the several charter provisions of the city of San Diego, which have a bearing on the controversy. But before proceeding to the main controversy herein one minor objection of respondents should be noticed. It is suggested that the initiatory ordinance was prematurely filed with the county auditor of the county of San Diego. In that connection, the provision of the statute is that a certified copy of the ordinance shall be filed "on or before the first Monday in the month of February immediately following the adoption of the ordinance." As the statutory requirement appears to have been fully met, we can see no merit in respondents' contention.

By section 1 of the act (Stats. 1895, p. 219), "any municipal corporation or city in this state, * * *" is given the right and power to elect, by ordinance, that the duties of its city assessor and city tax collector shall be performed by the county assessor and county tax collector respectively of the county in which such municipal corporation or city is situated; that (as hereinbefore stated) a certified copy of such ordinance must be filed with the auditor of such county on or before the first Monday in the month of February immediately following the adoption of such ordinance—following which the various steps to be taken in connection with the change of offices and the duties of the various city and county officers, including each of the officers represented by the several respondents herein are specifically set forth.

By section 32, chapter 1, article VI, of the charter of the city of San Diego, the common council thereof is empowered to adopt an ordinance authorizing the abolition of the offices of city assessor and city tax collector, and to provide therein for the assumption of the duties of such officers by the San Diego county assessor and tax collector respectively. Such charter provision further authorizes the city council to provide by such ordinance "a system for the assessment, levy and collection of all taxes; * * * to change the fiscal year of said city of San Diego; * * * and to make all such provisions as said common council may deem necessary to carry into effect the provisions of this section according to its true intent and meaning. * * *"

By section 1 of another act (Stats. 1913, p. 499), in substance identical in most respects with the act under which the consolidation of the city offices and the county offices herein was initiated, it is provided that "the duties of the officers of any city governed under a freeholders' charter" may be taken over by corresponding officers, etc., and, finally, by section 8 of said act of 1913 it is provided that:

> "This act shall in no wise affect any other act or acts providing that duties of officers of cities may be performed by county officers; and if any such act or acts provide for or apply to the performance by county officers of the duties of officers of cities governed under freeholders' charters, this act is intended to, and does provide an alternative method by which the duties of the officers of any such city with respect to the matters mentioned in section two of this act may be performed by officers of the county in which such city is situated."

[1] With reference to the challenged constitutionality of the statute of 1913, page 499, to the provisions of which reference herein has been had, it is clear that if for the sake of argument it be conceded that it is discriminatory, and that the attempted classification of cities therein is such as is not warranted by any constitutional provision of this state, it would follow that such statute being void, it could have no effect on the validity and operation of any of the provisions of the statute under which the initiatory proceedings here under consideration were undertaken. On the other hand, if the questioned statute is constitutionally sound, the result is that by its terms an alternative method is provided by which the duties of the city officers of the city of San Diego affected by the proposed initiative ordinance with which this proceeding is concerned may be performed by the proper respective officers of the county of San Diego. So that, viewed from either standpoint, the standing of the statute under which the proposed consolidation of offices was instituted is unimpaired.

[2, 3] The specific objection is urged by respondents that by the ordinance as adopted no provision was made either for a system for the assessment, levy, and collection of taxes, or for the changing of the fiscal year; and that because the ordinance originated through the initative power of the people, and not in the legislative body of the muncipality, such body of its own initiative is powerless to adopt the desired legislation and consequently that the ordinance already adopted in effect becomes a "dead letter"—incapable of administrative enforcement.

As hereinbefore set forth, it is by charter provision only (section 32, chap. 1, art. VI) that either a "system" for the assessment, levy, and collection of taxes, or a change in the fiscal year in the city of San Diego is specially authorized to be included within an ordinance of proposed consolidation of municipal offices with corresponding county offices. The statute to which attention has been directed, and under which the proceedings looking to the adoption of the ordinance in question were instituted, contained no requirement for the adoption by a municipality of either a so-called "system" for either or all the purposes relating to the collection of taxes, or to the necessity of changing the fiscal year of the municipality. Apparently, the main and primary object of the statute, as well as of the charter provision of the city of San Diego to which reference has been had, is to provide a means whereby the work and the expense of collecting taxes by city officers may be eliminated. The consolidation of the city offices with the corresponding county offices having been consummated by virtue of the provisions of the statute and the ordinance made permissible by the provisions of the charter of the city of San Diego, the method, or means, or "system" adopted, or to be adopted, by the proper legislative or administrative, officers in carrying on the work made necessary by such consolidation, becomes incidental only to the principal object of the legislation. For aught that appears, although it is possible and even probable that a "system" and a "change in the fiscal year" would be advantageous, nevertheless neither of such most desirable conditions is absolutely essential to the consolidation of the offices in question.

While by the terms of the section of the charter of the city of San Diego to which attention has been directed, in accordance with the ordinance which provides for the proposed consolidation of the offices here under consideration, the common council of such city is given the authority or power to include in such ordinance adequate provisions for a "system" and for a "change in the fiscal year," we see nothing in the language of the charter provision which would indicate that such action on the part of the city council was compulsory. Assuming a continuing jurisdiction in the city council, without so deciding, it may be that such matters as providing a "system" for the transaction of the business of any department of a city, or for changing the "fiscal year" of a city, are within the implied or the incidental powers of the municipal corporation, and, hence, that ordinarily no express charter provision would be necessary to enable the city to accomplish either or both of such objects. The question whether a "system" for doing the work of levying and collecting taxes, other than the existing laws, is necessary, or whether it is advisable to change the "fiscal year," are matters calling for the exercise of judgment and discretion on the part of the common council of the city of San Diego. In such circumstances it is well settled that mandamus cannot be used to direct the desired legislation. Hence it follows that as to each and all of the respondents herein having to do in their or either of their respective official capacities with the adoption of any proposed ordinance, the writ should be and it is discharged. But as to the remaining respondents, in view of the fact that their and each of their duties are administrative in nature only, and that such duties are specifically provided for by statute, it is ordered that as to them and each of them they do and perform each and all of the acts respectively provided for by the statute applicable to the consolidation of the offices in question and as specifically prayed in the petition herein. The demurrer to the petition herein is overruled.

Let the peremptory writ issue, for the performance of said administrative duties, as hereinbefore indicated.

We concur: CONREY, P. J.; YORK, J.

90 Cal. App. 337

NICOL v. DAVIS. (Civ. 6080.)★

District Court of Appeal, First District, Division 2, California. March 22, 1928.

Hearing Denied by Supreme Court May 21, 1928.

1. Judgment ⟹143(14)—Evidence showing plaintiff's counsel was engaged on another case, and believed continuance had been granted, authorized vacation of judgment (Code Civ. Proc. § 473).

Evidence showing that plaintiff's counsel, when case was called for trial, was engaged in trial of a case in another county, and that he made an application for continuance, and understood that defendant's attorney had agreed thereto, and that court had stated that cause would be continued on paying jury and reporter's fees for the day, and counsel sent money to the court, and, in absenting himself, believed he had secured the necessary continuance, *held* to authorize vacation of judgment under Code Civ. Proc. § 473, on ground of mistake, inadvertence, surprise, and excusable neglect.

2. Appearance ⟹9(1)—Appearance of person authorized only to secure continuance and pay fees held not general, binding plaintiff because of statements concerning jury.

Where only authority of person representing plaintiff's counsel engaged in litigation in another case was to appear for the purpose of a continuance and pay jury and reporter's fees, and his authority did not extend beyond that point, his statements concerning jurors being present and holding of the jury did not constitute a general appearance, binding on plaintiff.

3. Appeal and error ⟹957(1)—Discretion of trial court in vacating judgment would not be disturbed on appeal (Code Civ. Proc. § 473).

Order setting aside judgment based on motion by plaintiff under Code Civ. Proc. § 473, for mistake, inadvertence, surprise, and excusable neglect, rests in sound discretion of the trial court, and, having been resolved in favor of plaintiff, decision will not be disturbed on appeal, notwithstanding defendant's counsel denied that he had consented to continuance.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Actions by Vina Nicol against Ray H. Davis. Judgments for defendant by default. From order vacating and setting aside judgments, defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

BURROUGHS, Justice pro tem. This is an appeal by the defendant from an order of the superior court of the city and county of San Francisco vacating and setting aside the judgment entered in said cause on August 26, 1925. The order was based upon a motion made by the plaintiff in accordance with the provisions of section 473 of the Code of Civil Procedure, on the ground of mistake, inadvertence, surprise, and excusable neglect. There are two assignments of error, either of which, it is claimed by the appellant, requires a reversal of the order. First, that the order vacating the judgment was in excess of the jurisdiction of the court and therefore void; second, that there was no showing of mistake, inadvertence, surprise, or excusable neglect.

The complaint alleges a cause of action for personal injuries. The material allegations thereof are denied by the answer. The motion was heard upon affidavits, and upon the minutes of the court of August 26, 1927, which include therein certain statements made by the trial judge and which were considered in evidence on this motion.

It appears by the affidavit of Daniel A. Ryan, the attorney of record for the plaintiff: That this cause was originally assigned to department 10 of said superior court, and thereafter transferred to department 15, and set for trial therein for May 11, 1925. Because of the congestion of the calendar in said last-named department, the trial of the action was not reached, and the cause was carried on the trial calendar of said department 15 until about August 1, 1925, when it was transferred to extra session No. 1, and placed at the foot of the trial calendar therein. On August 18th it was No. 13 in the order of cases set for trial, and on August 24th it had advanced to such an extent that it seemed probable the trial would be reached on August 26, 1925. That affiant, as attorney for plaintiff, had answered ready many times during this period, and had at all times followed the progress of its advancement on the calendar to be ready for trial when called. On August 24, 1925, affiant was notified by the clerk of the superior court of Alameda county that another action pending in that court, in which affiant was an attorney, would be reached for trial on August 26, 1925. That on the 25th day of August he telephoned to Theodore Hale, attorney for defendant, and informed him of the conflict between the two cases, and requested that the instant case be continued to give affiant an opportunity to dispose of the Alameda county case. That said Hale informed him he would consent to a continuance, but would like to have the cause tried on Friday, August 28th, or Monday, August 31, 1925. That immediately thereafter affiant communicated with Hon. Louis H. Ward, judge of said extra session department 1 of said superior court, and informed him of the conflict of cases as aforesaid, and requested a continuance of the instant case. That said judge informed affiant that a continuance would be granted, provided counsel for defendant would consent thereto, but affiant would probably be com-

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★Hearing denied by Supreme Court.

pelled to pay the sum of $34, jury and reporter's fees for the day, unless he (the judge) could get some other case to go on trial that day. To this affiant agreed. Believing he had obtained a continuance, affiant gave to one R. E. Jeffress, an attorney who had offices with affiant, a check for $34, with instructions to go to said court when the case was called, and pay the amount into court. Relying upon the above conversations, and believing he had a continuance, affiant went to Alameda county on the 26th day of August, and participated in the Alameda county case, and did not know of the trial and entry of judgment in the instant case until about 1:30 o'clock p. m. August 27, 1925.

R. E. Jeffress stated in his affidavit that the attorney for plaintiff gave him a check for $34 to pay the jury and reporter's fees, and on August 26, 1925, at 10 minutes past 10 o'clock a. m., he went into the courtroom of said court, taking with him $34 for the purpose of paying said fees; that he believed and understood the calendar call was at 10 o'clock a. m., but was unavoidably detained until the time stated; that, when he arrived at said courtroom, the calendar was being called, and that the instant case had been passed on said call, and there were no jurors present, nor was the attorney for the defendant present; that he thereupon interrupted the call of the calendar, and asked the court for a continuance of the case, representing to the court that the attorney for plaintiff was engaged in the trial of a case in Alameda county; that the judge advised him that he would be compelled to pay the jury and reporter's fees in the sum of $52, which affiant stated he would do, but, not having $52 in money with him, he thereupon asked the court if it would accept a check for the amount, but the court advised him to take the matter up with the sheriff, and that affiant then stated to the court that he would procure the cash and pay the sheriff later; that affiant then asked the court if the cause could be tried the following Monday, to which the court replied that it could not be heard at that time, but would be continued to some time to suit defendant's counsel. Affiant, believing he had secured the continuance, left the courtroom to procure the cash to pay the sheriff. Affiant did not know, nor was he informed, that the jurors were in another department waiting to secure their fees or to try the case. When affiant reached his office for the purpose of procuring the balance of cash necessary to pay the fee, another attorney telephoned him that a jury had been impaneled in the above-entitled court, extra session No. 1, and was hearing this cause. Affiant immediately procured the money and returned to said court, and thereupon offered to pay the fee of $52, but the judge of said court informed him that it was too late, without the consent of counsel for defendant, and the latter refused such consent; that affiant also asked counsel for a continuance to allow him to send for plaintiff's attorney, which was refused.

The court in its statement says that, when the attorney who appeared on the morning of the trial and asked for a continuance was advised by him that a continuance would cost him $2 for every juror who had been summoned and the ordinary costs of court, the attorney said he would get the money and bring it back. The court further says that the jurors were not in the room at that time, and that they had been sent to department No. 5 with a view of trying the instant case; that, having waited from 10 minutes past 10 o'clock a. m. until 20 minutes past 11 o'clock a. m., and the attorney not appearing with the money, a jury was impaneled, and the matter submitted to them without any evidence whatever.

It further appears from the record that, when Mr. Jeffress returned to the courtroom, he asked that further proceedings be stayed, and offered to pay the $52 for the purpose of a continuance. At that time the jury had already been impaneled and the cause submitted to them, and the foreman was about to sign the verdict. The court then asked if it was stipulated by both sides that the jurors were in the box, to which Mr. Jeffress replied that there were twelve jurors there. The court further asked, after the verdict had been signed by the foreman and read, if either side desired the jury polled. Mr. Jeffress stated he would like to have the jury polled, which was done. Thereafter the court asked Mr. Jeffress if there was anything further, to which he replied there was nothing else.

By affidavit, Theodore Hale, counsel for defendant, denied that he had consented to a continuance of the above-entitled cause, or did or said anything that would lead said Ryan to believe that said action had been or would be continued, although he conversed with Attorney Ryan over the phone as to the latter's request for a continuance. He further said in his affidavit that, on the afternoon of August 25th, affiant had a phone call from attorney Ryan in which the latter said that his wife had been taken suddenly ill and removed to a hospital, and that he would be unable to try the case on the following day, and requested a continuance until August 31st; that affiant stated to him that under the circumstances of his wife's illness he could probably secure a continuance, but it could not be for a longer period than August 28th, if continued at all; that Ryan replied that he would send a representative out to court the next morning for the purpose of securing a continuance. Affiant further stated that, when the cause was called on August 26, 1925, in extra session No. 1 at 9:45 a. m., there was no response on behalf of the plaintiff; that the court, after waiting and there being no appearance by the plaintiff, sent the jury to department No. 5 of said court to try this action, and that they remained in said department until 11 o'clock, when they returned to extra session No. 1.

The foregoing is a sufficient statement of the evidence for a decision of the points raised on this appeal.

[1] In support of his contention that the order vacating the judgment was in excess of the jurisdiction of the court, counsel for appellant sets out in his brief the entire proceedings of the court held on August 26, 1925, from which he claims that the ruling of the court constituted an error of law which could only be taken advantage of by a motion for a new trial or on appeal from the judgment, but it appears from the foregoing statement of the evidence that, at the time of the trial, counsel for plaintiff was not in court, and that he was resting secure in the mistaken belief that he had secured a continuance of the cause, and that all that remained for him to do was to pay the $34 jury and reporter's fees, which the court had advised him would be necessary, and that he had made arrangements that this be done.

[2] It further appears from the foregoing statement of the evidence that the only authority of Mr. Jeffress, was to appear for the purpose of a continuance and pay the money. His authority did not extend beyond that point. He was not an attorney of record in the cause, and his statements concerning the jurors being present and the polling of the jury could not be construed as a general appearance binding on the plaintiff.

Section 473 of the Code of Civil Procedure provides in express terms that the court may "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The case of Pearson v. Drobaz Fishing Co., 99 Cal. 425, 34 P. 76, is a case similar to the one at bar. In that case issue of fact had been joined, and the cause placed on the trial calendar for October 6, 1891, and stood No. 7 thereon. Counsel for defendant was not present at the calendar call on that day, but left some one to answer ready. The preceding six cases were disposed of, and thereupon, in the absence of the defendant and its attorney, the plaintiff submitted his testimony and obtained a judgment in his favor. Within due time the defendant made a motion to vacate and set aside the judgment, but relief was denied by the trial court, and on appeal the order was reversed by the Supreme Court, holding that, although the attorney for the defendant had been negligent, it was not inexcusable, and that the best results would be obtained by a trial on the merits.

We have examined each one of the cases cited by appellant in support of his contention, but we do not consider them applicable to the facts of this case.

In United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199, cited by appellant, the trial court had granted an injunction pendente lite. It was held that the operation of the injunction could not be stayed by motion granted under section 473 of the Code of Civil Procedure. The remedy was by appeal.

In each one of the other cases cited, we find some distinguishing feature. We are therefore of the opinion that, under the plain terms of section 473, Code of Civil Procedure, counsel's point is not well taken.

It is the next contention of appellant that there was no showing of mistake, inadvertence, surprise, or excusable neglect. In response to this point, it is sufficient to say that under the above evidence it clearly appears that counsel for the plaintiff had at all times carefully watched the progress of the cause on the calendar of the court, and had answered ready whenever the case had been called; that, when he discovered that two cases in which he was an attorney conflicted as to the date of trial, he made application for a continuance of the instant case, and understood that the attorney for the defendant had agreed thereto, and that the court had also stated the cause would be continued upon his paying the jury and reporter's fees for the day. In accordance with that understanding, he had sent the money to the court, and in absenting himself he believed he had secured the necessary continuance.

[3] It also appears that, when Mr. Jeffress appeared and offered to pay the fees fixed by the court, neither the jury nor counsel for the defendant were present, nor was he advised that they were in another department awaiting the payment of their fees; that, when he left the courtroom to procure the additional money required for the payment of the day's fee, he believed a continuance had been granted. Under the circumstances, it was for the court to determine whether this state of facts constituted mistake, inadvertence, surprise, or excusable neglect. It is true that counsel for defendant denied that he had consented to a continuance, but, notwithstanding this, the ultimate determination of the question was in the sound discretion of the court, and, having resolved it in favor of the plaintiff, its decision will not be disturbed on appeal.

In Vinson v. Los Angeles Pac. R. R. Co., 147 Cal. 479, 483, 82 P. 53, 54, we find the following language:

"Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must, of necessity, be left largely to the court to which application is made, and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired."

In Mitchell v. California, etc., S. S. Co., 156 Cal. 576, at page 580, 105 P. 590, 593, it is said:

"Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed."

And at pages 578, 579 (105 P. 592), we find the following language:

"The tendency of this court has always been to relieve parties from their defaults and mistakes, upon proper showing, to the end that matters may be heard upon the merits."

And again it is said in that case:

"Section 473 of the Code of Civil Procedure is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it."

The foregoing disposes of the only contentions advanced by the appellant for a reversal of the order of the court, and, said claims being without substantial merit the order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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90 Cal. App. 193

CARTER v. TURNER et al. (Civ. 3358.)

District Court of Appeal, Third District, California. March 17, 1928.

1. Appeal and error 🔑843(2)—Mortgagor's liability as surety held moot question after foreclosure and sale of property for sufficient to cover amount due thereunder.

Liability of mortgagor as surety after assignment of note and extension of time of payment *held* a moot question, after foreclosure of mortgage and sale of property for sufficient to cover amount due under note and terms of mortgage.

2. Appeal and error 🔑1010(1)—Trial court's finding that cause of action for fraud was not barred sustained by testimony, will not be disturbed (Code Civ. Proc. §§ 335, 338, subd. 4).

Finding of trial court that cause of action for fraud was not barred by Code Civ. Proc. §§ 335, 338, subd. 4, sustained by sufficient testimony will not be disturbed on appeal.

3. Appeal and error 🔑1011(1)—Appellate court must accept lower court's findings on issue of fraud on conflicting testimony.

Where testimony in lower court on issue of fraud was only such as to create a conflict, appellate court is bound on appeal to accept findings of lower court on such issue.

4. Appeal and error 🔑1011(1)—Lower court findings on conflicting evidence must be adopted as true.

Findings of lower court, based upon conflicting evidence, must be adopted as true by the reviewing court.

5. Action 🔑48(1)—Joining causes of action for foreclosure and for damages for false representations in sale of deed of trust held not misjoinder.

Joinder of cause of action for foreclosure of mortgage and cause of action for damages for false representations in sale of deed of trust constituting a lien junior to that of mortgage *held* not to constitute a misjoinder of causes of action, in view of fact that nature of cause of action on trust deed and for foreclosure were so related that it was necessary to consider both matters, together for a complete determination of liability.

6. Evidence 🔑434(12)—Admitting evidence concerning note indorsed without recourse held not erroneous as attempt to vary terms of written instrument, in view of evidence.

In action for foreclosure of mortgage and for damages for false representations in sale of deed of trust, receipt of testimony concerning note indorsed without recourse *held* not erroneous as attempt to vary terms of written instrument by parol, in view of testimony relative to fraud and misrepresentation in transaction.

7. Fraud 🔑59(2)—Damages for misrepresentations in sale of trust deed is difference between actual value of property and value if representations had been true.

Measure of damages for fraud and misrepresentations in sale of trust deed, where purchaser did not elect to rescind, constitutes difference between actual value of property received and value which it would have had if representations as to value had been proved; hence trial court improperly allowed damages to amount of unpaid portion of trust deed note less any value existing in real property remaining after sale and application of proceeds in satisfaction of first mortgage.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by George A. Carter against Rodney L. Turner and others. From the judgment originally entered and an order granting relief denied by first judgment, and from an amended judgment, defendant named separately appeals, which appeals were consolidated. Affirmed in part and remanded, with directions.

Frederick W. Welsh and R. B. Turnbull, both of Los Angeles, for appellant.

Harry W. Horton, of El Centro, for respondent.

PULLEN, Justice pro tem. On March 12, 1917, appellant herein, Rodney L. Turner,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

was the owner of a tract of land in Tulare county, and on that date mortgaged it to one W. J. Walters, trustee, to secure the repayment of $18,000, with interest, maturing in three years.

Thereafter W. J. Walters, trustee, assigned this note and the mortgage securing the same to Security Savings Bank of Riverside, and subsequently the Security Savings Bank assigned to Elizabeth A. Frost. Shortly before the filing of the original complaint in this action Elizabeth A. Frost assigned the note and mortgage to George A. Carter, the plaintiff and respondent herein.

On March 11, 1919, appellant conveyed the Tulare county land above referred to, to J. B. Pilcher, taking in ostensible payment therefor Pilcher's note for $12,000 secured by a deed of trust upon the property, which was subsequent to the mortgage above referred to. This note and deed of trust was executed to Citizens' Trust & Savings Bank as trustee for Turner. On March 14, 1919, Pilcher conveyed the property to W. J. Buell, subject to the mortgage for $18,000 and the deed of trust for $12,000.

Before the commencement of this action, Carter, the respondent, and Turner, appellant herein, consummated a deal whereby Carter, for a valuable consideration, became the owner and holder of the $12,000 deed of trust which was assigned to him by Turner "without recourse," and subsequently, to protect his junior lien, acquired from Elizabeth A. Frost the first mortgage for $18,000.

Carter having become the owner and holder of the $18,000 note and mortgage, brought an action to foreclose the same. Turner answered, and, as one of his defenses, alleged the existence of the junior and subsequent deed of trust for $12,000, and asked that the trustee and the owner and holder of said note and deed of trust be made parties to the action. Thereupon Carter filed an amended complaint setting up as a first cause of action the foreclosure of the mortgage, and in a second and third cause of action set up the transaction of the deed of trust, and also allegations of fraudulent representations made by Turner on the sale of the note, and alleged the damages of such false representations to be the amount due on the trust deed. To this amended complaint defendant demurred on the ground that causes of action were improperly united, which demurrer was overruled, and Turner thereupon answered. The findings of fact followed the allegations of the amended complaint, including findings of fraudulent representations on the sale of the note by Turner to Carter. The conclusions of law were that plaintiff was entitled to a foreclosure of the mortgage and a deficiency thereon against Turner, but that respondent Carter was entitled to no relief against Turner on the second and third causes of action. Respondent moved to amend the conclusions of law and enter another judgment in favor of plaintiff on the facts found, which motion was granted and a new judgment entered directing the sale of the mortgaged property and granting respondent judgment against appellant for the deficiency on both the mortgage and deed of trust. Appellant has brought three appeals, which are consolidated for the purposes of this hearing. First, an appeal from part of the first judgment directing the foreclosure of the mortgage; second, an appeal from an order of the trial court made under section 663 of the Code of Civil Procedure which granted to respondent relief denied by the first judgment; and, third, an appeal from the amended judgment entered by the trial court.

[1] Appellant devotes considerable time to a discussion of his relation to the note and mortgage on the Tulare property. He contends he was a surety after the assignment of the note, and was released by an extension of time of payment; but, inasmuch as the mortgage has been foreclosed and the property sold for sufficient to cover the amount due under the note and the terms of the mortgage, this has now become a moot question and need not be here considered, for whatever liability may have attached to appellant would only arise in case of a deficiency judgment

[2] A further point urged by appellant is that any cause of action set up in the second and third causes of action are barred by the statute of limitations. On this point the court found:

> "That it is not true that the second cause of action set forth in plaintiff's complaint against the defendant is barred by the provisions of section 335 or section 338, subdivision 4, of the Code of Civil Procedure of the state of California, or any sections of the Code of Civil Procedure of the state of California, and the court finds that the plaintiff did not learn of the false and fraudulent representations of the defendant Rodney L. Turner or of any of the true facts concerning the said J. B. Pilcher and said note and trust deed and the representations and failure, neglect, and refusal of the defendant Rodney L. Turner to disclose the true facts concerning the same until less than three years before the commencement of the action herein, and until less than three years from the time of the filing of the amended and supplemental complaint herein."

An identical finding was made as to the third cause of action. An examination of the transcript shows ample testimony to support this finding, and it will not, therefore, be disturbed.

[3] Appellant also contends that the finding of false representations is not supported by the evidence, and an examination of the transcript of the testimony reveals that considerable time was devoted to the development of this feature of the case when the various witnesses were under examination.

It is true that appellant attempted to destroy the effect of that testimony by a searching cross-examination, and also by direct proof, but it had only the effect of raising a conflict in the testimony, and, the trial court having heard this testimony and seen the witnesses, this court is bound, therefore, to accept the findings upon the issue of fraud.

[4] Appellant also complains as to the finding of value of the lands and the insolvency of Pilcher, but those, also, are findings based upon a conflict in the evidence, and must be adopted as true by the reviewing court.

As to the finding on the defense of the release of surety, that is not now material, as the question of suretyship cannot now arise, in view of the fact that there was no deficiency on the sale of the mortgage, and that has now, as pointed out before, become a moot question.

[5] Appellant claims that there is a misjoinder of causes of action, in that respondent has united a cause of action for foreclosure of mortgage and a cause of action for damages for false representations. This situation is unique, but arose by reason of a demand or appellant that the holder of the note and deed of trust be made a party to the action to foreclose the prior lien, and, his demand having been complied with, he should not now be heard to complain. Furthermore, although plaintiff in his second cause of action asked that the deed of trust be foreclosed, he was not entitled thereto either by reason of the law or the facts, but he was entitled, in view of the relationship of the parties concerned, to have the entire transaction inquired into and to have any surplus on the sale of the property under the mortgage foreclosed applied to the credit of the note secured by the deed of trust. Appellant has not been injured by the joining of the different causes of action. The nature of the cause of action against appellant on the trust deed and his action for foreclosure of the mortgage are so related that it is necessary that both matters be considered together to a complete determination of what the responsibility of the defendant Turner was on the two notes, and whether he had a personal responsibility on either or both. Numerous decisions of our courts have held that, if a court of equity has jurisdiction of one phase of a case, and it is necessary to a complete determination of the rights of the parties, the court will not require piecemeal litigation, but will determine the whole case. Curtin v. Krohn, 4 Cal. App. 431, 134, 87 P. 243; Kraft v. De Forest, 53 Cal. 656; Sacramento Bank v. Alcorn, 121 Cal. 383, 53 P. 813; Banta v. Wise, 135 Cal. 277, 67 P. 129. It is also the rule that cases arising in contract and also in tort may be properly united (Boulden v. Thompson, 21 Cal. App. 279, 131 P. 765), and also causes at law and in equity may be joined if otherwise proper (Moore v. Massini, 32 Cal. 590).

[6] The $12,000 note was tranferred by appellant to respondent by indorsement "without recourse." The appellant insists that the attempt to hold him personally liable for the deficiency and the receipt of testimony concerning the $12,000 note was an attempt to vary the terms of a written instrument. If, however, that was part of the scheme to defraud, that point is not well taken, and its testimony upon that phase of the case is evidenced by its following finding.

> "That the defendant Rodney L. Turner did, as a part of a scheme to cheat and defraud the plaintiff, and as a part of said negotiations for the sale to the plaintiff of said note and trust deed, make said representations as to the responsibility of said J. B. Pilcher, and as to the said transaction as to the said J. B. Pilcher for the purpose of misleading the plaintiff, and the said Rodney L. Turner did fail to disclose, as aforesaid, the true facts concerning said transaction and the financial responsibility of the said J. B. Pilcher, all for the purpose of misleading the plaintiff and inducing plaintiff to purchase said trust deed note with the qualified indorsement thereon, to wit, 'without recourse,' as to the defendant Rodney L. Turner as assignor and indorser and that the plaintiff did so purchase said note with said indorsement 'without recourse' thereon solely and wholly because of the affirmative representations of the said Rodney L. Turner with respect to the financial standing and ability and the financial worth of the said J. B. Pilcher and because of the failure of the said Rodney L. Turner to disclose and make known to the plaintiff the true facts above found respecting said note and trust deed and the true facts concerning the said J. B. Pilcher rendering said note valueless so far as the said maker J. B. Pilcher is concerned, and that, relying upon such representations the plaintiff did and would not have otherwise purchased from the defendant Rodney L. Turner said note and trust deed with such indorsement."

In view of these findings, which are supported by the testimony, it was not error to admit this evidence, for the rule against varying the terms of a written instrument by parol is not applicable in the face of established fraud and misrepresentation.

[7] As to the measure of damages, the court found as follows:

> "That the plaintiff has suffered damages by virtue of the facts hereinbefore found as to the defendants Rodney L. Turner and J. B. Pilcher, to the amount of the unpaid portion of the said trust deed note and obligations evidenced thereby, less such value as may exist in said real property covered by said mortgage and trust deed as may remain after the sale and application of the proceeds from such sale in satisfaction of said first mortgage."

This measure of damages appears to have been erroneous. When a party has been damaged by false representations on an exchange of property, he has the right to rescind or affirm and recover his damages. Plaintiff did not rescind; he affirmed. The rule for fixing his damages in that instance has been established in the case of Wood v. Niemeyer, 185 Cal. 532, 197 P. 798, the court there saying:

> "Upon these findings and the settled rule of law in this state applicable to actions 'for deceit in the sale or exchange of real estate * * *' the plaintiff, as the party found to have been defrauded, was entitled to recover the difference between the actual value of the property which he received and the value which it would have had if the defendant's * * * representations as to the value thereof had been true"—citing authorities.

In Garstang v. Skinner, 165 Cal. 726, 134 P. 331, the court there said, in regard to the measure of damage:

> "The measure of damages applicable in this action, in the absence of any claim of special damages, is the excess of the value of the mortgages over the value of the bonds exchanged therefor, assuming that such exchange actually took place, such values being taken as of the time of the exchange. 4 Sutherland on Damages, § 1171, p. 3402; 1 Bigelow on Fraud, p. 627. This rule applies, at least, in all cases where there are no supervening circumstances which render the values at some other time material to the injury arising from the fraud. No such circumstances, and no facts showing special damages, appear either in the pleadings or findings. The finding that in March, 1909, the property was of no value and the bonds worthless does not establish the fact that they were not worth more than the mortgages when they were exchanged therefor on November 6, 1906, more than two years before. The injury from such exchange, if any there was, was complete when it occurred. Subsequent deterioration in the value of the property would reduce the value of the bonds, but this reduction would be attributable to the causes which impaired the value of the property and not to the fact that the mortgages had been exchanged for the bonds. The fact that the plaintiff's bonds were not an exclusive first lien would imply that the bonds were of less value than the mortgages, but no facts are alleged from which it is possible to ascertain the difference in such values, or to indicate that it was substantial."

Bigelow on Fraud, p. 627, upon the same subject, lays down the rule as follows:

> "It is now well settled that, in actions for deceit or breach of warranty in sales, of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be."

The time for the comparison of values to ascertain the defrauded party's damage is the time the deal was made.

In view of the mistake of the trial court in the measure of damages set up, it is ordered that this cause be referred back to the trial court, with directions to take such testimony as may be necessary to establish the relative values of the properties at the time of the transfer, and report the same back to this court. In other particulars the judgment is affirmed.

I concur: HART, J.

90 Cal. App. 291

HILL v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES. (Civ. 6148.)

District Court of Appeal, First District, Division 2, California. March 21, 1928.

1. Vendor and purchaser 🔑117—Written offer to reconvey property to trustee on purchaser's rescission held sufficient, notwithstanding substitution of new trustee (Code Civ. Proc. §§ 2074, 2076).

Under notice of rescission of purchase contract on ground of fraudulent concealment of character of land substituted for that originally sold, demand for purchase money and tender of deed conveying property back to trustee *held* sufficient, though new trustee had in meantime been substituted, under Code Civ. Proc. §§ 2074, 2076, where defendant rejected entirely the notice of rescission.

2. Vendor and purchaser 🔑37(7)—Vendor's letter to purchaser of almond orchard, recommending substitution of another tract and concealing fact that other tract was not planted to almonds, held fraudulent; "actual fraud" (Civ. Code, § 1572).

Where plaintiff contracted for purchase of ten-acre almond orchard, vendor's letter which suggested that another tract be substituted and concealed fact that substituted tract was inferior in quality and was not planted to almonds constituted suppression or concealment of facts amounting to actual fraud under Civ. Code, § 1572, which justified purchaser's rescission, where purchaser had no opportunity to actually inspect the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

3. Corporations 🔑423—Ignorance of agent of vendor corporation, who wrote letter to purchaser fraudulently concealing nature of land recommended to be substituted, held no defense to corporation, where its knowledge was otherwise shown (Civ. Code, § 1572).

In suit against corporation for rescission of purchase contract on ground of corporation's fraud in recommending substitution of inferior property under Civ. Code, § 1572, ignorance of agent of corporation who wrote the alleged fraudulent letter was no defense to corporation, provided corporation through its other agents knew of true situation.

4. Vendor and purchaser 🔑119—Finding that purchaser's delay in suing for rescission of land contract was not bar to relief held proper, where fraud was not immediately discovered and defendant not prejudiced.

Finding that one year and ten months' delay in commencing suit for rescission and refund of purchase money on contract for sale of almond orchard on ground of fraudulent concealment inducing substitution of different tract did not bar recovery *held* sustained, where plaintiff's occupation prevented inspection of premises, and contract charged defendant with care of orchard, and no prejudice was shown.

5. Equity ⟹71(1)—Laches are not shown by length of time alone.

Length of time by itself does not ordinarily establish laches.

6. Vendor and purchaser ⟹123—Purchaser fraudulently induced to substitute inferior tract held entitled to rescission in total and not merely to restoration of original contract, where original property had been disposed of.

In purchaser's suit for rescission of contract for purchase of almond orchard on ground that defendant vendor had fraudulently concealed condition of another tract which plaintiff agreed to substitute on defendant's recommendation, purchaser was entitled to rescission in total, and not merely to restoration of the original contract, where vendor had sold the property first contracted for.

7. Vendor and purchaser ⟹341(1½)—Assignee of purchase-money mortgage given by purchaser before discovery of vendor's fraud, held not necessary party in suit for price.

In suit for rescission of contract for purchase of almond orchard, brought by purchaser, who before discovering fraud had accepted deed and given vendor mortgage for unpaid part of price, assignee of mortgage *held*, not essential party, where only money judgment was sought against vendor.

8. Mortgages ⟹256—Assignee of mortgage takes subject to equities between original parties.

Mortgage is not negotiable, and one taking assignment thereof from mortgagee takes it subject to equities existing between original parties.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Henry R. Hill against the Associated Almond Growers of Paso Robles. Judgment for plaintiff, and defendant appeals. Affirmed.

Griffith & Thornburgh and Wm. G. Griffith, all of Santa Barbara, for appellant.

R. T. Quinn, of Los Angeles, for respondent.

KOFORD, P. J. Plaintiff recovered a judgment for the purchase money which he had paid upon a contract for the purchase of a ten-acre almond orchard. The contract was rescinded for fraudulent concealment inducing plaintiff to consent to a substitution in his contract of a prune orchard for the almond orchard. Defendant appeals, claiming chiefly that the evidence is insufficient to prove fraud and that it shows such laches upon the part of plaintiff in discovering the fraud as to bar his action.

The facts disclosed by the evidence and findings are as follows: In September, 1919, plaintiff, who then resided in Chicago, entered into a written contract with defendant to purchase the north ten acres of lot 38 Associated Almond Orchards, Independence No. 1, near Paso Robles, Cal. The contract called for monthly installments of purchase price which were paid as they fell due. It required the corporation to plant the land to almond trees, to cultivate and care for the same, and pay all taxes for four years. It contained covenants for the protection of the buyer in case of illness or death. It provided also for a development fund to be held by a trustee who would also hold the title to the land. At the time this contract was executed plaintiff had never seen the property, but in December, 1920, he visited California and inspected the property. He found it satisfactory. It was planted to almond trees about one year old. He returned to his residence in Chicago and continued in his occupation in Detroit, Mich. He there received a letter January 15, 1921, from the defendant corporation, written from Chicago by its assistant vice president, who resided there. This letter alone induced the plaintiff to consent to a substitution of a different ten-acre orchard than that which he had first purchased. The ten-acre orchard, thus substituted, plaintiff subsequently discovered, was inferior in quality and was planted to prunes and not almonds. The failure to disclose these facts to plaintiff constitute the fraudulent concealment. This letter to plaintiff read as follows:

> "In making a switch of lots for a Mr. Clark who wanted to get two lots adjoining (one planted last year and one to be planted this year), we have released lot 82 of Independence tract No. 6, which, as you know, is our only tract that is near the main east and west state highway, which is now being constructed. This lot which is No. 82 of Independence tract No. 6 is located on the main county road, is a well shaped lot and we feel sure that you will like it better than the north 10 acres of lot 38, Independence tract No. 1, which you now have. Would like to have you take advantage of this opportunity, and, feeling sure that you will want to do so, we are inclosing herewith, letter in duplicate, changing the assignment; and if you are agreeable, will you place one copy of the inclosed letter with your contract and sign and return the other copy for our files. Yours very truly, Associated Almond Growers of Paso Robles, by T. B. Willard, Ass't to Vice President."

Plaintiff believed from this letter that "it was an even trade" and everything would be the same except the location, and so without further question he gave his consent, and the substitution was indorsed on his contract by attaching a letter to it.

In January, 1922, plaintiff moved to California and worked as a hardwood floor subcontractor in Los Angeles and Alhambra. His work kept him occupied daily except Sundays. He never visited his new orchard until October, 1923, when he went there with the vice president and general manager of the defendant corporation. He discovered to his surprise it was prunes and not almonds. He testified:

> "It is a place laid right down in a hole, in a regular wash, and he (the vice president and general manager) explained to me why the almonds wouldn't grow there, so they put prunes there. I told him I wasn't buying prunes, I was buying almonds; and he says, 'Well; somebody had made a bull.' "

Upon plaintiff's return to Alhambra he wrote a letter of protest to the defendant and later consulted an attorney, with the result that on November 14, 1923, he served a notice of rescission of the contract upon the grounds of the fraudulent concealment of the different character of the substituted land and orchard and upon other grounds as well. The written notice demanded back the purchase money paid and tendered a deed from plaintiff and wife conveying the property back to the Bank of Italy, trustee. The written notice further stated that defendant might if he found it more convenient, place the demanded purchase money in escrow with a bank, with instructions "to receive from me the said deed or any other necessary instruments that you may wish or think necessary."

The demand was not complied with, and this action followed. After the notice of rescission was served plaintiff received by mail a deed conveying to him the substituted land. The Bank of Italy, trustee, was grantor. The deed had been recorded August 20, 1923. At the trial plaintiff offered in evidence and left with the clerk of the court a deed from plaintiff and wife to said Bank of Italy for the purpose of keeping good his tender to reconvey.

[1] We see no merit in the appellant's contention that the tender was not good because a new trustee had been in the meantime substituted for the Bank of Italy. The notice of rescission contained a written offer to reconvey, and that was sufficient tender under the circumstances, the defendant rejecting entirely the notice of rescission. Code Civ. Proc. §§ 2074, 2076.

[2, 3] The letter of January 15, 1921, in connection with the circumstances attending it, was a suppression or concealment of facts in the knowledge of the defendant which amounted to actual fraud. Civ. Code, § 1572. Mr. Willard, the assistant vice president, who wrote the letter over the corporation defendant's signature, testified that at the time he wrote the letter he knew nothing about the orchards, but still he believed that the substituted land contained an almond orchard. Whatever may have been the individual state of mind or ignorance of Mr. Willard there is no doubt whatever that the corporation well knew the character of its own land. It planted the prune trees there and was under contract to cultivate and otherwise care for them. The corporation is the defendant, not Mr. Willard. The corporation wrote the letter, not Mr. Willard. Plaintiff in proving knowledge on the part of the corporation was not confined to proving it by the knowledge of the very officer who wrote the letter.

The defendant might have remained entirely silent about the character of the substituted land and allowed plaintiff to decide the question entirely by himself. In that case plaintiff, if he had an equal opportunity for observation, might be expected to investigate for himself or to accept the substitute at his own risk under the rule of caveat emptor. But plaintiff had never seen the substituted land and was at a disadvantage. Defendant's letter undertook to make statements of fact and opinion about the land and was not entitled to state half truths. The following statements of law are quoted with approval in Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803:

> "Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure. 12 R. C. L., 'Fraud and Deceit,' § 71. Fraudulent representations may consist of half-truths calculated to deceive. Thus a representation literally true is actionable if used to create an impression substantially false. 26 C. J. p. 1100."

Under the circumstances disclosed by the record, the letter justified plaintiff in believing at least that the substituted land was in almonds, as was his previous purchase, and we think it also justified him in believing that the land was equal in quality to his first selection.

[4, 5] Plaintiff rescinded promptly upon discovering the fraud, but it is claimed that he was not diligent in discovering the fraud; that after moving to California he should not have waited one year and ten months before visiting the orchard. The orchard was a day's journey by automobile from plaintiff's residence. Plaintiff's occupation consumed all his time except Sundays. The contract put upon the defendant the entire burden of caring for the development and growth of the orchard for four years. The court found against the defense of laches, and the finding is sufficiently supported by the evidence as against an attack upon appeal, even though plaintiff's delay was one year and ten months after coming to California in January, 1922. Length of time by itself does not ordinarily establish laches. 10 Cal. Jur. 526, § 64. No

facts are brought home to plaintiff from which the law would infer that he had knowledge putting him upon inquiry, and no prejudice to defendant is shown by the delay. The defendant resold the first ten acres immediately after plaintiff consented to the substitution.

[6] It is contended that if fraud vitiated the agreement to substitute, the judgment of the court should have decreed a restoration of the original contract and not a rescission in total. The objection is technical only. Defendant at the time of the trial had long since put it out of its power to perform the contract in respect to the first ten-acre orchard by selling it to other purchasers. Conceding that plaintiff could, if he chose to do so under conditions making it equitable, insist upon a restoration of the original contract, the fact is that he did not do so. Defendant cannot insist upon it because it is unable to perform that contract.

[7, 8] Before plaintiff visited the substituted orchard and rescinded, he had accepted a deed and given back to defendant a mortgage for the unpaid balance of purchase price. This was done through a supplemental agreement not involved in this appeal, made Janury 1, 1923. This mortgage was, by defendant, pledged for a loan at the County National Bank and Trust Company of Santa Barbara. Appellant claims that the bank was an essential party to the action for rescission. The judgment gives plaintiff no relief against the bank. It is only a money judgment against the defendant. The bank's rights in the mortgage are the same now as before the judgment. The value of the mortgage in its hands now depends upon its validity and enforceability between the parties to it, just as it did before the judgment. The mortgage was not negotiable, and the bank took it subject to the equities between the parties, and this is no more true after the judgment than before.

This disposes of all the points on appeal. The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

90 Cal. App. 213

TOWNSEND v. MERCANTILE INV. CO. et al. (Civ. 3398.)★

District Court of Appeal, Third District, California. March 17, 1928.

Hearing Denied by Supreme Court May 14, 1928.

1. Appeal and error 🔑110—Order denying motion for new trial is not appealable (Code Civ. Proc. § 963).

Under Code Civ. Proc. § 963, an order denying a motion for a new trial after judgment is not subject to review.

2. Appeal and error 🔑719(6)—Sufficiency of evidence to sustain findings cannot be considered without specification of insufficiency in bill of exceptions (Code Civ. Proc. § 648).

Under Code Civ. Proc. § 648, sufficiency of evidence sustaining findings cannot be considered on appeal on failure to specify in bill of exceptions particulars in which it is claimed that evidence does not support findings.

3. Appeal and error 🔑907(3)—Appellate court on appeal from judgment roll alone is concluded as to questions of fact by findings of trial court.

On appeal amounting to practically only an appeal from judgment on judgment roll alone, appellate court is concluded as to all questions of fact by findings of trial court which must be taken as true for purposes of appeal.

4. Trial 🔑395(1)—Findings that plaintiff suing for accounting under contract to subdivide real property was not entitled to account supported judgment denying recovery and quieting title.

Findings to effect that plaintiff suing for accounting under contract for subdividing town lots was not entitled to any account or accounting, and that defendants had fully accounted in all matters arising out of and resulting from such contract, *held* sufficient to support judgment denying recovery and quieting title to real property in defendant.

5. Trial 🔑395(7)—Conclusions of law that plaintiff, suing for accounting under contract to subdivide lots, take nothing, supported judgment denying recovery and quieting title.

In action for accounting under contract for subdivision of lots, conclusions of law that plaintiff take nothing, and that defendants were entitled to have title quieted in tract of land involved, *held* sufficient to support judgment denying recovery and quieting title in defendant.

Appeal from Superior Court, Los Angeles County; W. T. O'Donnell, Judge.

Action by H. H. Townsend against the Mercantile Investment Company and another. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

Paul Barksdale D'Orr and A. L. Abrahams, both of Los Angeles, for respondents.

HART, J. This action involves a controversy between the parties regarding certain contracts into which they had entered, whereby the defendants, owners of a tract of land situate near the city of Long Beach, in Los Angeles county, agreed with the plaintiff that the latter should subdivide said land into town lots and improve the same, with the view of establishing a town or city between said city of Long Beach and the city of Pasadena, in said county, to be named and known as "Hollydale." The contract first so entered into

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★Hearing denied by Supreme Court.

provided, among other things, that the lots or units into which the land was to be subdivided were, at the expense of plaintiff, to be improved by laying out and building streets and sidewalks and installing a water pipe system in said Hollydale; that plaintiff was to sell said lots or units and from the gross proceeds of such sales he was to receive 50 per cent. and the defendants a like per cent.

Appellant's brief contains a general statement of the allegations of the amended complaint and the denials and the averments of a special defense set up by the defendants. Said statement is as follows:

> "Plaintiff-appellant, a real estate broker, brought an action against the Mercantile Investment Company and E. A. Parkford (the sole owner of such corporation) to declare his interests in certain contracts relating to a townsite called 'Hollydale,' and for an accounting for the property he had sold therein.
>
> "In his complaint (amended and supplemental) plaintiff set forth his original contract in full and then proceeded to recite the acts he had done thereunder, and then after alleging what took place, he pleaded a second agreement and his work under both contracts. The original contract provided in substance that plaintiff was to subdivide, improve and sell the land, and for such services he was to receive fifty per cent. (50%) of the gross receipts. The second or supplemental agreement provided that, instead of plaintiff financing the project as to improvements, etc., Parkford was to do so, and that after paying all expenses, plaintiff and Parkford were to share equally in the profits of the enterprise.
>
> "The complaint then sets forth twenty-one specifications wherein the defendants, Mercantile Investment Company and Parkford, had breached the agreement, and alleging the fraud practiced upon plaintiff from which he alleges that he cannot safely proceed with his part of the contract, and for which reason he asks the court to declare his rights and interest in said contracts, and for an accounting thereunder.
>
> "Defendants filed an answer admitting the execution of the contracts, but denying any breaches of the contract, and by way of further answer, alleged fraud of the plaintiff in the procuring of both contracts."

The prayer of the complaint (supplemental and amended) is for a decree for an accounting between plaintiff and defendants, "in order that it may be declared plaintiff's interest in and to the partnership agreement * * * (Exhibit A), and his interest thereunto because of Exhibit B (a supplemental contract), and, further, that the interest in the land, pursuant to the contracts herein designated as Exhibits 'A' and 'B' of the plaintiff, be declared and fixed," and for the appointment of a receiver, etc.

It is not necessary, in view of the conclusion at which we have been compelled to arrive, to state in detail herein the several different particulars in which the answer alleges a breach of the contracts by the plaintiff. It may be generally stated that the defendants, by their answer, in addition to denying specifically the vital averments of the complaint, charge that plaintiff by false and fraudulent representations procured defendants to enter into the contracts designated Exhibits "A" and "B," the particulars in which such act on the part of plaintiff involved false and fraudulent representation being set forth in the answer specifically; that plaintiff by false and fraudulent representations induced certain parties to purchase lots in the subdivision, and that by reason thereof such purchasers appealed to defendants and insisted that they right the wrong or repair the losses and thus relieve them of improvident bargains and unfair contracts into which thus they had been led by the plaintiff; that the latter collected large sums of money on the sale of lots which he did not report in full to the defendant; that he (said plaintiff) wrongfully retained and appropriated to his own use certain portions of such money, and fraudulently concealed from defendants the fact of the collection and receipt by him of large sums of money on such sales, etc.

The prayer of the answer to the "supplemental and amended" complaint is:

> "Wherefore defendants pray that plaintiff take nothing by this suit; that defendant Mercantile Investment Company be adjudged and declared to be the owner and entitled to the possession of Hollydale as against the plaintiff, his agents and employees, and all persons claiming by, through or under him; for costs and for general relief."

The court found against the plaintiff on all the vital issues submitted for determination and decision by the pleadings and as developed by the evidence. The findings are specific and voluminous and cannot (nor is it necessary) be presented herein in detail. It is sufficient to refer thereto in a very general way. First, it is proper to state that among its other findings the court found that "it was stipulated by the parties in open court that all of the matters of difference between the plaintiff and the defendants, or either of them, arising out of said contracts, or either of them, or the breaches of said contracts, or either of them, which may be properly determined by the court under the evidence produced within the issues raised by the evidence or pleadings, shall be determined in this action." It was further found, as it is alleged in the answer, that plaintiff, through and by means of false and fraudulent representations, procured the said contracts to be entered into and executed by defendants, and that all other acts of fraud charged in the answer against plaintiff in his alleged performance of the terms thereof were committed by plaintiff and that false reports and representations were made from time to time by the plaintiff to the defendants as to the sums of money collected and received by him (plaintiff), all with the intent to defraud defendants of their just rights under said contracts. The court also found:

> That "the plaintiff has no interest in, or claim against, the tract described and known as Hollydale. That the plaintiff has no interest in, or claim against, any contracts, money, or other things of value arising out of, or resulting from, the sale of any lot or lots in said tract. That the plaintiff is not entitled to any account or accounting, and that the defendants have fully accounted to plaintiff in all matters arising out of, or in connection with, or resulting from, said contracts or either of them. That said contracts and each of them, have been and were fully terminated, and the defendants rightfully declared said contracts terminated, and ended, on or about April 15, 1924. That the defendants are not, nor are either of the defendants, indebted to plaintiff in any sum whatever. That the defendants are entitled to retain said tract and all improvements thereon, and all contracts and moneys and other things of value received heretofore, or which may hereafter be received by them, or either of them, in any manner whatsoever. That the relationship of the plaintiff to the defendants, and each of them, was terminated and ended about April 15, 1924."

From the findings of fact the court educed the following conclusions of law:

> "That the defendants are entitled to a judgment and decree that plaintiff take nothing by his suit; that defendants' title to the tract in said findings described, and each and every part and parcel thereof, and to the proceeds from the sale of said tract, of every kind and character whatsoever be quieted as against the plaintiff and all persons claiming by, through or under him; for possession of all of said properties and each and every parcel and part thereof, that plaintiff be forever barred and foreclosed of and from any claim or demand against the defendants, or either of them, or against said properties and proceeds, or any part or parcel thereof, and for costs."

Upon its findings and conclusions of law the court ordered judgment for defendants as follows:

> "(1) That plaintiff take nothing by his suit; (2) that the defendant Mercantile Investment Company is the owner in fee of the land described in the complaint and involved herein, and all improvements thereon; (3) that defendant Mercantile Investment Company's title to said real property be and the same is hereby adjudged to be quieted as against any and all claims, demands, or pretentions of the plaintiff and all persons claiming by, through, or under him; (4) that the defendant Mercantile Investment Company is the owner and entitled to the possession of all contracts, moneys, and all choses in action and other proceeds from the sale of any lot or lots in said tract, and its title thereto is hereby adjudged to be quieted as against the plaintiff and all persons claiming by, through, or under him; (5) that plaintiff, H. H. Townsend, has not any right, title, equity, interest, or right of possession in or to any of said real property, or in or to any of said personal property, contracts, moneys, or choses in action, or any part thereof, and said H. H. Townsend is hereby perpetually restrained and enjoined from setting up or making any claims to or against the same or any part thereof;" (6) that the contracts between the plaintiff and defendant Mercantile Investment Company, designated, respectively, as Exhibits "A" and "B," be, and each of them is, "hereby declared and adjudged to have been terminated and the relation created thereby ended," on April 15, 1924, "and it is further adjudged and decreed that the plaintiff has no claim or demand against defendants or either of them in law or equity under said contracts or either of them or otherwise in connection with the matters in said contracts or either of them referred to; (8) it is further adjudged and decreed that defendant Mercantile Investment Company be put in possession of said real property and the whole thereof and that plaintiff be ousted therefrom."

[1] The plaintiff appeals from the judgment and also from the order denying his motion for a new trial, supporting the appeals by a bill of exceptions. An order denying a motion for a new trial is not subject to appeal (Code Civ. Proc., § 963); hence the appeal from such order herein must be and is hereby dismissed.

[2] The plaintiff contends, under four distinct assignments, which may be stated without reference to the manner in which they are presented in the brief, as follows: That he was entitled, under the pleadings and the evidence, to have it declared and decreed that he and the defendant corporation were joint adventurers in the prosecution of the transactions which were the subject and the purpose of the contracts upon which this action is founded, and that, by reason of the relation between him and said defendant thus created by said contracts, he was entitled to have his rights thereunder declared and adjudicated; that the evidence is insufficient to support the findings; and, lastly, that the conclusions of law do not support the judgment. The presentation in substance hereinabove of the prayers of the complaint and the answer and the findings, the conclusions of law, and the judgment was for the purpose of considering the point or proposition last stated. The three propositions stated precedently to the last are involved in the point that the evidence is insufficient to support the findings. And as to that proposition the plaintiff has not presented here a reviewable record, since the particulars in which it is claimed that the evidence does not support the findings are not specified in the bill of exceptions. Code Civ. Proc. § 648. Said section provides, among others things, that—

> "When the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

[3] It is said in Millar v. Millar, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184:

> "It is settled by a long line of decisions of this court that the question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from a judgment where the bill of exceptions relied on contains no specification of insufficiency of evidence."

"The object of the rule requiring these specifications," it is said in Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 168, 74 P. 700, 702, "is first to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter." See, also, Hawley v. Harrington, 152 Cal. 188, 92 P. 177; Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 P. 166; Smith v. Meade, 36 Cal. App. 173, 171 P. 815. In addition to the reason given in the above cases for the necessity of complying with the requirement of section 648 of the Code of Civil Procedure, where the appeal is supported by a bill of exceptions and the findings are challenged on the ground that they are not supported by the evidence, another may be suggested, and that is that the Courts of Appeal should not be expected or required, without the aid of "square or compass," to make an excursion through the more or less intricate meanderings of the ordinary record on appeal, to ascertain whether the findings, or any finding essential to the support of the judgment, are or is sustained by the evidence, and thereby assume a burden which naturally and rightly should, and which the Legislature, in effect, has said shall be borne by the attorney of the appealing party. It follows that the appeal, as it is presented here, is practically nothing more than an appeal from the judgment on the judgment roll alone, and that "as to all questions of fact," this court is "concluded by the findings of the trial court, which must be taken as true for all the purposes of this appeal." Millar v. Millar, supra.

[4, 5] We perceive no force in the contention that the conclusions of law do not support the judgment, nor in the further contention that the findings themselves are inconsistent and contradictory. The parties, as seen, stipulated that all issues raised by the pleadings or evidence should be determined in this action, and the court made a finding to the effect that such a stipulation was entered into and made. An examination of the record will show that the court made a finding on every material issue arising in the case, and, as shown above, found that "the plaintiff has no interest in, or claim against any contracts, money," etc., arising out of or resulting from, the sale of any lot or lots in said tract, "and that plaintiff is not entitled to any account or accounting, and that the defendants have fully accounted to plaintiff in all matters arising out of * * * or resulting from said contracts or either of them." The other findings in their general purport harmonize with the foregoing, and the findings in their entirety support the judgment. The conclusions of law may not be as full and specific as they might have been made, yet they are in accord with the findings and are sufficient. They substantially embrace conclusions from the findings of all the vital facts.

The judgment is affirmed.

I concur: PLUMMER, J.

PEOPLE v. GORDON. (Cr. 1591.)★

District Court of Appeal, Second District, Division 2, California. March 22, 1928.

Hearing Granted by Supreme Court May 21, 1928.

1. Criminal law 🔑1071—Failure to present statement of grounds of appeal within time held to require dismissal of appeal (Pen. Code, § 1247, and § 1246, as amended by St. 1927, p. 1047, § 1).

Failure of appellant to present application to the trial court stating grounds of appeal and points relied on within five days from time appeal was taken, as prescribed by Pen. Code, § 1247, *held* to require dismissal of appeal, since such section, though expressly repealed, remains effective by virtue of saving clause in section 1246, as amended by St. 1927, p. 1047, § 1, and provisions thereof are mandatory.

2. Criminal law 🔑1111(1)—Record disclosing date of filing statement of grounds of appeal must prevail over order directing transcript of reporter's notes in determining whether statement was filed in time (Pen. Code, § 1247).

On motion for dismissal of appeal for failure of defendant to present application stating grounds of appeal and points relied on within time required by Pen. Code, § 1247, certified clerk's transcript disclosing date of filing, which constituted part of record, must prevail over order of court directing phonographic reporter to transcribe his notes, which recited that statement of grounds of appeal had been filed.

3. Criminal law 🔑1105(2)—Absence of clerk's certificate as to time of filing statement of grounds of appeal held not to prevent dismissal of appeal for delayed statement (Pen. Code, § 1247; rule 6, § 2 of Supreme Court and District Courts of Appeal).

Absence of certificate of clerk of trial court showing that statement of grounds of appeal was not filed within time allowed by Pen. Code,

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★Superseded by opinion of Supreme Court, 269 P. 529.

§ 1247, *held* not to prevent dismissal of appeal, where record showed failure to file statement in time, clerk not being required by rule 6, § 2, of Supreme Court and District Courts of Appeal, to repeat matters furnished and certified to in transcript.

4. Statutes 🔑141(1)—Saving clause which postponed effect of repealing act held not to violate constitutional provision requiring reenactment on amending statute (Pen. Code, § 1247, and § 1246, as amended by St. 1927, p. 1047, § 1; Const. art. 4, § 24).

Saving clause in Pen. Code, § 1246, as amended by St. 1927, p. 1047, § 1, which delays the taking effect of repeal of section 1247, *held* not to violate Const. art. 4, § 24, requiring reenactment of any act revised or amended and preventing amendment by mere reference to title, since in this case no provision or amendment was involved.

Appeal from Superior Court, Los Angeles County; Eliot Craig, Judge.

Proceedings by the People against M. M. Gordon. From an adverse judgment, defendant appeals. Appeal dismissed.

Laird L. Neal and Burke & Catlin, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

THOMPSON, J. [1] The respondent has made a motion to dismiss the appeal in this case on the ground that appellant "failed" to "present an application to the trial court stating in general terms the grounds of the appeal and the points upon which appellant relies, and" designating "what portions of the phonographic reporter's notes it will be necessary to have transcribed" within five days from the time the appeal was taken, as prescribed in section 1247 of the Penal Code. The record discloses that appellant's motion for a new trial was denied, judgment pronounced, and an appeal taken from the order and judgment on November 16, 1927. The record also shows that the statement required was not filed until November 29, 1927. We have recently held that section 1247 of the Penal Code, which was expressly repealed at the legislative session of 1927, is still in force for a limited time, notwithstanding the repeal, by virtue of the saving clause in section 1246 of the Penal Code as amended in 1927 (St. 1927, p. 1047), which says in effect that until rules are promulgated by the judicial council "the time and manner" of making up and filing the record on appeal "provided by statutes in force on January 1, 1927, shall govern." People v. McClellan (Cal. App.) 263 P. 841; People v. Pierce (Cal. App.) 264 P. 519. It is also there held, following a long line of authorities, that the provisions of section 1247 requiring a dismissal for failure to file the statement within the time, are mandatory.

[2] In this case appellant seeks to avoid the provision of section 1247 that in the event of failure to file the statement "the appeal is wholly ineffectual and shall be deemed dismissed," by calling our attention to the order which the court may and did make under the provisions of that section, directing the phonographic reporter to transcribe his notes, in which order it is recited that the statement of the grounds of appeal had been filed. This order is dated November 21, 1927, and filed November 29, 1927, or filed on the same date on which the statement was filed. It is not necessary for us to indulge in any presumptions either of error, oversight, or omission. The clerk's transcript, which discloses that the statement and order were both filed November 29, 1927, is certified to contain "full, true, and correct copies" of the documents therein enumerated, "together with the indorsements on said papers and documents as the same now appear on file in my office." The record must prevail over a mere recital in the order. With respect to a similar contention in the case of Downing v. Le Du, 82 Cal. 471, 23 P. 202, the Supreme Court said:

> "The bill of exceptions shows that she demanded a jury trial, which was denied her, and she excepted. * * * The respondent contends that she waived a jury trial, and it is so recited in the findings. But there is nothing in the record showing such waiver, and the recital in the findings that there was a waiver cannot prevail against the showing in the bill of exceptions that she demanded a jury and it was denied."

It is obvious that there is more reason for holding that the record prevails in the instant action than in the one from which we have just quoted because the record here establishes a single patent fact, while in the former the jury might conceivably have been waived subsequent to demand and denial. We adhere to the rule there announced.

[3] The appellant also insists that there is no certificate of the clerk of the trial court to the fact that the statement was not filed within the time allowed; that such certificate is contemplated by section 2 of rule 6 governing the practice in the Supreme Court and District Courts of Appeal. Apparently he would have the clerk in a separate document, confined solely to the statement of the grounds of appeal and the dates relating thereto, do all over again what he has already furnished and certified in the transcript. His certificate already covers all of the facts which he might cover in a separate instrument, and it is axiomatic that the law and the courts require neither useless nor absurd acts. The rule is fully complied with in this instance.

[4] The appellant also argues that the saving clause in section 1246 of the Penal

Code is violative of that portion of section 24 of article 4 of the state Constitution, which provides that:

> "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended. * * *"

It is apparent, if he be correct in his assertion, that prior to the time the judicial council shall promulgate rules governing the time and manner of making up and filing the record on appeal in criminal cases there is no method whatsoever provided by law, and that the statutes relating thereto have been repealed. This entire subject was covered in one act of the Legislature entitled:

> "An act to amend sections one thousand two hundred forty-six and one thousand two hundred fifty-two of the Penal Code, to add a new section to the Penal Code to be numbered one thousand two hundred fifty-six, and to repeal sections one thousand two hundred forty-seven, one thousand two hundred forty-seven a, one thousand two hundred forty-seven b, one thousand two hundred forty-seven c, and one thousand two hundred forty-seven d, of the Penal Code, relating to appeals in criminal cases." Stats. and Amendments 1927, p. 1047.

There can be no conclusion other than that the Legislature in abolishing by one act the method provided for preparing and filing the record on appeal and at the same time providing a manner in which a new method might be set up, saw the necessity of restricting the time when the repealing portion of the act should take effect. In effect it said this portion of the one act shall not take effect until the judicial council shall promulgate its rules. It is said in Lewis' Sutherland Statutory Construction (2d Ed.) section 354:

> "A saving clause is, like a proviso, an exemption of a special thing out of the general things mentioned in the statute. Its name implies such exemption to preserve from loss or destruction. It is generally employed to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights, penalties incurred, and pending proceedings, depending on the repealed statute. An absolute repeal puts an end to such rights, powers and proceedings, and discharges such penalties. To preserve them to any extent or for any purposes requires a special provision in the repealing act or existing statute having a saving effect."

Viewed in this light, the sections were neither revised nor amended, but the taking effect of the repeal was stayed by the saving clause until the rules were promulgated. This does no violence to the spirit or intent of the constitutional provision.

Appeal dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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90 Cal. App. 360

H. G. B. ALEXANDER & CO. et al. v. MARTZ et al. (Civ. 5878.)

District Court of Appeal, Second District, Division 2. California. March 23, 1928.

1. Appeal and error 🔑800—Motion to dismiss appeal for not filing brief in time must be determined as of date of notice, but advantage should not be taken of excusable negligence (Supreme and District Court Rule 2, subd. 4).

Motion to dismiss appeal on ground that appellant failed for more than 30 days after filing transcript to file opening brief as required by Rules of Supreme Court and District Courts of Appeal, No. 2, subd. 4, must be determined as of date of notice to dismiss, unaffected by subsequent service and filing of brief, but advantage should not be taken of negligence which is excusable.

2. Appeal and error 🔑771—As regards failure to file brief in time, lawyers may rely to some extent on functioning of system calling duties to their attention.

As regards failure to file appeal brief in time, where lawyers actively engaged in professional duties adopt system by which duties may be directed to their attention, and they become accustomed to functioning of system, they should not be held to same strict accountability when break in system occurs as though habit of reliance on system had not been formed.

3. Appeal and error 🔑771—Neglect to file opening brief in time, due to illness of attorneys' clerk held excusable (Supreme and District Court Rule 2, subd. 4).

On motion to dismiss appeal for failure of appellant to file opening brief for more than 30 days after filing transcript, as required by Rules of Supreme and District Courts of Appeal, No. 2, subd. 4, affidavit showing reliance by attorney on clerk whose duty it was to keep record of time for taking appeals, that clerk was taken ill and time for filing brief not called to attorney's attention and that opening brief has been filed since, making of motion, *held* to excuse negligence in failing to file brief in time, especially where no injury would result by reason of delay.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by H. G. B. Alexander & Co. and another against H. D. Martz and others, in which defendant named filed a cross-complaint. Judgment for plaintiff, and named defendant appeals. On motion to dismiss appeal. Motion denied.

Cooper & Collings, of Los Angeles, for appellant.

Elbert E. Hensley, of Los Angeles, for respondents.

THOMPSON, J. [1-3] The respondents have made a motion to dismiss the appeal herein on the ground that appellant failed

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

for more than 30 days after filing his transcript to file his opening brief as required by subdivision 4 of rule 2 of the rules governing the practice in the Supreme Court and District Courts of Appeal. The appellant seeks to be relieved of his failure to comply on the ground that it was occasioned through inadvertence and excusable neglect of his counsel. From the affidavit of one of counsel it appears that the transcript was filed on September 20, 1927; that for the past eight years counsel had had in their employ a clerk whose duty it was to keep a record of the time for appearances, for the taking of appeals, etc.; that some time about the middle of September, 1927, this clerk was taken ill and that for that reason the time for filing appellant's opening brief was not put upon the calendar customarily kept by the clerk, nor called to the attention of counsel until the notice of motion to dismiss was served upon them; that counsel who makes the affidavit and who was familiar with the case had also instructed this clerk to prepare a résumé of the testimony in narrative form for use in writing the brief, which, on account of the illness mentioned, was also not done; that immediately upon learning of the inadvertence affiant proceeded to work upon the brief. It now appears from the record that appellant's opening brief has been filed since the making of the motion, as has respondents' brief.

While it is undoubtedly true that the motion must be determined as of the date the notice is given (McCabe v. Healey, 139 Cal. 30, 72 P. 359), unaffected by the subsequent service and filing of the brief, yet it is also manifestly true that advantage should not be taken of negligence which is excusable, and which may not always be guarded against in the practice of a busy lawyer. Obviously there was negligence, but the question is: was the negligence excusable? Generally lawyers who are actively engaged in professional duties adopt a system or plan by which their manifold duties may be directed to their attention, and they become so accustomed to the functioning of the system that, when a break in the chain occurs, they should not be held to the same strict accountability as though the habit of reliance upon the system had not been formed. The case which has been called to our attention, Erving v. Napa Valley Brewing Co., 16 Cal. App. 41, 116 P. 331, is nowise in point here, for the reason that counsel in that case relied upon the county clerk to file the transcript, which is quite different from habitual reliance upon counsel's office organization. It has been held in a proceeding to relieve from default under section 473 of the Code of Civil Procedure that the entry in counsel's diary of a notice of the time set for trial on the page marked August 8, when it should have been on the page headed August 7, was a sufficient excuse in the absence of a showing that the entry was deliberate. Hagenkamp v. Equitable Life Assur. Soc., 29 Cal. App. 713, 156 P. 520. We think the similarity of situations is sufficient to have weight in the consideration of this motion. It is not suggested by respondents that any injury will result by reason of the delay in filing the brief. While we are loath to take action that will in any wise tend to encourage procrastination and lack of diligence, we feel that the circumstances here are such that counsel should be relieved from the effect of his neglect and that the appeal ought not to be dismissed.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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90 Cal. App. 362

BLACKBURN v. MERCHANTS' LIFE INS. CO., BURLINGTON, IOWA.★

(Civ. 6149.)

District Court of Appeal, First District, Division 2, California. March 24, 1928.

Rehearing Denied April 23, 1928.

1. Gifts ⟹50—Where plaintiff suing on life policy claimed to be donee, court had duty to ascertain insured's intention in delivering policy to plaintiff.

In suit on life insurance policy, in which plaintiff contended that she was donee of policy, it was duty of court to ascertain intention of insured in delivering policy to plaintiff, considering all facts and circumstances of case; question whether gift was made being mixed question of law and fact.

2. Gifts ⟹49(1)—Plaintiff claiming as donee of insurance policy must establish completed gift by clear and convincing evidence.

Where plaintiff suing on insurance policy claimed to be donee of policy, she had burden of proof to establish completed gift by clear and convincing evidence.

3. Gifts ⟹28(3)—Plaintiff held beneficiary rather than donee of life policy, where insured did not assign policy to her and reserved control (Civ. Code, § 1148).

Plaintiff suing on life policy *held* to be merely beneficiary and not donee, notwithstanding that she had possession of policy, where insured reserved right to surrender policy for surrender value, change it for paid-up policy, have it extended in case of default in premiums, borrow on its security and change beneficiary, and did not assign policy to plaintiff, since gift other than gift in view of death cannot be revoked by giver under Civ. Code, § 1148.

4. Insurance ⟹243—Where insured allowing beneficiary to possess policy reserved right to cancel and take surrender value, insurer paying insured surrender value held relieved of further liability.

Where insured, though allowing policy to be in possession of beneficiary, reserved right to

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★Rehearing denied.

cancel it and take in cash surrender value, insurer *held* relieved of all liability when it paid insured full surrender value.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Daisy C. Blackburn against the Merchants' Life Insurance Company, Burlington, Iowa. Judgment for defendant, and plaintiff appeals. Affirmed.

Norman T. Mason, of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued upon a policy of life insurance issued by the defendant upon the life of John A. Blackburn, who was the husband of plaintiff at the time the policy was issued. Defendant had judgment, from which the plaintiff has appealed on a typewritten record.

The policy, which was issued August 2, 1916, at Burlington, Iowa, while the parties were living together as husband and wife in the state of Kansas, named the wife as beneficiary. Subsequent to their divorce in 1921, the insured attempted to change the beneficiary to his estate, and thereafter accepted the privileges of the policy and received the sum of $186 on June 30, 1922, which was the cash surrender value at the time. Prior to this adjustment, and for more than a year preceding it, correspondence was had between the company and the insured, who was living in Texas, and between the company and the plaintiff herein, who resided in California, in which the insured demanded a change of the beneficiary, and the plaintiff sought information as to the right of the insured to make this change and also as to her rights to collect the cash value of the policy. The company informed the plaintiff that the insured might change the beneficiary whenever he desired and that he alone could borrow on the security and collect the surrender value.

The cause was tried before the court sitting without a jury. The trial court found that the plaintiff was never at any time the owner of the policy; that it was duly canceled in June, 1922, when the insured was paid the full cash surrender value; that plaintiff knew, in 1921, that the insured claimed the right to change the beneficiary and to cancel the policy and that he had requested the company to make these changes; that the insured died in September, 1924; and that plaintiff was estopped by her laches from claiming any right under the policy.

[1, 2] On this appeal the appellant attacks the finding that she was not the donee of the policy. The argument is that as the appellant testified that shortly after the policy was issued the insured handed it to her with the words, "This is yours," and she put the policy in a tin box in which she kept her personal belongings and had it ever since, and as this testimony was not directly controverted, the trial court should have found that an irrevocable gift had been made. The question whether a gift was made was a mixed question of law and fact, the determination of which depended not only upon evidence of the delivery of the policy, but upon the presence of all the elements necessary to make a valid gift. Thus it was the duty of the trial court to ascertain the intention of the insured from all the facts and circumstances of the case. Estate of Hall, 154 Cal. 527, 532, 98 P. 269; Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 503, 238 P. 1034. The burden of proof was on the appellant, and it was necessary for her to establish a completed gift by clear and convincing evidence. Mutual Benefit Life Ins. Co. v. Clark (Cal. App.) 254 P. 306. It was said in the latter case:

> "The delivery must be absolute, and this is true whether a gift be inter vivos or causa mortis; that is to say, the donor must not only part with the possession of the property intended as a gift, but must relinquish to the donee all dominion and control over it. * * * If, however, the transfer of such dominion and control is postponed until the death of the donor, or to some other future date, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift."

[3, 4] In the policy in issue the insured reserved to himself the right to surrender the policy for its surrender value, to change it for a paid-up policy, to have it extended for a definite period in case of default in premiums, to borrow on its security, and to change the beneficiary. All these reservations were wholly inconsistent with the theory that all dominion and control over the policy had been relinquished by him. This in itself would be sufficient to justify a finding adverse to the appellant upon the claim that she was a donee, particularly when the claim was raised for the first time after the death of the insured and was supported by such meager testimony. But, in addition to this, the trial court could draw the inference that no gift was intended from the fact that the insured did not assign the policy to his wife. The policy provided for an assignment which would have transferred to the assignee all the rights of the insured enumerated above and all other benefits under the policy. Under appellant's theory she succeeded to all the rights of the insured when he handed over to her the document; but the contract called for a written assignment with a duplicate to be filed with the company. The failure of the insured to assign the policy to appellant and his reservation of the right to cancel it are inconsistent with the intention to make an absolute gift.

It is plain from an examination of the whole record that appellant was merely a beneficiary and not an owner of the policy, and that, as such, her interest in the policy was "that of a mere expectancy of an incompleted gift, subject to revocation at the will of the insured." Mut. Ben. Life Ins. Co. v. Clark, supra. But a gift, other than a gift in view of death, cannot be revoked by the giver. Section 1148, Civ. Code. Hence the insured, having reserved the right to cancel the policy at any time and take in cash the surrender value, explicitly retained dominion and control over the policy even though the document was out of his possession. As this right of surrender was not dependent upon the consent of the beneficiary, the respondent was relieved from all liability under the policy when it paid the insured the full surrender value when it was canceled.

Our conclusion that appellant had lost all rights to any benefits under the policy before the death of the insured makes it unnecessary to consider any other points raised.

Judgments affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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90 Cal. App. 307

Ex parte McDANIEL. (Cr. 1565.)

District Court of Appeal, Second District, Division 1, California. March 21, 1928.

1. Habeas corpus ⚷99(1)—On habeas corpus involving custody of infants, fitness of petitioner or respondent and welfare of children may be considered and determined.

While function of writ of habeas corpus ordinarily involves only question of legality of detention, in cases involving custody of infants, matters relating to the fitness of the petitioner or the respondent and to the temporal, moral, and spiritual welfare of the children may be considered, and order looking to children's interests may be included.

2. Habeas corpus ⚷93—Order awarding custody of children to respondent, in habeas corpus proceedings, held within court's jurisdiction.

In habeas corpus proceeding to regain custody of minor children, in which the issue of petitioner's fitness to have the care and custody of the children was tendered, and evidence pertinent to such issue introduced, determination that best interests of children required that they be retained in respondent's custody and order awarding control of children to respondent *held* within court's jurisdiction.

3. Habeas corpus ⚷117(1)—Adjudication in habeas corpus proceedings of fitness of opposing litigants as regards minor children held conclusive between parties in subsequent habeas corpus proceedings.

In habeas corpus proceedings, involving custody of infant children, in which issue of fitness of opposing litigants was raised and evidence introduced under such issue and received at hearing, court's judgment was valid adjudication of rights of parties and binding upon them in subsequent habeas corpus proceedings.

Original habeas corpus by Lorena McDaniel against the Superior Court of Los Angeles County to secure the custody of certain minor children. Writ discharged.

Clarke & Bowker, of Los Angeles, for petitioner.

C. E. McDowell, of Los Angeles, for respondent.

HOUSER, J. By the petition herein, petitioner seeks the custody of her three minor children. As gleaned from the record, the salient facts are that in the state of Oklahoma, in a divorce proceeding between petitioner and her husband, petitioner was awarded the custody of their three children who are the subject of this proceeding; that thereafter petitioner took the said children to the city of Fort Worth, state of Texas, where in a rooming house she abandoned them and left them destitute; that thereupon, after proceedings had in the district court of Tarrant county, Tex., each of said children was adjudged a dependent child and ordered placed in the Tarrant County Orphans' Home. Thereafter, by order of said court, the custody of said children was awarded to their aunt, the respondent herein, who thereupon brought the children to this state. It further appears that heretofore, in a habeas corpus proceeding instituted in the superior court of Los Angeles county by the mother of the children against their aunt, an order was made by said court that the aunt, respondent herein, retain the custody and control of said minor children.

[1, 2] It is contended by respondent that the order of the superior court is conclusive so far as the instant proceeding is concerned. On the other hand, petitioner urges that in a habeas corpus proceeding the court is limited to an order either granting to the petitioner the relief sought by him, or to deny it, and consequently that the order made by the superior court by which the control of the children was awarded to the respondent herein was in excess of the jurisdiction of the court.

While in the superior court the proceeding was denominated an application for a writ of habeas corpus, nevertheless, by the petition therein, the issue of the fitness of the petitioner to have the care and custody of the children was tendered to and accepted by the respondent, with the result that at the hearing evidence pertinent to such issue was introduced by each of the parties to the proceeding. As is shown by the judgment or order made by the superior court in said matter, it "appearing to the court at such time that the best interests of said children in respect to their temporal, mental, and moral welfare and the preference of said children required that the petition of the said Lorena McDaniel be denied, and that the custody and control of said minor children be retained by said E. Lura Adams, it is therefore ordered that the custody of said minor children * * * be, and the same is hereby, awarded to the said E. Lura Adams, and the said E. Lura Adams is to retain the custody and control of said minor children."

It thus appears that, notwithstanding the main feature of the proceeding was the question of the legal right of the respondent to the custody of the children, in effect a judicial determination was had of what possibly might be termed the subsidiary or dependent question of the proper disposition to be made of the children. While ordinarily it may be said that the function of the writ of habeas corpus is to determine only the legality of the detention of a person under restraint of his liberty (13 Cal. Jur. 217, and note), in cases involving the custody of infants, the rule seems to be relaxed and extended so that the determination of the matter may include an order looking to the best interests of the children (13 Cal. Jur. 279).

[3] In the Matter of Hart, 21 Cal. App. 30, 32, 130 P. 704, it is held that, in a habeas corpus proceeding before the District Court of Appeal, that court "is not called upon, nor * * * has it jurisdiction or authority to hear evidence with reference to the best interests of the child. * * *" However, as opposed to such statement of the law, as hereinbefore indicated, the practice is well established in a proceeding of this nature that such matters as relate to the fitness of either the petitioner or the respondent, or the temporal, moral, and spiritual welfare of the child, may be considered and determined. 12 R. C. L. 1215, and cases there cited; In re Mathews, 176 Cal. 156, 167 P. 873; Ex parte Becknell, 119 Cal. 496, 51 P. 692; In re Gates, 95 Cal. 461, 30 P. 596. But in addition to such general power of the court in such matters, it is clear in principle that, although possibly from abstract reasoning the relief in a habeas corpus proceeding should be limited to an inquiry into the question of the validity and regularity of the authority upon which the respondent may base his right to the detention of the petitioner, in a habeas corpus proceeding involving the custody of an infant, where the issue of the fitness of each of the opposing litigants is made and evidence of such issue is introduced and received at the hearing, the judgment by the court thereon is a valid adjudication of the rights of the parties and binding upon them.

In the well-considered case entitled In re Gille, 65 Cal. App. 617, 224 P. 784, the authorities are reviewed and the conclusion reached that, as between the same parties and upon the same state of facts, a final adjudication on a writ of habeas corpus brought to determine the right of the parent to the care and custody of a minor child is res adjudicata as to all questions necessarily involved in the proceeding. To the same effect is the case entitled In re Holt, 34 Cal. App. 290, 167 P. 184. The syllabus in Re Frazier, 50 Cal. App. 45, 194 P. 510, contains the following declarations of the law:

> "In an original proceeding in habeas corpus to recover the custody of a minor, the appellate court is bound by the judgment of the superior court in a similar proceeding between the same parties, and the conclusive effect thereof is not affected by the presentment of facts which existed at the time of the former hearing, but which were not introduced in evidence."

The situation here seems to be controlled by the authorities to which reference has been had. It therefore becomes unnecessary to consider other points raised by the respective parties to the proceeding.

The writ is discharged.

We concur: CONREY, P. J.; YORK, J.

89 Cal. App. 612

MAXWELL v. JIMENO et al. (Civ. 4751.)

District Court of Appeal, Second District, Division 2, California. March 2, 1928.

1. Appeal and error ⚷171(1)—Appellate court must consider appeal on theory on which case was tried.

Appellate court must consider appeal on theory upon which case was tried in court below.

2. Appeal and error ⚷907(3)—Evidence cannot be reviewed on appeal on judgment roll alone (Code Civ. Proc. § 670).

Under Code Civ. Proc. § 670, on appeal on judgment roll alone, evidence cannot be reviewed, and it must be assumed that findings are sustained by the evidence.

3. Judgment ⚷251(1)—Plaintiff ignoring contract and suing for money for services, judgment was not unsustained by pleadings under which court found contract fraudulent (Code Civ. Proc. §§ 437, 462).

Where, in action for services performed and materials furnished, plaintiff elected to ignore contract and sue upon common count for money due him, *held* that, in view of Code Civ. Proc. §§ 437, 462, contention that pleadings do not sustain judgment for plaintiff is without merit, where court found that contract was obtained by false and fraudulent representation and that it was rescinded by plaintiff.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by John Maxwell against F. D. Jimeno and another for work and labor performed and materials furnished. Judgment for plaintiff, and defendants appeal. Affirmed.

Ernest P. Wellman and George W. McDill, both of Los Angeles, for appellants.

Henry L. Knoop, of Los Angeles, for respondent.

VALENTINE, Justice, pro tem. This is an appeal from a judgment of the superior court in favor of plaintiff and against defendants. The appeal is taken on the judgment roll alone.

The action was to recover $862.95 for work and labor performed and materials furnished. The answer admits that plaintiff performed certain work and furnished certain materials, but denies they were of the value of $862.95, or of any value, except as set forth in a certain agreement incorporated in and set up as a part of the answer and as a defense. It is alleged in the answer that it was under this agreement that plaintiff performed services and furnished materials, and that plaintiff was paid by the conveyance to him of certain real property as provided in the agreement.

[1] The sole contention of appellants is that the pleadings do not sustain the judgment, inasmuch as the court found that the contract was obtained by false and fraudulent representations, that it was in due time repudiated, canceled, and rescinded by the plaintiff, and is void, and that because there was no pleading asking for a rescission of the contract the pleadings do not sustain the findings and judgment; that plaintiff should have set up all the facts with reference to the making of the contract, and then should have pleaded fraud and asked for a rescission.

Without reference to whether the plaintiff might have done this, he did not, and we must consider this appeal upon the theory upon which the case was tried. Lugiani v. Landau Economic Syphon Co., 38 Cal. App. 146, 175 P. 648. Plaintiff evidently relied upon his repudiation of the contract and elected to ignore it and sue upon the common count for money due him. He was justified in this by the finding of the trial court referred to above.

[2, 3] The appeal being on the judgment roll alone, the evidence cannot be reviewed on appeal, and it must be assumed that the findings are sustained by the evidence. Code Civ. Proc. § 670; Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826.

Appellant cites many authorities to illustrate the rule that the judgment must be sustained by the pleadings, but this is elementary and respondent admits it, claiming it has no application to the case at bar.

Section 437 of the Code of Civil Procedure provides:

> "The answer of the defendant shall contain:
> "1. A general or specific denial of the material allegations of the complaint controverted by the defendant. * * *"

And section 462 of the Code of Civil Procedure provides:

> "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

The above would seem to sustain respondent's contention.

In Sarnighausen v. Scannell, 11 Cal. App. 652, 656, 106 P. 117, 119, the court says:

> "Under our form of pleading, there is no opportunity offered for the filing of a replication to the answer. Colton L. & W. Co. v. Raynor, 57 Cal. 588. When affirmative matter is pleaded as a defense it is deemed to be denied. Code Civ. Proc. § 462. Thus, where a contract is set up as a special defense, plaintiff, without pleading such matter, may show that it was procured by fraud, menace or duress, or that it has been rescinded. Sterling v. Smith, 97 Cal. 343, 32 P. 320; Brooks v. Johnson, 122 Cal. 571, 55 P. 423; Moore v. Copp, 119 Cal. 429, 51 P. 630."

A subsequent ratification has been held to be equivalent to a previous authorization. In view of the finding of the trial court that the said contract was void, the plaintiff would seem to have been justified in ignoring it.

In Donegan v. Houston, 5 Cal. App. 626, 632, 90 P. 1073, 1075, quoting from Minor v. Baldridge, 123 Cal. 187, 55 P. 783, the court says:

> "If the trial court accepted the explanation of plaintiff, which it had a right to do, and found the withholding of the certificate was a fraud upon plaintiff and without warrant, there was evidence to sustain it, and the complaint was sufficient to support the finding without the fraud or excuse being specifically pleaded or set out."

In view of the foregoing there is no merit in appellants' contention that the judgment is not sustained by the pleadings.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 298

BOYD v. IBBETSON. (Civ. 6138.)★

District Court of Appeal, First District, Division 2, California. March 21, 1928.

Rehearing Denied April 20, 1928. Hearing Denied by Supreme Court May 17, 1928.

1. Work and labor 🔑14(2)—Land owner contracting for improvement of lots, portion of cost to be paid in lots, breached contract and became liable on quantum meruit, where he refused to deed lots.

In action by contractor for grading streets, constructing curbs, etc., which work was to be paid for part in cash and part in lots to be selected by him, where contract provided that upon earning certain part of contract price contractor should have right to select lots, and after portion was earned contractor selected lots but owner refused to deed them to him, *held* that owner breached contract in refusing to carry out the agreement to liquidate percentage of contract price earned in lots.

2. Work and labor 🔑14(2)—Contractor could consider grading contract terminated and sue for reasonable value where landowner was in default in payment for work done.

Where owner of land was in default in payment for grading and curbing streets and building sidewalks, which work, by his admission, was done according to specifications and under directions of his own agent, *held* that contractor had right to consider contract at end and to sue for reasonable value of work done.

3. Work and labor 🔑28(4)—Contract price held prima facie reasonable value for grading streets.

In action for reasonable value of services rendered in grading and curbing streets and building sidewalks, where contracts providing that contractor be allowed 35 cents per cubic yard for grading were pleaded and relied on by both parties and were introduced in evidence without objection, *held* that contract price of 35 cents per cubic yard for dirt moved was prima facie evidence of reasonable value for work performed in grading streets.

4. Work and labor 🔑29(2)—Contractor could not recover for excavating sand in grading streets in suit for reasonable value of sand, where contract did not include sand and its value was not shown.

Contractor grading streets, who was also to put in curbing, removing sand and gravel, and depositing same in different parts of tract of land to be used for improvement, *held* not entitled to recover for work in excavating sand and gravel and placing it upon the tract in suit for reasonable value of sand and gravel, where same was not within contract and its value was not shown.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Actions by Frank Boyd against R. E. Ibbetson for work and labor performed and materials furnished, and for specific performance, consolidated for purpose of trial by stipulation. Judgment for plaintiff, and defendant appeals. Modified, and as modified affirmed.

Maurice C. Sparling, of Los Angeles, for appellant.

Carlyle Wynn, of Los Angeles, for respondent.

WELCH, Justice, pro tem. Appellant, in November, 1922, was the owner of a tract of land in Los Angeles county which he proposed to subdivide into residence lots. Respondent, a contractor, entered into a memorandum of agreement with appellant whereby he agreed to grade the streets of said subdivision and to construct sidewalks and curbs therein. Respondent entered upon the work of grading the streets of the subdivision and continued to do so until February 17, 1923, when a dispute arose between the parties. On March 7th the parties entered into another agreement which was supplemental to and in amplification of the memorandum agreement above mentioned. This dispute being unsettled in May, respondent ceased work under the contracts and commenced three separate actions against appellant, one for grading and leveling work, one for specific enforcement of the contracts and one for sand and gravel alleged to have been furnished appellant by respondent, independent of the contracts.

It being stipulated that the three actions may be tried together and that the testimony introduced in any one cause may be applied to all three causes, the trial court made but one decision and one judgment in all three cases. In so doing it considered that the three complaints were contained in one pleading and that the three answers thereto were contained in one pleading; that the cross-complaint of appellant and the answer thereto be considered as a separate action.

The trial court gave respondent judgment for $4,422.20, from which this appeal is taken upon the judgment roll and a bill of exceptions. Included in the appeal is an order denying appellant a new trial.

The theory of respondent is that appellant was in default in his payments and in keeping his agreements, and for these reasons respondent may recover a reasonable value for his work and services already performed without first completing his entire contract. It appears from appellant's pleadings and his claims here that his theory of the case is that the contract between the parties is entire; that respondent did not complete the entire contract, but ceased to perform the same long before its completion, that he thereby breached his contract and is entitled to nothing, but, on the contrary, is liable to appellant for the money necessarily expended beyond the contract price in completing the work.

In response to an attack made by appellant upon the sufficiency of the pleadings of respondent and upon the trial court's decision, respondent's counsel admits that the complaints are not "paragons of pleadings" and

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★Rehearing denied. Hearing denied by Supreme Court.

that their shortcomings might imperil the judgment, were it not for the protecting provisions of section 4½ of article 6 of the state Constitution. Considering all the pleadings in the three actions together, as did the parties and the trial court, in which pleadings all the facts of the contracts and of the transaction are set forth and also considering the bill of exceptions wherein a full transcription of the evidence is brought here, this court does not find it necessary to resort either to said constitutional provision, which covers a multitude of errors, or to the broad provisions of section 956a of the Code of Civil Procedure, added by St. 1927, p. 583, in regard to insufficient findings.

The first question of inquiry is: Was there a breach of contract by the appellant? The answer to this question will practically decide this case on appeal.

In the preliminary agreement appellant authorized respondent to commence at once the grading of the streets of appellant's subdivision and agreed to pay him "35 cents a yard for the dirt removed." The contract further provided for laying sidewalks and installing curbs by appellant on the subdivision at agreed prices; 60 per cent. of the value of all work was to be paid for in cash and 40 per cent. in lots of the tract at sale prices; of the 60 per cent., 75 per cent. thereof was to be paid as the work progressed and the balance of 25 per cent. upon the completion of the work.

Respondent immediately entered upon the execution of his contract and continued his work of grading the streets until February 17, 1923, when, as stated above, a dispute arose between the parties as to payments, yardage of dirt moved and other differences. At that time all of the rough grading down to the laying of the sidewalks and installing curbs had practically been done. The engineer, who was the agent of the appellant owner, had given to respondent an estimate of 29,000 cubic yards of earth moved in so grading the streets, while respondent claimed that by reason of his being compelled by no fault of his to move certain earth two or three times the yardage moved and re-moved by him was 41,000 cubic yards. On this point of yardage the trial court held that by reason of errors of the engineer of appellant in placing grade stakes, respondent had been compelled to move large quantities of earth more than once, but that the amount of which could not be ascertained, and thereupon fixed the amount of dirt moved in grading under the contract at 23,492 cubic yards. For this yardage the court allowed appellant 35 cents per cubic yard, amounting to $8,222.20. Upon this amount $4,920 had been paid, leaving a balance of $3,302.20. This balance on February 17, 1923, had been earned, and respondent, if not in default, was then entitled to an adjustment and settlement under the terms of the contract. The supplemental agreement recited that respondent in grading the streets had followed the specifications and directions of the owner's engineers.

[1] Exclusive of an item of $1,120, which we will hereafter notice, the appellant had overpaid respondent on February 17th the 75 per cent. of the 60 per cent. cash payment to be made as the work progressed; but in our judgment respondent at that time was entitled to payment and liquidation of his 40 per cent., which had been earned and which was to be liquidated in lots. The supplemental complaint provides that "as to the manner and time of payment for such services and work performed" said owner shall pay in money 75 per cent. of the 60 per cent. of the price of dirt moved on the 1st and the 15th of each month and the balance of 40 per cent. shall be liquidated by respondent receiving different lots to be picked out by him from lots over the entire tract not already sold. Under the terms of the contracts and the evidence in the case respondent did not have to wait until he had completed all his contract work before receiving his lots in liquidation for the 40 per cent. earned as the work progressed. Respondent with the knowledge and consent of appellant had on February 17th exercised his right to select his lots in liquidation of his 40 per cent. of the contract price. The evidence shows and the court found that appellant agreed to deed these lots to respondent, but failed to do so. In excuse for his failure to keep his promise appellant now claims that the deeds of conveyance were to be executed to respondent upon the payment by respondent of 25 per cent. assumed for the proportional amount of an existing mortgage on the subdivision. The weakness of this argument is that he made no such condition to his promise to deed the lots selected as payment for the 40 per cent. earned under the contract. Besides, he might have waived the 25 per cent. mortgage payment, or he may have kept his promise to convey and demanded before delivery of the deed the payment of the proportional amount of the mortgage instead of requiring respondent to assume the amount. The preliminary memorandum contract provided that the contractor should assume 25 per cent. of the price value of the lots, being the estimated proportional part of the mortgage on the whole tract. It was under this contract that the grading here charged for and allowed was done. The supplemental agreement provides that the contractor shall assume the 25 per cent. mortgage debt; that upon the selection of the lots in liquidation of the 40 per cent. earned the owner would execute to respondent contracts of sales, "showing proper allowances for his credit equaling said 40 per cent. and deeds and certificates of title thereafter be executed" to respondent upon the payment of 25 per cent. assumed. Upon respondent earning the 40 per cent. and selecting lots at sale prices in payment and liq-

uidation thereof, it was incumbent upon appellant, and without demand of respondent, to execute to respondent, or to offer to execute to him, contracts of sale, as provided for in the contract. This he did not do and failed, as found by the court, to reserve for respondent his selected lots.

[2] We conclude on this branch of the case that appellant breached his contract in failing and refusing to carry out his agreement to pay for and liquidate the 40 per cent. of the contract price earned in lots. It is of no moment whether he failed and refused to keep his contract as to his cash payments or defaulted in keeping his agreements to liquidate the balance in lots. It clearly appearing from the pleadings, evidence, and findings that appellant was in default in his payments for the work of grading which by admission of appellant was done according to specifications and under the direction of his own agent, respondent had the right to consider his contract at an end and to sue for the reasonable value of the work done. Porter v. Arrowhead Res. Co., 100 Cal. 500, 35 P. 146; Beck v. Schmidt, 13 Cal. App. 448, 110 P. 455.

[3] Appellant contends that even if he has breached his contract in making his payments respondent cannot recover, under the pleadings and evidence in the case, a reasonable value for work done. Respondent alleged in his complaints that $14,350 was the reasonable value for the grading and work performed before the breach of the contract on the part of appellant; that $5,740 of such amount, or 40 per cent. thereof, was to be paid for in lots, and that $5,740 was the reasonable value of said lots to be taken in payment for such grading; that respondent demanded of appellant conveyance of said lots so earned and that appellant has failed and neglected to convey such lots or any lots to respondent. In his answers appellant denied that $14,350 is a reasonable or any value for services and work performed by plaintiff, "or any sum whatever in excess of $4,095.00," exclusive of the 40 per cent. to be liquidated in lots, and denied that $5,740 represents 40 per cent. of the total to be taken in real estate, "or any other sum in excess of $3,288.88 is a fair, just or reasonable value of that portion of the work performed by plaintiff under said contract to be taken in lots." Nor did appellant specifically deny respondent's allegation in his second count in his first verified complaint wherein he alleged that appellant in November, 1922, engaged and hired respondent to grade certain streets and agreed to pay respondent the reasonable value for such services. The trial court found the amounts as admitted and pleaded by appellant. If the admissions be deemed insufficient to relieve respondent from producing evidence independent of the contract to show reasonable value for such services, then we hold under the circumstances of this case that the contract price of 35 cents per cubic yard "for dirt moved" is prima facie evidence of the reasonable value for services and work performed in grading said streets. Bringham v. Knox, 127 Cal. 40, 59 P. 198. The contracts were pleaded and relied on by both parties. They were introduced in evidence without objection and with the consent of the appellant. The findings of the court and the admissions and estimations of appellant are based upon the price of 35 cents per cubic yard.

[4] In addition to allowing respondent 35 cents per cubic yard for the earth moved in the grading of the streets under written contracts, the court allowed respondent an item of $1,120. In his third complaint respondent sued appellant for the reasonable value of 3,200 cubic yards of sand and gravel which he alleged he furnished to appellant and deposited upon the subdivision tract. The facts are that during the grading work respondent discovered in the line of one of the streets which he was grading an old creek bed of sand which he conceived would be of use to him in making sidewalks and curbs under the terms of his contract. He excavated 3,200 cubic yards of this sand and gravel and placed the same in convenient piles over the tract for future use. He filled the excavations from which he took the sand and gravel with other earth materials. In its decision the trial court stated that it did not find the reasonable market value of such sand and gravel for the reason that it was taken from the land of appellant; but that 35 cents per cubic yard was a fair, just, and reasonable compensation for the work, labor, and services in excavating and placing same upon such streets and that appellant had received full benefit and use of the same in constructing sidewalks and curbs, which benefit exceeded 35 cents per cubic yard. The undisputed evidence, however, shows that appellant used but 25 to 35 per cent. of the sand and gravel in dispute. The remaining portion contained so much dirt that the municipal authorities would not allow it to be used, and, at the expense of appellant, it was hauled to other places and scattered over the tract.

It will be noted that respondent did not sue for reasonable value for services, but he sued for reasonable value of the sand and gravel. The court expressly refused to find the reasonable value of the sand and gravel, but found that the contract price of 35 cents per cubic yard was a fair and reasonable value of the work of excavating and placing the sand and gravel on the tract ready for use. No evidence was produced by respondent as to the reasonable value of such work, and the court could not resort to the contract for such value for the reason that the transaction was no part of the contract; in other words, the court could not resort to the grading contract —the only contract between the parties—to measure the voluntary service of hauling sand

and gravel, a transaction separately sued upon and separate and apart from the grading contract. This item of $1,120 will be disallowed.

The view we take of the case, that appellant breached his contract and that respondent not being in default had the right to recover for the reasonable value of his work performed before such breach, it is not necessary to consider the claim of appellant on his pleading (designated a cross-complaint) that he has been damaged in the completion of the contract of respondent. It should be noted, however, in passing, that the trial court found that appellant was not damaged in the completion of said contract, and that the amounts he paid for completing such grading—nearly four times the contract price—"was unreasonable and exorbitant as a charge for such work."

From the judgment of $4,422.20 there will be deducted the sum of $1,120, leaving the sum of $3,302.20, for which amount the judgment will be affirmed with costs of appeal in favor of respondent.

We concur: KOFORD, P. J.; STURTEVANT, J.

PEOPLE v. BALL. (Cr. 1019.)★

District Court of Appeal, Third District, California. March 22, 1928.

Rehearing Denied April 21, 1928. Hearing Granted by Supreme Court May 21, 1928.

1. Automobiles 🔑351—Information, alleging taking of automobile for purpose of temporarily depriving owner of possession without owner's consent, held to charge felony, though driving was not alleged (State Automobile Act, § 146; Pen. Code, § 499b).

Information charging that defendant did "feloniously take an automobile * * * for the purpose of temporarily depriving the owner of the possession of said vehicle, and at the time * * * did not have permission, or consent, of the owner," *held* to charge a felony under State Automobile Act, § 146 (St. 1923, p. 564), denouncing the driving of a vehicle without the owner's consent, and with intent to deprive owner of possession, and not merely a misdemeanor under Pen. Code 1905, § 499b, though driving was not alleged, since taking alone will constitute felony, in view of use of words "taking or driving" in felony statute.

2. Automobiles 🔑339—Person taking another's automobile with intent to deprive him of possession is guilty of felony, without driving automobile so taken (State Automobile Act, § 146).

Person taking another's automobile without his consent, with intent to permanently or temporarily deprive the owner of his title or possession, is guilty of a felony under State Automobile Act, § 146 (St. 1923, p. 564), even though person charged does not drive car so taken into possession.

3. Criminal law 🔑1141(2)—Regularity of proceedings below is presumed, and appellant must produce record affirmatively showing error.

All intendments and presumptions are in favor of the regularity of proceedings in courts of general jurisdiction, and error will not be presumed, but appellant must produce record affirmatively showing alleged errors.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

George Ball was convicted of taking an automobile without the owner's consent, and he appeals. Affirmed.

George Stahlman and Sydney C. Bennett, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

BARTLETT, Justice pro tem. This is an appeal from a judgment of the superior court of San Joaquin county, Cal., sentencing defendant to imprisonment in the state prison at San Quentin, on his plea of guilty when arraigned on an information, the charging part of which is as follows:

> "The said George Ball is accused by the district attorney of the county of San Joaquin, state of California, by this information of the crime of taking an automobile without permission of the owner, a felony, committed as follows: The said George Ball did on or about the 11th day of November, A. D. nineteen hundred twenty seven, prior to the filing of this information, at and in the county and state aforesaid, willfully, unlawfully, and feloniously take an automobile, to wit, a Buick roadster, Oregon license No. 193783, motor No. 412665, for the purpose of temporarily depriving the owner of the possession of said vehicle, and at the time of so taking said automobile the said defendant did not have permission or consent of the owner thereof, to wit, A. M. Parry, to so take said automobile."

[1, 2] Defendant claims that the foregoing statement of acts on the part of defendant set forth in the information does not describe any prescribed felony under the laws of the state of California, and, because of this, he asks a reversal of the judgment. The question presented by the appeal involves the construction of section 499b of the Penal Code and section 146 of the State Automobile Act, as enacted in 1923. California Stats. 1923, p. 564.

Section 499b of the Penal Code, which was adopted in 1905, is as follows:

> "Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished

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★Superseded by opinion of Supreme Court, 267 P. 701.

by a fine not exceeding two hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

Section 146 of the State Automobile Act reads thus:

> "*Driving Vehicle Without Owner's Consent.* Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony."

The information in question charges defendant, not with the acts set forth in section 499b of the Penal Code, taking an automobile without the permission of the owner for the purpose of temporarily using or operating, in which instance, the crime is a misdemeanor, but charges defendant with a felony because of a willful, unlawful, and felonious taking of the described automobile for the purpose of temporarily depriving the owner of the possession of the vehicle, also alleging that, when defendant took the automobile, he did not have the permission or consent of the owner to so take the same. The information is silent as to whether or not the defendant drove the machine after taking it, and it is because of its failure to contain such an allegation that defendant claims that no offense is stated therein, which constitutes a felony under the laws of California.

Section 146 of the State Automobile Act, read as a whole, will not justify the construction defendant seeks to place upon the words "drive" and "driving." Ordinarily, the words "take" and "drive" would not be synonymous. But, in the case of an automobile, it cannot be said that one can drive that species of vehicle without first taking possession of it, and the purpose of the act is to punish the depriving of the owner of his title or his possession of the automobile, though the intent to deprive may have been to deprive of possession for only a temporary time. While perhaps not framed in as clear and concise English as could have been done, the language of the entire section manifests the intent of the legislators to prohibit an unlawful taking of possession from the owner of an automobile, when the purpose is to deprive the owner of possession either permanently or temporarily, and that intent it is the duty of the court to ascertain and enforce, if it can be ascertained that such was the intent of the legislators, as manifested from a consideration of the whole statute. The use of the words "taking or driving" used in the second sentence of the section, and the use of the words "unauthorized taking or driving" in the last sentence, prohibits any reasonable construction of the act that would declare that driving an automobile, taken into possession without the consent of an owner for the purpose of depriving the owner of its possession, even temporarily, is necessary and additional to a taking to constitute the felony established by the act.

[3] The form of the commitment from the justice's court does not appear from the record. No demurrer to the information was interposed at defendant's arraignment, and no motion was made to set aside the information, on the ground that, before the filing thereof, the defendant had not been legally committed by a magistrate. All intendments and presumptions are in favor of the regularity of the proceedings in courts of general jurisdiction. Error will not be presumed, and it is incumbent on an appellant to produce a record affirmatively showing alleged errors. No such showing is made by the record presented in this case.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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90 Cal. App. 354

PEOPLE v. HAUGH. (Cr. 1572.)

District Court of Appeal, Second District, Division 1, California. March 23, 1928.

1. Criminal law 🔑811(6)—Instruction that no greater presumption attached in favor of defendant's testimony than to other witnesses' held error, where only conflicting testimony was that of complaining witness.

In prosecution for rape, in which there was no disputed evidence to be weighed by the jury except that of complaining witness and defendant, who denied all charges against him, instruction that no greater presumption attaches in favor of defendant's testimony than attaches to any other witness *held* error requiring reversal, especially in view of another instruction which improperly emphasized testimony of complaining witness.

2. Rape 🔑59(3)—Instruction in rape case permitting jury to consider other improper conduct held error, where prosecutrix was uncorroborated.

Instruction in rape prosecution that evidence of improper familiarity between defendant and prosecutrix both before and after time charged in information was admissible to prove greater probability of commission of offense charged *held* error, where there was no evidence of any such act after date alleged in information, and where testimony of prosecutrix was not substantiated by any other evidence, either circumstantial or otherwise, since her statements as to other acts would have no tendency to render her testimony with respect to act charged more credible.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

William Haugh was convicted of rape, and he appeals. Reversed, and new trial ordered.

M. W. Conkling, of El Centro, and Arthur Dorn, and Edgar B. Hervey, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, J. Appellant was convicted on the first count of an information containing two counts. The second count was dismissed on motion of the district attorney, and the appellant appeals from the judgment and order denying his motion for a new trial.

In so far as the objections to the sufficiency of the evidence is concerned, there was legally sufficient evidence in the record to sustain the verdict of the jury.

[1, 2] The objection, however, to the following instruction, referring to the testimony of the defendant, is evidently well taken: "No greater presumption attaches in favor of his testimony than attaches to that of any other witness." In the case of People v. Fritz, 54 Cal. App. 137, 140, 201 P. 348, 350, and cases there cited, such an instruction is held to be error. The instruction in the case of People v. Fritz reads: "No greater presumption attaches in favor of her testimony than attaches in favor of that of any other witness." It is true that in that case it is held that it did not furnish sufficient ground for reversal; but in the case at bar there was no disputed evidence to be weighed by the jury excepting only the evidence of the complaining witness and the evidence of the defendant. There is a direct denial on the part of defendant of every part or portion of the testimony of the complaining witness charging him with any impropriety. The effect of the error above noted is intensified by another error in an instruction given by the trial court:

> "You are further instructed that evidence of other acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence in this case, and as having a tendency to render it more probable that the act of sexual intercourse charged and relied on in the information was committed, and for no other purpose."

One difficulty with this instruction is that there was no evidence introduced of any act of sexual intercourse, or of improper familiarity, after the time charged in the information. In addition to that inaccuracy, the instruction is faulty in that in the given case the evidence of the complaining witness, so far as any conduct of the defendant is concerned, was not substantiated by any other evidence, either circumstantial or otherwise. Therefore, in the case at bar, her statement that there were other acts of intercourse or improper familiarity on the part of defendant towards and with the prosecutrix would not have any tendency to render more credible her testimony that the act of sexual intercourse charged and relied on in the information was committed. In other words, the only testimony connecting the defendant with the alleged crime is the testimony of the prosecutrix herself; and such evidence on the part of the prosecutrix could not be said in any way to render the guilt of the defendant more probable than if she had testified that the act had been done but the once charged in the information. None of the prior acts testified to by the prosecutrix were corroborated in any manner. The doctor who was supposed to give the corroborating testimony did not testify that the condition which he found was probably the result of sexual intercourse. There was nothing in his testimony that would tend to show any act of the defendant, and, although this is apparently relied on to show corroboration of the prior acts, there is nothing in such testimony found in the record which would substantiate any such claim.

As we have here a case of absolute contradiction between the testimony of the defendant and the testimony of the prosecutrix without any other testimony or evidence tending to connect the *defendant* with the commission of the alleged offense, it seems to us that the errors committed by the court in the instructions which it gave to the jury acquire a larger importance and more prejudicial character than would be attributed to them if there had been other evidence clearly tending to establish the actual guilt of the defendant.

The judgment and order are reversed and a new trial ordered.

We concur: CONREY, P. J.; HOUSER, J.

90 Cal. App. 317

PEOPLE v. LORRAINE. (Cr. 1439.)★

District Court of Appeal, First District, Division 1, California. March 22, 1928.

Rehearing Denied April 21, 1928. Hearing Denied by Supreme Court May 21, 1928.

1. Larceny 🔑65—Evidence held sufficient to sustain conviction for grand larceny.

In prosecution for grand larceny, alleged to have been committed by concerted action of defendant and others administering drugs to person from whom jewelry was stolen, evidence *held* sufficient to sustain conviction.

2. Criminal law 🔑423(1)—Acts and declarations of one member of conspiracy in pursuance of original concerted plan with reference to common object are admissible against all.

Where an unlawful enterprise is established between several persons, every act or declaration of each member in pursuance of original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of all, and is therefore original evidence against each of the others.

3. Criminal law 🔑424(1)—Acts and admissions of coconspirators after objective of conspiracy is ended are not admissible against the others.

Acts and declarations of coconspirators, to be admissible against others, must have been made and done during pendency of the criminal enterprise and in furtherance of its objects, and, when the objective of the conspiracy is at end, subsequent acts and admissions of coconspirators are not admissible against the others.

4. Criminal law 🔑736(1), 1158(4)—Whether coconspirator's act after offense is part of common design is for jury's determination, which, if supported by any evidence, is conclusive.

Question whether an act done by one of the conspirators after the commission of the crime is the ordinary and probable effect of the common design or the independent product of the mind of the actor is a question of fact for the jury, whose determination is conclusive, if supported by any evidence.

5. Criminal law 🔑424(6)—Evidence that defendant's coconspirators, on returning after departure together, subsequent to commission of offense, engaged apartments under assumed name, held admissible.

Where, in prosecution for grand larceny, evidence indicated that alleged conspirators, after time of offense, departed in an automobile, and that defendant disappeared while his coconspirators returned, evidence that coconspirators on their return engaged apartments under an assumed name *held* admissible as against defendant, to entitle jury to determine whether the original conspiracy extended to a scheme to evade arrest and escape punishment.

6. Criminal law 🔑736(1)—Question whether return of defendant's alleged coconspirators and taking of apartments under assumed name after commission of offense was part of conspiracy held for jury.

In prosecution for larceny, in which conspiracy was claimed to exist between defendant and others who departed together after commission of offense, question whether conduct of coconspirators in returning and engaging apartments under assumed name was in pursuance of original conspiracy *held* for jury.

7. Criminal law 🔑1163(1)—Conviction will not be reversed unless prejudice affirmatively appears, and appellant has burden to prove error prejudicial.

Injury must affirmatively appear to the reviewing court after an examination of the entire cause, including the evidence and the nature of the error itself, before a judgment of conviction will be reversed, and burden of showing prejudice is upon appellant.

8. Criminal law 🔑1169(7)—Error in admitting evidence of subsequent acts of coconspirator is harmless if it does not show participation of defendant in committing the crime.

Evidence of acts of coconspirator after the accomplishment of the purpose of the conspiracy, even if incompetent and erroneously admitted, is harmless, if those acts throw no light upon the issue as to whether defendant participated in committing crime.

9. Criminal law 🔑830—Instruction which in part states law incorretly may be totally rejected.

Where requested instruction is erroneous in part in its statement of the law, it may be rejected as whole.

10. Criminal law 🔑673(3)—Instruction that conviction of alleged coconspirator, proved by defendant by her admission, was shown solely for impeachment held properly refused, where defendant made her his witness.

Where defendant, accused of larceny, vouched for credibility of alleged coconspirator by calling her as witness, and examined her as to her conviction for same offense, instruction that evidence of her conviction was admitted only for purposes of impeachment was properly refused.

11. Criminal law 🔑720(5)—Prosecuting attorneys were entitled to comment on alleged coconspirator's admission of conviction, brought out by defendant and not limited for particular purpose.

Where testimony of alleged coconspirator as to her conviction for same offense was not offered or admitted for any limited purpose, and was brought out by defendant, prosecuting attorneys were entitled to comment upon it in their argument to the jury.

12. Criminal law 🔑351(3)—Flight of person accused may be considered as proving guilt.

Flight of person accused of crime may be considered as circumstance indicative of his guilt.

13. Criminal law 🔑720(6)—Argument based on evidence of defendant's disappearance after commission of offense held not improper.

Argument of counsel in larceny prosecution, containing reference to defendant's disappearance after commission of crime, *held* legitimate.

★Rehearing denied. Hearing denied by Supreme Court.

14. Criminal law ⚷1037(1)—Alleged misconduct of counsel in argument may not be asserted for first time on appeal.

Defendant, who offers no objection to prosecuting attorney's argument at the time, and fails to assign it as misconduct, cannot object for the first time on appeal.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Jack Lorraine was convicted of grand larceny, and he appeals. Affimed.

Leo R. Friedman, of San Francisco (V. R. Hamilton, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was convicted of the crime of grand larceny, and has appealed from the judgment of conviction and the order denying his motion for a new trial. As grounds for reversal, he urges that the trial court erred in ruling upon the admissibility of the evidence and in refusing to give to the jury one of his proposed instructions, that respondent's attorneys were guilty of prejudicial misconduct in arguing certain matters to the jury, and that the evidence is insufficient to support the verdict. Respondent has filed no brief, nor was any oral argument presented in support of the judgment; it being stated on behalf of respondent at the time the appeal came on for hearing before this court that the contentions made in appellant's brief were deemed unanswerable. We have nevertheless carefully examined the record on appeal, including the transcript of the evidence, and have also fully considered the contentions made in appellant's brief, and in our opinion the points appellant urges are without sufficient merit to demand a reversal of the judgment.

[1] The record discloses that appellant was indicted by the grand jury of the city and county of San Francisco, jointly with Emma Brose and Fred Brose, her husband, upon a charge of stealing from Eva M. Fleming six diamond rings of the total value of $16,000, but, owing to appellant's disappearance following the alleged theft, Brose and his wife were tried first with the result that the jury acquitted Brose, but convicted his wife. Upon appeal, Division 2 of this court, on March 31, 1927, affirmed the judgment of conviction (People v. Brose [Cal. App.] 255 P. 233), and thereafter a petition for a hearing before the Supreme Court was denied. The evidence establishing the guilt of the defendant in that case, so far as it is set forth in the opinion, appears to be substantially the same as the evidence upon which the verdict of guilty in the present case was founded, and there, as here, the question of the insufficiency of the evidence was urged as one of the grounds for reversal. It would seem, therefore, at the outset, that the affirmance in that case definitely disposes of appellant's contention here that the evidence does not support the verdict, and would make it unnecessary to again narrate the evidence and consider the question of its sufficiency here. However, in addition to the facts set forth in the opinion in People v. Brose, supra, the reporter's transcript in the present case discloses proof of a number of circumstances tending strongly to establish appellant's guilt. For that reason, in view of the charge of conspiracy, and in order to readily understand appellant's legal contentions, it would seem necessary that the facts appearing in the record before us be stated somewhat fully.

Summarizing, the evidence shows without dispute that Miss Fleming's rings were stolen from her fingers on the night of October 27, 1925, in appellant's apartments, while she lay in a stupor caused by either drugs or intoxicants or both, after having participated in a dinner party given therein by appellant and others; and, in our opinion, the circumstances established by the prosecution clearly justify the conclusion that said apartments were rented by appellant and the dinner party arranged therein for the very purpose of executing this crime, and that appellant was an active participant therein. The principal facts supporting the foregoing conclusion, as the same are shown by the evidence, are as follows:

Miss Fleming was engaged in the insurance business in San Francisco, and was in the habit of wearing said jewelry almost constantly. She had known Brose and his wife for some time prior to the year 1925, having made their acquaintance in the pursuit of her business. She was also acquainted with members of Mrs. Brose's family and with others living in the same house. The acquaintanceship between the two became quite friendly in a social way; Miss Fleming having attended several social affairs at Mrs. Brose's invitation, during which more or less intoxicating liquor was served. Mrs. Brose had invited Miss Fleming to a dinner to be held at the former's home in the Richmond district, San Francisco, on September 26, 1925, but, upon learning that she would be unable to attend, Miss Fleming called early in the afternoon of that day to inform Mrs. Brose of that fact, at which time she met appellant. He was introduced to her by Mrs. Brose as Jack Barr, although at that time Mrs. Brose knew that his name was Lorraine, having known him since 1919 and formerly been in his employ. After completing her call, Miss Fleming was driven to her office down town by Brose and appellant; and, notwithstanding that for many years appellant had resided in San Francisco, he carried on a conversation with Miss Fleming, while en route to her office, in which he represented himself as being a resident of Chicago, and intimated that he intended to take out additional insurance.

Miss Fleming met appellant socially in company with Brose and his wife on three subsequent occasions; each meeting having been brought about by Mrs. Brose. The first one took place at Mrs. Brose's home on October 3d, another shortly afterwards at a downtown hotel, and the third at the Braeburn Apartments on October 26th, the night before the theft of the jewels. With reference to the occasion last mentioned, the evidence shows that Mrs. Brose invited Miss Fleming to a dinner party to be held at said apartments that night, but Miss Fleming did not accept. About 8:30 the same night Mrs. Brose phoned Miss Fleming at her hotel, again inviting her to the Braeburn, and in response Miss Fleming went there, arriving about 9 o'clock and remaining until after midnight, and then returned to her hotel. Present on that occasion besides appellant, Brose, and his wife, were a Mrs. Jones, who at that time was known to Miss Fleming only as Rachel, and a man referred to by those present as "Red" Rafferty, and to whom Miss Fleming had been introduced by Mrs. Brose at one of the previous gatherings. It was represented that Mrs. Jones had just taken the apartment at the Braeburn, and during the course of the evening Mrs. Brose, after expressing regrets that Miss Fleming was not able to join them at dinner, persuaded her to accept an invitation to dine there the next night, explaining that they did not have much privacy at their own home on account of others living in the same house with them, and that they were down at the apartment "for a lark." The fact was that the apartment had not been rented by Mrs. Jones, but had been engaged and paid for by appellant two nights before for a week, under the fictitious name of Lorry.

In response to this invitation, Miss Fleming arrived at the apartment early the next evening, and about 7 o'clock dinner was served, at which were present besides Miss Fleming, the appellant, Brose and his wife, Red Rafferty, and a young woman they addressed as Myrtle. Rachel Jones was absent. The testimony given by Miss Fleming as to what afterwards happened was, in substance, as follows: Before dinner was served she was offered intoxicating drinks, but declined because she did not like the kind of liquor Mrs. Brose had given her at the apartment the night before, and she asked for and was given what she believed was a glass of ginger ale. During the dinner, she was also served with a cup of coffee, but did not drink all of it, because she did not like the taste of it. After dinner she assisted Mrs. Brose in washing and drying the dishes, and, while doing so began to feel distressed, being "short of breath," as she expressed it. After the dishes had been put away, Mrs. Brose suggested a game of cards, but, not feeling well, Miss Fleming did not join in playing. During the progress of the game another round of drinks was served, but Miss Fleming again called for ginger ale. Soon after taking this last drink, she felt "very miserable," and went into the living room adjoining to recline on the couch, where she was served with another drink of what she took to be ginger ale. Soon afterwards she lapsed into a state of unconsciousness, and, when she regained her senses, she was still reclining on the coach, and Mrs. Brose and Myrtle were standing in front of her. Mrs. Brose immediately told her that the apartment had been robbed. Appellant at that time was in the dining room adjoining; the two rooms being connected by an open archway. Miss Fleming asked how the apartment could have been robbed while Mrs. Brose and the rest of them were there, and she was told that after she had gone to sleep they all left the apartment and went to the beach to get something to eat, and that the robbery had taken place during their absence. Miss Fleming immediately looked at her hands and discovered that all of her rings had been stolen from her fingers, and she noticed also that the crystal of her wrist watch was broken and the catch loosened, but that her watch was still running, indicating that it was 9:30 o'clock. Looking down on the floor, she saw a bar pin which had been removed from her dress. She instantly declared she would phone to the clerk of the apartments and also to the police, but appellant emphatically told her that she "would do nothing of the kind," that his reputation was at stake, or words to that effect, and that he would "not have any excitement" about the matter. Myrtle stated that, if the robbery was made public, she would lose her job, and Brose declared he would likewise lose his position. Rafferty said nothing. All assured Miss Fleming, however, that, if she would only keep quiet, they "would get their heads together and find some good way" to locate her stolen jewels and have them returned to her. They also informed Miss Fleming that the robbers had taken a bracelet, a necklace, and two rings belonging to Mrs. Brose, a watch and wallet containing over $100 belonging to appellant, and a watch belonging to Red Rafferty.

The evidence shows without dispute that there were no indications whatever of a breaking into the apartment. The door was fastened with a spring lock, and Mrs. Brose admitted that she locked the same when they departed for the beach, and that it was found securely locked upon her return. Miss Fleming further testified that, after regaining consciousness, she was detained in the apartment against her will by the Broses and appellant the rest of the night and until the next evening; that at different times during the night she attempted to phone to the police and to friends, also to leave the apartment, but that she was forbidden from doing so by appellant and forcibly restrained by Mrs. Brose; also that on one occasion she raised the window in the apartment, but that Mrs. Brose immediately closed it. Toward evening, Miss Fleming insisted on leaving the apartment, whereupon the Broses, appellant, and Rafferty consented to drive her to her hotel in the Brose machine, but, after she entered the car, they started to take her for a ride to the beach. She insisted on being driven to the hotel, however, and on the way there Mrs. Brose threatened to sue her if she made public the robbery, and appellant declared:

> "If you say anything about this and it hurts my splendid reputation you will have all the publicity that a woman can possibly be given. You will be ruined."

She was let out of the machine a short distance from the hotel. Soon after entering her hotel, Miss Fleming communicated with friends, and a private detective was called in. Later on, about 1 o'clock that night, they went to police headquarters and reported the robbery. A search was immediately made by police detectives, accompanied by Miss Fleming, for the Broses and appellant, and, although the search continued until 6 o'clock in the morning no trace of them could be found. The apartment had been given up by appellant, and his belongings removed, soon after Miss Fleming had been taken to her hotel, and, when he checked out, the clerk suggested to him that the week for which he had paid in advance was not up; nevertheless, he paid the additional incidental expenses and departed. Later on that same night Brose and his wife, appellant, and Rafferty went on to Oakland by automobile, leaving San Francisco about midnight. They remained there until morning; and, after having breakfast together, appellant disappeared, and Brose and his wife returned to San Francisco and took an apartment at a hotel under the fictitious name of Clem. They remained there until November 3, 1925, when they surrendered to the police. As to what became of appellant, the evidence does not reveal, but he was not placed on trial until approximately two years after the theft was committed, and it may be reasonably inferred from the circumstances proved that the delay was caused by his disappearance.

Further evidence was offered by the prosecution to prove that between 9 and 10 o'clock on the morning of October 29th, which was the second day after the theft, Miss Fleming consulted a doctor on account of pain she was suffering from a small bruise on each shoulder. The doctor testified that in his opinion these bruises were caused by the insertion of a hypodermic needle, also that from the description given of Miss Fleming's symptoms her unconscious condition had been produced by chloral. It was also shown that, notwithstanding other members of the dinner party claimed to have been victims of the robbery, no report was ever made by any of them to the police, nor did appellant even mention the matter to the clerk of the Braeburn when he checked out.

Appellant did not offer himself as a witness at the trial, nor were any of the others present at the dinner party called upon to testify except Mrs. Brose, who was produced as a witness first by the prosecution and afterwards by the defense; and it was upon her testimony that appellant mainly relied to establish his innocence, she having denied taking any of Miss Fleming's jewelry herself or of seeing any one else take the same, claiming that the robbery occurred during the absence of herself and the others from the apartment. Appellant furthermore endeavored to prove on cross-examination of Mrs. Brose and Miss Fleming that the latter's unconscious condition was caused by a voluntary overindulgence in intoxicants; but it would seem to make little difference whether she was drugged or intoxicated, for, irrespective of the exact cause of her condition, her jewelry was admittedly stolen from her while she was in a helpless state; and the fact, therefore, that she may have been intoxicated and not drugged would have no tendency to prove either that the robbery was not committed or that appellant was not a participant therein. Appellant also attempted to show in the same manner that Miss Fleming was not detained in the apartment against her will nor prevented from communicating with friends or the police, but that, on the contrary, she continued to drink and remained intoxicated during the rest of the night and most of the next day, which was the real reason for remaining in the apartment until the evening following the dinner; and, in this connection, the clerk at Miss Fleming's hotel testified that on the morning after the robbery a man whose identity was not disclosed phoned to him saying that Miss Fleming desired to see him at the Braeburn Apartments, but that he declined to go there. In explanation of this latter testimony, Miss Fleming testified that she tried to phone to the clerk herself, but was forcibly restrained from doing so; and, with reference to the charge of intoxication, she consistently denied that such was the fact. The jury, whose exclusive province it was to determine the truth of the matter, doubtless believed her, and we have found nothing inherently improbable in her testimony. Therefore, so far as the question of appellant's guilt is concerned, there are no grounds upon which we may legally set aside the jury's conclusions; and, unless such error was committed in the trial of the action as deprived appellant of a fair trial, the judgment must be affirmed.

With reference to the admissibility of evidence, appellant relies upon but one assignment of error. It relates to the testimony of Mrs. Brose, while testifying as a witness for the people, to the effect that, after separating from appellant in Oakland, she and her husband, upon their return to San Francisco, engaged a hotel apartment under an assumed name. The testimony in question was as follows:

> "Mr. Garry (Assistant District Attorney): Q. Where did you go? A. To the Ogden Hotel on Mission street.
>
> "Q. By 'we' you mean you and your husband? A. Yes sir.
>
> "Q. Did—were you registered there at the Ogden Hotel? A. We were.
>
> "Q. Under what name?"

The question was objected to by counsel for appellant upon the ground that the testimony sought to be elicited was incompetent, irrelevant, and immaterial, not part of the res gestæ. The objection was overruled, and the witness answered:

> "I think, if I remember right, I think it was the name of Clem."

Continuing, the testimony was as follows:

> "Mr. Garry: Q. That would be on the morning of October 29th, would it not? A. I know it was on Thursday morning. What date it was I don't remember.
>
> "Q. Well, that would be the second day after the dinner at the Braeburn Apartments? A. Yes, sir.
>
> "Q. And how long did you remain there? A. Until the following Tuesday.
>
> "Q. Until the following Tuesday. That would be November 3d, would it not? A. Election day, yes, sir.
>
> "Q. And on that day you surrendered to the police, did you not? A. We did."

In support of his objections, appellant contends that, if a conspiracy did exist between appellant and others, including Mrs. Brose, to steal Miss Fleming's jewelry, the object thereof was accomplished on the night of October 27th between the hours of 8:30 and 11:30 o'clock; or, if it be assumed that such conspiracy continued for any purpose thereafter, it was terminated when the Broses and appellant separated in Oakland, and that, in either event the evidence called for by the question objected to related to an act of a coconspirator committed after the termination of the conspiracy, and therefore was inadmissible.

[2, 3] The rule relating to the admissibility of the acts and declarations of coconspirators is well settled, and is to the effect that, where an unlawful enterprise is established between two or more persons, either by direct or circumstantial evidence, every act or declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them, and that every one who thus enters into a common purpose or design is generally deemed in law a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in futherance of such common design. But the authorities hold care must be taken that the acts and declarations thus admitted be those only which were made and done during the pendency of the criminal enterprise and in futherance of its objects (1 Greenleaf on Evidence [16th Ed.] p. 305); and, whenever it appears that the objective of a conspiracy in which several persons participate is at an end, the subsequent acts and admissions of coconspirators are not admissible against the others (People v. Oldham, 111 Cal. 648, 44 P. 312).

[4] The common design of a criminal enterprise may extend, however, as appellant concedes, beyond the point of the commission of the act constituting the crime for which the alleged conspirator is on trial (People v. Opie, 123 Cal. 294, 55 P. 989; People v. Mazzurco, 49 Cal. App. 275, 193 P. 164; People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Rodley, 131 Cal. 240, 63 P. 351); and, as declared in California Jurisprudence, vol. 5, p. 523:

> "The question as to when the design is accomplished and abandoned is one depending on the facts and circumstances of each case, and the nature and purposes of the conspiracy; and such question is one for the jury, as is also the question as to whether the acts proven were not a part of the design of the conspiracy"—citing People v. Holmes, supra; People v. Mazzurco, supra; People v. Rodley, supra.

In other words, whether or not the subsequent act committed is the ordinary and probable effect of the common design or whether it is "a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury (Bowers v. State, 24 Tex. App. 542 [7 S. W. 247, 5 Am. St. Rep. 901]; Spies v. People, 122 Ill. 1 [12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320]), and if there be any evidence to support the finding of the jury on this question, its determination is conclusive" (People v. Kauffman, 152 Cal. 331, 92 P. 861). See, also, People v. Bringhurst, 192 Cal. 748, 221 P. 897.

[5, 6] In the present case, as above shown, the prosecution proved that immediately after driving Miss Fleming to her hotel the apartment wherein the robbery occurred was given up, and shortly after midnight that same night the alleged conspirators, under unusual circumstances, departed in an automobile for Oakland, and that within a few

hours thereafter, appellant disappeared and the Broses returned immediately to San Francisco and engaged apartments under an assumed name. The reasonable inference to be drawn from the foregoing evidence is that all of these subsequent acts were consummated in execution of a scheme to evade arrest and escape punishment, and therefore, under the rule of the authorities cited, the trial court was justified, we think, in receiving the evidence in order that the jury might determine whether or not the original conspiracy extended up to and included the scheme to escape, and, if so, whether the act of the Broses in registering under an assumed name was in pursuance thereof.

In this particular the present case does not differ materially from People v. Rodley, supra. There the charge was perjury for having given false testimony in connection with the probate of a will. The prosecution was allowed to prove that subsequent to the giving of the false testimony the matter was investigated by the grand jury, and that a Mrs. Houseworth, who was the beneficiary named in the spurious document offered for probate and an accomplice in the crime of perjury for which Rodley was on trial, sought to induce a witness named Swearingen not to testify before the grand jury as to certain facts of which he was cognizant. Rodley sought to have the testimony excluded upon the ground that it was the act of a coconspirator committed subsequent to the commission of the crime of perjury; but the Supreme Court said:

> "The object of the conspiracy was to 'loot' the estate of the deceased, Fuller; the perjury of defendant and the others in the probate proceeding was only one step to this end. It had been necessary before this to fabricate a will, and *it was still necessary for the conspirators to avoid detection, keep themselves out of the state prison*, and keep up the deception that they were practicing on the probate court, in order to realize anything from their crimes; and it was with these ends in view, no doubt, that Mrs. Houseworth approached Swearingen on the subject of his testimony before the grand jury. We think, therefore, that what she said and did in that connection was in furtherance of the purpose of the conspiracy, and does not come within those cases which exclude the acts and declarations of one conspirator, done and made after the 'common criminal design' is accomplished or abandoned, as against his coconspirator." (Italics ours.)

And so here, if, as the jury decided by its verdict, the parties conspired to rob Miss Fleming, the obtaining possession of the jewelry was only one step in the execution of the enterprise, and it was still necessary to the successful consummation thereof that the parties to the conspiracy evade arrest. It is reasonable to believe, therefore, that any attempt by them to do so was part of the original design.

In support of his position regarding the point under discussion, appellant cites several California cases, all of which adhere to the fundamental rule against the admission of declarations and acts of a coconspirator not made and done in furtherance of the common purpose. The restatement of the rule in the forepart of this opinion is an assurance that we do not presume to question its soundness; but, as has been well said, controversy usually arises with reference to its application to the circumstances of the individual case, and for that reason the decision in one case is usually of little value as a precedent in another. 1 Greenl. on Ev. p. 305, note 2. Looking to the facts of the cases appellant cites, we find them to be materially different from those of the one before us.

The last four cases cited by him (People v. Oldham, supra; People v. Ayhens, 16 Cal. App. 618, 117 P. 789; People v. Smith, 151 Cal. 619, 91 P. 511; and People v. Collum, 122 Cal. 186, 54 P. 589) all involved testimony given by persons not parties to the conspiracy as to *declarations* of coconspirators made manifestly after the conspiracies had ended; and it may be conceded that the admission of such testimony clearly violates the hearsay rule that it is "never competent to use as evidence against one on trial for an alleged crime the statements of an accomplice not given as testimony in the case nor made in the presence of defendant, nor during the pendency of the criminal enterprise and in furtherance of its objects." People v. Moore, 45 Cal. 19. But the application of the hearsay rule does not concern us here, for no question of declarations is presented. Our problem involves the testimony given by an alleged coconspirator herself as to an act of hers, done under circumstances bearing the reasonable inference that it was a part and in furtherance of the original common design. It will therefore be seen that the four cases mentioned do not touch the point at issue.

In People v. Irwin, 77 Cal. 494, 20 P. 56, the judgment of reversal was based on several grounds, the opening sentence of the opinion reading: "The record herein bristles all over with errors." One of the points urged, however, was that the court instructed the jury that "falsehood, evasion, and silence" of a coconspirator not on trial, when questioned after the crime had been committed, should be considered by the jury "as tending in some measure to establish the fact of a criminal conspiracy as charged." In holding the instruction to be erroneous, the court pointed out that the evidence proved "beyond controversy that the only conspiracy, if any existed, to which the defendant was a party, ended before the declarations in question were made, and declared that "no falsehood, evasion, or silence" of a coconspirator, occurring after the deceased was killed, was admissible in evidence against the defendant under any circumstances, and, in any event, the evidence was inadmissible to establish the existence of the conspiracy. In the case at bar, Mrs. Brose was not interrogated subsequent to the alleged theft, and consequently no question of her declarations or demeanor under such circumstances has arisen.

In People v. Opie, supra, the testimony related to the "appearance, conduct, and declarations" of a conspirator not on trial, apparently upon being questioned after the crime had been committed. Obviously, such testimony was inadmissible under the "falsehood, evasion, and silence" rule announced in People v. Irwin. True, the prosecution, on appeal, sought to justify the admission of the testimony upon the theory that the conspiracy had not ended at the time such "appearance, conduct, and declarations" were observed, the prosecution claiming that the stolen property had not yet been divided; but, answering this contention, the court pointed out that there was no evidence whatever in the record disclosing that the property had not been divided or that there was any intention that it should be divided; and it was held, therefore, that there was no evidence introduced (as there was here) tending to show a continuation of the conspiracy after the commission of the crime.

The manner in which appellant presents and discusses the case of People v. Lee Chuck, 78 Cal. 317, 20 P. 719, upon which he strongly relies, is somewhat confusing. There the defendant was on trial for murder, and the prosecution introduced evidence showing that four other Chinamen were present at and participated in the killing. The defense sought to prove an alibi for two, and to show that the others, including Lee Chuck, killed the deceased in self-defense. Among the other points urged on appeal were two rulings relating to two distinct matters of fact. The principal ruling pertained to testimony showing the absence at the trial of three of the accused Chinamen. In connection therewith, the prosecution was allowed to prove, over defendant's objection, that, although diligent effort had been made to serve warrants of arrest upon the absentees, they could not be found. This evidence was admitted upon the theory advanced by the prosecution that the failure of the absentees to be present at the trial to explain what occurred at the time of the shooting was a circumstance to be taken against the defendant on trial, tending to show that the homicide was not committed in self-defense as claimed. In holding the admission of the testimony to be error, the Supreme Court said:

> "There is nothing to show that the defendant was in any way responsible for their absence, or that he was not as desirous that they should be present as the prosecution. This is to permit the act or conduct of one party, after a crime is claimed to have been committed, indicating his guilt, to be proved as against another *in no way connected with such act or conduct.* We are wholly unable to see upon what rule of law or justice such a ruling can be upheld." (Iitalics ours.)

And after discussing at some length the analogy of a New York case, the court held:

> "Having gone to the jury for that purpose, its injurious effect upon the rights of the defendant must be apparent. We hold that this was a fatal error, for which a new trial should have been granted."

The facts upon which the foregoing ruling was based are not referred to in appellant's brief. The other state of facts, involving the second ruling, is the one to which appellant does call our attention. With respect thereto the evidence shows that several hours after the shooting, a police officer arrested the fourth accused Chinaman, not on trial, in a small "cubby-hole" at the top of a building near the place of the shooting, which the officer was allowed to describe with the view of proving that the Chinaman was hiding there to avoid arrest. The district attorney claimed that the evidence was competent to disprove any alibi which the defendant might attempt to assert. In passing upon this particular point, the court merely said:

> "We are quite clear that it was not competent for that purpose. There is nothing to show that his whereabouts tended in any way to establish the presence of the defendant at the place of the killing, and it appeared that the time to which the testimony referred was several hours after the homicide occurred. It was error to admit the evidence."

As above indicated, appellant refers only to the facts relating to the Chinaman being concealed in the "cubby-hole," but in his brief he has mistakenly applied to those facts the "fatal error" language employed by the Supreme Court in holding to be reversible error the admission of the evidence relating to the absentees. Moreover, and aside from the differentiating facts above mentioned, the Lee Chuck Case cannot be said to be decisive of the point here involved, for neither the absence from the trial of some of the accused, nor the fact that the other was concealed in the "cubby-hole," was in any way connected with the activities of the defendant on trial, nor did the circumstances tend to show, as they did here, that the acts complained of were the result of a preconceivd scheme to which the defendant on trial was a party.

In People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401, the remaining case cited by appellant, the defendant was indicted for robbery, jointly with three others, named Collins, McGovern, and Smith. Stanley was tried separately and convicted, and on appeal the judgment was reversed on a ruling of the trial court admitting evidence introduced by the prosecution to the effect that, immediately after the robbery, the parties charged were arrested, and, while being conducted to the jail, McGovern broke away from the officer and attempted to escape by flight, but after a chase was recaptured. The decision therein is of little or no value as a precedent, however, because the court qualified its decision by adding:

> "If all evidence was before us, it might be apparent that the admission of the testimony could not possibly have prejudiced the defendant. But, in the absence of the evidence, it is impossible for us to determine that it could not; and the rule is that every error in the admission of testimony is presumed to be injurious, unless the contrary clearly appears."

And afterwards the same testimony was introduced over the defendant's objection in the companion case of People v. Collins, 48 Cal. 277, which is not cited by appellant, and a reversal of the judgment of conviction was urged therein upon the authority of People v. Stanley, supra; but the Supreme Court ruled adversely upon the point, saying that the entire record of the evidence was then before it, from which it appeared that the testimony was admissible for the purpose of showing that McGovern had the opportunity after his arrest to dispose of the fruits of the robbery without detection; and the judgment in the Collins Case was accordingly affirmed. It will be seen, therefore, that the reversal in People v. Stanley was the result, merely, of the failure of the prosecution to bring before the Supreme Court on appeal the entire record of the evidence. In the present case, pursuant to the modern method of appeal, the entire transcript of the evidence is before us. Also, it will be noted that in neither of the cases last cited was it claimed that the attempted flight of McGovern was the result of a concerted plan, or otherwise connected with the defendant on trial.

[7, 8] Assuming, however, for the purpose of discussion, that there is some remote analogy in fact or principle between the case at bar and the Lee Chuck and Stanley Cases, it is evident that the latter are not to be taken as decisive of the present appeal, because the judgments of reversal therein were rendered during that period of time when it was the established law of this state that error being shown in the admission of testimony was presumed to be prejudicial unless the contrary clearly appeared. Since then, as is well known, an important change has been made in the state Constitution which effectually abrogated the rule theretofore governing appeals; and, in the present state of the law, injury must affirmatively appear to the reviewing court, after an examination of the entire cause, including the evidence, and from the nature of the error itself, before a judgment of conviction will be reversed (People v. Watts, 198 Cal. 776, 247 P. 884); and the burden of showing such prejudicial tendency of error is upon appellant (8 Cal. Jur. p. 601). Viewed, therefore, in the light of the rule now prevailing, it cannot be said with any degree of assurance that the act of the Broses in registering at a hotel in San Francisco under an assumed name operated prejudicially against appellant; for, if it be deemed indicative of guilt at all, it related only to themselves, and, standing alone, had no tendency to inculpate appellant in the theft of the jewels. Even though it be assumed, therefore, that error was committed in admitting the testimony, it would not constitute ground for reversal, for, as held in People v. Stokes, 5 Cal. App. 205, 89 P. 997, evidence of the acts of a coconspirator after the accomplishment of the purpose of the conspiracy, even though incompetent and erroneously admitted, is harmless if those acts throw no light upon the issue as to whether the alleged conspirator on trial was a participant in the commission of the crime.

Appellant's next point is that the court erroneously refused to give an instruction proposed by him, relating to the witness Mrs. Brose. It reads as follows:

> "There has been testimony introduced in this case to the effect that (a) witness for the prosecution has previously been convicted of a felony and that such felony was for the same offense for which the defendant is here on trial. *You are instructed that such evidence was only admitted for a special purpose; that is, for purposes of impeachment of such witness, and cannot be considered by you for any other purpose.* The defendant in this action must be tried by you solely upon the evidence introduced in this case, and, in determining the guilt or innocence of the defendant, the fact that some other person has been previously convicted of the same offense cannot be considered by you as a fact in any way bearing upon the guilt of Jack Lorraine." (Italics ours.)

The testimony referred to in the instruction was elicited by appellant from Mrs. Brose at the close of her cross-examination, and was as follows:

> "Mr. Friedman (Counsel for Appellant): Q. Mrs. Brose, unfortunately you have been tried for this offense, have you not? A. Pardon me? I didn't hear you.
>
> "Q. I say you have been tried for the stealing of these jewels? A. I have.
>
> "Q. Your husband was likewise tried with you? A. He was.
>
> "Q. He was acquitted, was he not? A. He was.
>
> "Q. And you were convicted? A. I was.
>
> "Mr. Friedman: That is all."

[9, 10] Where a requested instruction is erroneous in part in its statement of the law it may be rejected as a whole. People v. Metzler, 21 Cal. App. 80, 130 P. 1192; People v. Davis, 64 Cal. 440, 1 P. 889; People v. Walters, 98 Cal. 138, 32 P. 864. In the present case that portion of the proposed instruction above italicized was manifestly erroneous, for the record clearly demonstrates that the fact of Mrs. Brose's conviction was not elicited by appellant, nor admitted by the court for the purposes of impeachment or to discredit her as a witness. On the contrary, it shows that throughout the trial appellant relied almost entirely upon her testimony to establish his innocence; and on this appeal he has consistently endeavored to sustain the verity of her testimony, particularly with reference to what happened on the night of the robbery and the day following. In fact, she was the only one present at the dinner party to testify at this trial in refutation of Miss Fleming's charges, and appellant afterwards called her as a witness in his own behalf, thus vouching for her credibility. Moreover, it will be noted that, at the time appellant revealed the fact of Mrs. Brose's conviction, he proved also that her husband had been acquitted, which would fairly indicate, we think, that the ostensible purpose of the cross-examination on this point was not to impeach or discredit Mrs. Brose as a witness, but to show that, if Miss Fleming's jewelry was stolen, a jury had already fastened the guilt upon Mrs. Brose alone.

The numerous cases cited by appellant in support of his last point merely adhere to the settled rule that any affirmative evidence offered, either by the prosecution or the defense, to show the conviction or acquittal of another person of the crime for which the defendant is on trial is incompetent; and, in those cases where such testimony was introduced by the prosecution over the defendant's objection, it was held to be error. Here the testimony was elicited by appellant, and therefore he is not in a position to complain of its effect.

[11-14] Nor do we find any merit in appellant's final contention that the prosecuting attorneys were guilty of prejudicial misconduct in their arguments to the jury. As pointed out, the testimony of Mrs. Brose as to her conviction was not offered or admitted for any limited purpose, and, being brought out by appellant, the prosecuting attorneys were entitled to comment upon it for what it was worth. As to the reference made by said attorneys regarding appellant's disappearance, it has long since been the rule that flight of a person accused of crime may be considered as a circumstance indicative of guilt. The circumstances surrounding appellant's disappearance fairly justify the inference that he fled after the separation in Oakland. Argument on the point was therefore legitimate. The third claim of misconduct has reference to the comments made by respondent's attorneys in relation to the act of the Broses in registering at the hotel under an assumed name. Appellant concedes, however, that he offered no objection to this line of argument at the time it was being made, nor did he assign the same as misconduct; consequently, under the well-established rule, his objection for the first time on appeal comes too late.

After reviewing the entire record, including the transcript of the evidence, we do not find that any error has been committed in the trial of the action which has deprived appellant of the fair trial to which he is entitled, nor do we believe that the verdict has resulted in a miscarriage of justice; consequently we are without authority to disturb the jury's finding.

The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

203 Cal. 778

SMITH v. RASMUSSEN et al. (S. F. 11409.)

Supreme Court of California. April 5, 1928.

Brokers ⚷82(4)—Assignee of broker's compensation right could not recover reasonable value of services on claim seller had breached definite compensation contract.

Assignee of real estate broker's right to compensation under contract could not recover the reasonable value of broker's services under claim that seller had breached his contract for definite remuneration, and that therefore rule of reasonable value would apply.

Department 1.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by C. D. Smith against Morris Rasmussen and another. Judgment for defendants, and plaintiff appeals. Affirmed.

William R. Biaggi, of San Jose, for appellant.

Louis Oneal, W. F. James, and Maurice J. Rankin, all of San Jose, for respondents.

SEAWELL, J. Plaintiff appeals from a judgment in favor of defendants in an action brought by him as assignee to recover $3,250 alleged to have become due and owing to his assignors as a real estate brokers' commission for services performed by said assignors in effecting the exchange of ranch property owned by defendants for an apartment house owned by G. R. Searl and H. Geraldine Searl, his wife.

The complaint alleges that defendants, by an agreement in writing, employed plaintiff's assignors to make the exchange; that said assignors secured an offer of exchange which was accepted by defendants, and the exchange was consummated and such deeds, bills of sale, and other instruments in writing as were necessary to convey title to the respective parcels of realty and appurtenant property were executed and delivered. It is further alleged that the defendants placed a value of $65,000 on the property, and that it was exchanged upon the basis of said valuation, and that upon the completion of said exchange defendants became indebted to plaintiff's assignors in the sum of $3,250, a sum equal to 5 per cent. of $65,000, as a brokers' commission, $3,250 being the reasonable value of the services rendered. The complaint contains no allegation of an express agreement to pay a commission in the sum of $3,250, or in any sum whatsoever.

Plaintiff in his brief sets out two theories upon which he bases his right to recover. The first is that the evidence shows an agreement that plaintiff's assignors were not to be compensated for their services by the payment of a cash commission, but in lieu thereof defendants were to transfer the apartment house which they were receiving in exchange for their ranch property to plaintiff's assignors at a price sufficiently low to enable said assignors to realize a substantial profit upon resale and thus compensate themselves for their services rendered defendants; that defendants having "violated their agreement to give this net contract, he [plaintiff] was entitled to recover the reasonable value of his assignor's services." The second theory advanced by appellant is that the compensation of plaintiff's assignors was to be the difference between the sum of $30,000, which amount was to be respondents' sale price, and whatever sum plaintiff's assignors might be able to obtain for it in advance of said sum of $30,000.

The fallacy of either theory is apparent. Conceding for the purposes of discussion, as plaintiff contends, that defendants did in fact agree to either of such contracts, the remedy for their refusal and failure to perform was an action to recover such damages as the law allows for breach of contract. It is elementary that a refusal to make the contract compensating plaintiff or his assignors in the manner claimed to have been agreed upon would not entitle said assignors or plaintiff to substitute therefor at will an entirely different contract, and to sue upon such substituted contract in lieu of bringing an action for breach of the contract in fact entered into. The complaint herein does not state a cause of action to recover damages for breach of a contract giving plaintiff's assignors the right to buy the property or to sell it for respondents and retain the amount of the selling price in excess of $30,000, and no proof of the amount of damages ensuing from the breach of such contracts was offered. In addition, plaintiff would be without right to recover for breach of said contracts, for the written assignment to him, introduced in evidence herein, is only of a right to recover a cash commission, the assignment transferring the "right, title, and interest in and to that claim for broker's commission now held against Morris Rasmussen and Margrethe Rasmussen." The court correctly instructed the jury when he said:

> "I instruct you that plaintiff's claim is for a money commission, and nothing else.
>
> "He is not seeking to enforce an agreement to give him, nor his assignors, a net contract for the sale or purchase of the Hester Apartments. He is only entitled to recover if he proves by a preponderance of the evidence that defendants agreed to pay the Santa Clara Valley Realty Company a cash commission for making the exchange here involved, hence I instruct you that if plaintiff has only proved that defendants agreed to give the Santa Clara Valley Realty Company a contract for the sale or purchase of the Hester Apartments and nothing else, plaintiff has not made out his case, and you must render your verdict in favor of the defendants."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Decisions to the effect that, where a real estate broker or other agent is employed to perform valuable services and no agreement is made as to the amount of remuneration, the law implies a promise to pay the reasonable value of the services rendered are not applicable here, for the reason that plaintiff's claim, as stated in his brief, is not that there was a failure to provide for compensation, but, rather, that there was a definite agreement to compensate plaintiff's assignors in a particular manner, which agreement defendants refused to perform.

None of the agreements upon which appellant relies to support his cause of action were reduced to writing, and the terms of said agreements as attempted to be orally stated are left in a state of uncertainty. Besides, respondents dispute the claim of appellant on all material issues.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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203 Cal. 703

PEOPLE v. SCOFIELD. (Cr. 3056.)

Supreme Court of California. March 27, 1928.

1. Automobiles 🔑355(8)—Evidence held insufficient to sustain conviction for failing to render aid following automobile accident (Vehicle Act, § 141).

Evidence *held* insufficient to sustain conviction for failing to render aid following automobile accident under Vehicle Act, § 141 (St. 1923, p. 562), where injured man was unconscious and the necessary assistance was rendered by bystanders, since such statute requires only that necessary assistance be rendered, and does not require impossible in giving information to person injured.

2. Automobiles 🔑336—Statute requiring automobile driver to render aid following accident held binding on all drivers involved in accident, regardless of respective negligence (Vehicle Act, § 141).

Vehicle Act, § 141 (St. 1923, p. 562), requiring driver of vehicle to stop after accident, give certain information to injured person, and render necessary assistance, *held* operative and binding on all drivers involved in accident, regardless of any question of their respective negligence.

3. Criminal law 🔑825(1)—Court instructing as to form of verdict for failure to render aid following automobile accident must of own motion instruct that jury to convict must agree that at least one of alternative charges of statute was violated (Vehicle Act, § 141).

Giving instruction as to form of verdict for failure to render aid following automobile accident as required by Vehicle Act, § 141 (St. 1923, p. 562), *held* erroneous for failure to instruct that jury must agree on at least one of pleaded alternative charges enumerated in statute in order to find defendant guilty; court being required to give such instruction of its own motion.

4. Criminal law 🔑824(1)—Court on own motion must instruct on pertinent general principles but not on specific points developed through evidence.

It is duty of court in criminal cases to give of its own motion instructions on general principles of law pertinent to such cases when they are not proposed by parties, but it is not its duty to give instructions on specific points developed through evidence introduced at trial, unless such instructions are requested by a party desiring them.

5. Automobiles 🔑336—Violation of any provision of statute requiring automobile driver to render aid following automobile accident is punishable under penal provisions (Vehicle Act, § 141).

Under Vehicle Act, § 141 (St. 1923, p. 562), requiring driver to render aid following automobile accident, driver may be convicted for failure to do any of enumerated things, statute requiring driver to stop, give name, and address, give name and address of passengers, give registration number of car, and render necessary assistance.

6. Criminal law 🔑824(1)—When defendant is charged with separate offenses requiring independent proof, court of own motion should instruct as to each offense.

When defendant is charged with separate and distinct offenses, each requiring independent proof, court should properly instruct jury as to each offense, even though instructions thereon be not requested by either party.

7. Automobiles 🔑357—Instruction that automobile driver must stop after collision and render assistance "in all cases" held too broad (Vehicle Act, § 141).

In prosecution under Vehicle Act, § 141 (St. 1923, p. 562), for failing to render aid following automobile accident, instruction that driver of automobile colliding with another must stop, render assistance, and furnish information required by statute in all cases, *held* erroneous as being too broad for inclusion of phrase "in all cases."

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Urban A. Scofield was convicted of failing to render aid following an automobile accident, and he appeals. Reversed.

Superseding opinion in District Court of Appeal, 258 P. 656.

Wm. T. Kendrick, Jr., and Wm. H. Campbell, both of Los Angeles (Wm. T. Kendrick, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

SHENK, J. An information was filed in the superior court in and for the county of Los Angeles, charging the defendant in three counts—manslaughter in the first count; operating a motor vehicle on a public highway while under the influence of intoxicating liquor in the second count; and with failure to stop, render aid, etc., in violation of section 141 of the California Vehicle Act, in the third count. During the course of the trial, the second count was dismissed on motion of the district attorney. The jury disagreed on the manslaughter charge, but found the defendant guilty as charged in the third count. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

Numerous specifications of error are assigned with reference to the conduct of the case applicable to the first and second counts. They have been examined, but nothing is discovered which would prejudicially affect the rights of the defendant as to the count upon which he was convicted. They are not likely to recur in the event of a new trial, and no further notice need be taken of them.

[1] As to the third count, the first contention to be considered is that the evidence is insufficient to support the judgment of conviction. The accident occurred under the following circumstances: About 7:30 o'clock on the evening of October 25, 1926, Jacob V. Gilliam, the deceased, was driving his Chevrolet automobile in a southerly direction along Glendale avenue in the city of Glendale. He was driving his car near the center of the street. As he approached the intersection of Glendale and Elk avenues, he crossed the center line of Glendale avenue and entered the intersection. The defendant was sales manager of the Pearl Motor Company and resided in Glendale. About 7 o'clock on the evening in question he left his place of business in the company of his employer, C. W. Pearl, in the latter's Lincoln sedan. The two then proceeded to the home of A. J. Flanders, where they were joined by Mr. and Mrs. Flanders and their 4 year old son. From this point the party started out with the intention of attending an automobile show, and the defendant was at the steering wheel. At the intersection of Glendale and Elk avenues, the Chevrolet car was struck by the Lincoln sedan. By the force of the impact, the Chevrolet car was badly wrecked. Mr. Gilliam was unconscious from the time of the accident until his death, which occurred at the hospital a few hours later. The steering wheel of the Lincoln sedan hit the defendant in the stomach, "knocked the wind" out of him, rendered him unconscious for a moment, and when he awoke he was "gasping for breath." Mr. Pearl, who was seated on the right side of the front seat, was cut about the head and face, and was later removed to the hospital for attention. Mrs. Flanders received a fractured ankle, but Mr. Flanders and the boy were uninjured.

A crowd of people assembled about the cars immediately after the accident. Mr. Gilliam was lifted from the wreck by the bystanders and was laid on the sidewalk nearby. One of those also present went to a nearby telephone and summoned an ambulance, which responded and removed Mr. Gilliam to the hospital. Mr. Pearl and Mrs. Flanders were taken away for hospital attention.

Most of the rather voluminous record is taken up with a recital of the circumstances occurring just prior to the impact, such as the location of the cars on the street, the method of their operation, their speed, etc., and also as to whether the defendant was under the influence of intoxicating liquor at the time of the accident. This evidence was pertinent to the charges of manslaughter and driving an automobile on a public highway while under the influence of intoxicating liquor as set forth in counts 1 and 2 of the information. But as the jury disagreed as to the manslaughter charge and the second count was dismissed before the close of the trial, such evidence need not now be further recounted. We are concerned only with the sufficiency of the evidence to support the charge of a violation of section 141 of the California Vehicle Act. Stats. 1923, p. 562. That section provides as follows:

> "Duty to stop in case of accident. The driver of any vehicle which strikes any person or collides with any other vehicle shall immediately stop and give his name and address and the names and addresses of all passengers not exceeding five in his vehicle, also the registration number of his vehicle, to the person struck or the occupants of the vehicle collided with, and shall also render to such persons all necessary assistance, including the carrying of such persons to a physician or surgeon for medical or surgical treatment, if such treatment is required or if such carrying is requested by the person struck or any occupant of such vehicle collided with. Any person violating any of the provisions of this section is punishable by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment."

In the charging part of count 3 of the information, it was alleged that the defendant did "fail to immediately stop and give his name and address and the registration number of his said vehicle to the said Jacob V. Gilliam, and did then and there fail to render to said Jacob V. Gilliam any assistance; said person being then and there in need of assistance by reason of injuries and damage caused by said collision." The form of these allegations in the light of the instructions will be presently referred to. The proof showed without conflict that both cars were stopped by the impact and remained at the scene of the accident until all parties directly concerned had been taken away or had departed. Immediately after the collision, the defendant got out of the Lincoln car through the left front door and proceeded toward the Chevrolet car, around which a crowd was assembling. He did not give his name and address, and the registration number of the Lincoln car to Gilliam for the obvious reason that Gilliam was unconscious, and could not receive the same, and he did not assist in removing Gilliam from the Chevrolet car for the reason that his assistance was not necessary. Others already were performing this service. By undisputed evidence, it appeared that more persons were endeavoring to assist and were assisting in caring for Gilliam than were necessary. After the injured persons had been removed, the defendant walked to his own home. The prosecution insists that there was a conflict in the evidence as to whether the defendant remained at the scene of the accident after the collision. The only evidence that tended to create a conflict was the testimony of certain witnesses that they "did not see" the defendant there. This negative evidence was not sufficient to create a substantial conflict in the light of all the evidence in the case, including the positive testimony of several witnesses that the defendant was at the scene of the accident walking around in the crowd after the collision had taken place.

On the evidence as to the particular charge on which the defendant was convicted, and as above outlined, the trial judge denied the motion for a new trial, sentenced the defendant to state's prison, and denied bail pending appeal, although he did issue a certificate of probable cause.

[2] We think the evidence was insufficient to support the judgment of conviction. The purpose of said section 141 is to prevent every driver of an automobile from leaving the scene of an accident in which he participates or is involved without proper identification and to compel necessary assistance to those who may be injured. The requirements of the statute are operative and binding on all drivers involved in an accident, regardless of any question of their negligence respectively. People v. Kaufman, 49 Cal. App. 570, 193 P. 953. But it is obvious that criminal liability should not attach in all cases where a literal application of the language of the statute might be made. For example, no one would have the hardihood to contend under the facts in the present case that Mr. Gilliam, had he lived, and while he was unconscious, would have been guilty of a violation of section 141 because he did not give his name and address and the registration number of his automobile to the occupants of the Lincoln car or because he did not render assistance to Mr. Pearl or Mrs. Flanders, who were injured in the other car, yet literally he would be within the terms of the statute. His unconscious condition would, of course, excuse him. When both drivers are rendered unconscious, as occasionally happens, there could be no criminal liability on the part of either for failure to do the things required by the statute. These illustrations merely show that the statute cannot be given literal application "in all cases" of collision or accident. The law does not require the impossible. As to the first requirement of the statute the prosecution in this case makes the following concession:

> "If, therefore, the injured man was rendered unconscious by the collision of the two cars, the defendant was not required to give to him the information mentioned in the statute because it would have been impossible for him to do so."

It was possible for the defendant to have placed on the person of Gilliam the specified information, but the law would seem to contemplate that such information be given to some one consciously able to receive it. This interpretation of the statute does not, as has been suggested, render it possible for a reckless driver to escape punishment by being sure that he renders his victim unconscious and then proceed on his way. There is still the obligation to stop and render the necessary assistance to the injured party. In this connection it must be noted that the statute requires that *necessary* assistance be rendered. Under the facts in this case, the deceased was given all the assistance that could be required without the aid of the defendant. It is suggested that the defendant might have interjected his person into the midst of the several individuals who were caring for the deceased and insisted upon his own ministrations. This, we think, he was not required to do under the circumstances here shown. In other words, his assistance was not *necessary*. To have forced himself into the company of those who were rendering aid might have been an impertinence and not at all justifiable. A failure to do so should not subject the defendant to criminal responsibility under the statute.

[3-5] The foregoing might well dispose of this appeal were it not for the fact that an important matter of practice and procedure is involved, a determination of which seems desirable in the event a new trial is had. The trial judge instructed the jury as follows:

> "There have been prepared two forms of verdict for you as to each of the two counts. * * * As to the third count, the body of one form reads: 'We, the jury, * * * find the defendant guilty of violation of section 141 of the California Vehicle Act, a felony, as charged in count 3 of the information. * * *' If your verdict be a verdict of guilty as to count 3, that is the form you will use. * * * If your verdict be 'not guilty' use this form: 'We, the jury, * * * find the defendant not guilty,'" etc.

There was no instruction that the members of the jury must agree upon at least one of the alternative charges enumerated in the statute and pleaded in the third count in order to find him guilty. The defendant contends that the trial judge of his own motion should have instructed the members of the jury that they must agree upon at least one of said alternative charges pleaded in count three of the information. California Jurisprudence, with citation of authority, states what is conceded to be the general rule as follows:

> "It is the duty of the court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, when they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them." 8 Cal. Jur. 309; People v. Williams, 184 Cal. 590, 194 P. 1019; People v. Peck, 43 Cal. App. 638, 185 P. 881.

Here no instruction was requested by the defendant, and it is necessary to determine whether the subject-matter involved in the omission of the court to instruct related to general principles of law applicable to the cause on trial or related to a specific point developed at the trial.

[6] It is conceded by the prosecution that a defendant may be convicted under said section 141 of a failure to do any one of several things required of him in the event of a collision with another car or with a human being. Of them he may be convicted of a failure (1) to stop immediately; or (2) to give his name and address; or (3) to give the name and address of the passengers in his car; or (4) to give the registration number of his car; or (5) to render necessary assistance. A violation of any of these provisions is in terms made punishable under the penal provisions of the statute. People v. Kaufman, supra. A failure to perform any one of the required acts is a separate offense. Evidence sufficient to support one charge might be entirely unrelated to and insufficient to support another. The jury might not all agree on any one of the offenses, but might all agree that there had been a violation of some portions of the section. We think the situation here presented called for an instruction from the court on the point contended for by the defendant, even though no such instruction was requested. It is difficult to lay down a rule which will fit all cases, but this much may be said, generally, that, when a defendant is charged with separate and distinct offenses each requiring independent proof, the court should properly instruct the jury as to each offense, even though instructions thereon be not requested by either party. Applying this rule, we think it was error not to instruct the jury on the point that they must agree on at least one of the separate offenses alleged in count 3 of the information in order to find the defendant guilty on that count. Whether such error be prejudicial in any case must depend to a great extent on the record in each case. But, says the prosecution, the allegations of count 3 were in the conjunctive, and, since the jury found the defendant guilty as charged in said count, it must be assumed that he was found guilty on all of the separate offenses therein alleged. To this the defendant replies that, in such case, count 3 must stand or fall as a whole under the instruction given. There is much force in the defendant's position. The evidence in such case must be sufficient to support a conviction on each and every of the separate offenses so conjunctively charged. If there then be no evidence of a substantial character to support some one of the alleged offenses so conjunctively alleged, it might well be an abuse of discretion for the trial court not to grant a new trial as to the entire count.

[7] The defendant takes exception to the following instruction which was given by the court:

> "The duty imposed upon a driver of an automobile which collides with another vehicle to stop, render assistance, and furnish the information required by the law, is a duty which he must perform in all cases."

It is insisted that the phrase "in all cases" is too broad. We think the criticism well taken, as the facts before us in the present case illustrate. This instruction has been under review before, and it has been stated that, while the instruction is no broader than the section itself, it is inconceivable that the Legislature intended to make the provision of the section applicable, for instance, to a person who was ignorant of the fact that the automobile which he was driving had struck another person. People v. Graves, 74 Cal. App. 415, 240 P. 1019. It is unnecessary to determine whether the giving of the instruction in this form would in and of itself require a reversal in view of our conclusions on other points.

The judgment and order are reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

CURTIS, J. I concur in the judgment.

203 Cal. 761

BRUNSKI v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 12565.)

Supreme Court of California. March 29, 1928.

1. Master and servant ⚷416—Industrial Accident Commission may open case for "good cause shown" after expiration of time for rehearing and within 245 weeks after injury (Workmen's Compensation Act, § 65 [a]).

Power of Industrial Accident Commission to open up cause is present after expiration of period provided by Workmen's Compensation Act, § 65, subd. a (St. 1917, p. 871), for rehearing and continues until expiration of 245 weeks from time of injury, provided that exercise of such power be prediated on "good cause shown" before commission.

2. Master and servant ⚷416—Falsity of claimant's statements as to previous injury held "good cause" for rescinding order approving settlement agreement (Workmen's Compensation Act, § 20 [d]).

Industrial Accident Commission *held* not to abuse discretion under Workmen's Compensation Act, § 20, subd. d (St. 1917, p. 850), in setting aside order approving settlement agreement on ground that falsity of claimant's statements regarding previous injuries related to physicians and commission and upon which physicians and commission relied was "good cause," since fraud need not be extrinsic to justify rescission of previous order.

In Bank.

Proceeding under the Workmen's Compensation Act by Anton Brunski against the Pacific Gas & Electric Company. The Industrial Accident Commission set aside an order approving a settlement agreement, and claimant brings certiorari. Order affirmed.

Superseding opinion in 256 P. 275.

Warren H. Pillsbury, of San Francisco, for petitioner.

G. C. Faulkner, John J. Briare, and Leo H. Susman, all of San Francisco, for respondents.

SHENK, J. This proceeding was brought to review and annul an order of the Industrial Accident Commission. The facts in brief are as follows: The petitioner, Brunski, suffered a head injury in 1919 when working for the Ford Motor Company in the middle west. Later on he filed suit against that company for damages. His deposition was taken in Kansas City in 1923, in which he stated that following his said injury he had a roaring and thumping in his head, had headaches and dizzy spells once or twice a week, had nervous attacks two or three times a week, and his eyes were affected. The litigation was settled by the payment to Brunski of the sum of $1,000. He then came to California and became an employee of the Pacific Gas & Electric Company. While in the employ of that company he suffered a second head injury on October 7, 1924. He was off 2 weeks and was then declared by the doctor as able to work, a slight scalp wound having healed in the meantime. He did not return to work for the Pacific Gas & Electric Company, but about a week later went to work for the California-Oregon Power Company and worked for about 14 days for that company. He filed an application for an adjustment of claim with the commission on December 10, 1924, which application was dismissed on January 31, 1925, for failure to prosecute. Again on March 13, 1925, he filed a second application for adjustment of claim. In his statement to the physicians, and in his testimony under oath before the commission's referee, Brunski stated that he had never before had any head injury or symptoms of trouble in his head; that he was perfectly well until the time of his accident in October, 1924; that he had a slight head injury while working for the Ford Motor Company in Kansas City, but went to work three days thereafter, and that said injury had no effect on him whatever; that said slight head injury was the only head injury he had ever received, except the one he had when working for the Pacific Gas & Electric Company.

With the foregoing statements by Brunski to the commission and the reports of the physicians based on false statements made by Brunski to them, the commission on October 22, 1925, made an award granting to Brunski 2 weeks' temporary total disability and 50 per cent. partial disability thereafter continuing indefinitely. Within 20 days the employer, the Pacific Gas & Electric Company, filed a petition for a rehearing, which was granted.

Basing its action on the statements by Brunski to the commission and to said physicians, the Pacific Gas & Electric Company entered into a compromise agreement with Brunski in the sum of $1,500 and filed the same with the commission for its approval on December 12, 1925. Seven days later the commission entered its order affirming said compromise agreement, basing its order of approval on Brunski's statement to the commission and to said physicians that prior to his head injury of October, 1924, he had not received a head injury of any consequence. Shortly after the order of approval of said compromise agreement the employer discovered that the statements made by Brunski to the physicians were false, and that the testimony given by Brunski before the commission in July, 1925, was false. Thereafter, on January 16, 1926, the employer filed a petition with the commission setting forth the alleged perjury and false statements by Brunski in obtaining the settlement and the approval of the commission, and praying that the commission set aside its order of approval of said settlement agreement and set the matter down for

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

further hearing. The petition was granted, and it is the order granting the same that Brunski now seeks to have annulled.

It is urged by the petitioner that the commission was without jurisdiction to reopen the case after the expiration of the period provided by section 65 (a) of the Workmen's Compensation Act (St. 1917, p. 871) for a rehearing before the commission as to any point determined in or within the issues of the former proceeding, and that this court has, by its construction of section 20 (d) of the act (St. 1917, p. 850), limited the continuing jurisdiction of the commission over its orders, decisions, and awards during a period of 245 weeks to the granting of relief required by new developments occurring subsequent to the order, decision or award in question. Or, to state the contention of the petitioner in another way, it is that the commission's continuing jurisdiction during the 245 weeks after the date of the injury may be invoked or exercised only as to matters outside of the issues previously litigated and arising subsequent to the order, decision or award in question. As authority for his position the petitioner cites the case of Georgia Casualty Co. v. Industrial Accident Commission, 177 Cal. 289, 170 P. 625. It is insisted that the continuing jurisdiction of the commission is still governed by that case and the cases following it with approval. In the recent case of Bartlett Hayward Company v. Industrial Acc. Com. (Cal. Sup.) 265 P. 195, it was held that the Georgia Casualty Company Case was concerned only with the construction of the 1913 law, and that the amendments to or reenactments of the statute in 1917 removed the limitations on the continuing jurisdiction of the commission declared in the Georgia Casualty Company Case. It was further held that the construction of section 20 (d) of the statute as enacted in 1917 was correctly announced in the case of Kennedy v. Industrial Acc. Com., 50 Cal. App. 184, 195 P. 267, and that the later cases, relying upon and adhering to the doctrine of the Georgia Casualty Company Case, had not given sufficient if any notice to the effect of the change of the statute in 1917.

[1, 2] Under the law as announced in the Bartlett Hayward Co. Case, it must be concluded that the power of the commission to open up a cause before it is present after the expiration of the period provided by statute for a rehearing, and continues until the expiration of 245 weeks from the time of the injury, provided always that the exercise of such power be predicated on "good cause shown" before the commission. It but remains to determine herein whether the commission abused its discretion in determining that the alleged false statements and perjury on the part of Brunski in relating to the physicians and to the commission the history of his physical disability and upon which statements the said physicians and the commission relied was a sufficient showing of "good cause" to justify the commission in setting aside its order of approval and directing a further hearing to be had. It cannot be doubted that false swearing as to a pertinent fact, either in support or in defense of an application for an award of compensation or other order of the commission, is conduct most reprehensible. It strikes at the very foundation of the effective administration of the Workmen's Compensation Law by the commission. Its design is to thwart the purpose of this law to see that right shall prevail. It is so frowned upon by the social order that not only perjury, but the subornation of perjury, are declared to be crimes amounting to a felony. But, says the petitioner, the fraud involved in the perjury must be extrinsic else the commission may take no cognizance of it. It is conceded by petitioner that the discovery of extrinsic fraud, after the time for a rehearing has elapsed, is a "new development," even within the holding of the Georgia Casualty Company Case, sufficient to justify the rescission of a previous order, decision, or award, but it is insisted that the commission has only the power of a court of equity in the premises, that is to say, that a court of equity may set aside or enjoin the enforcement of a judgment only upon a showing of extrinsic fraud, and that the same rule should apply to the powers of the commission respecting its own orders, decisions, and awards. We think the power of the commission is not so circumscribed. In the state of Colorado the continuing jurisdiction of the commission is provided for in the following language:

> "Upon its own motion on the ground of error, mistake or a change in conditions, the commission may at any time after notice of hearing to the parties interested, review any award and on such review, may make an award ending, diminishing, maintaining or increasing the compensation previously awarded." Colo. Session Laws 1919, p. 745, § 110; section 4484, C. L. 1921.

It was also provided by the statute that any award should become final unless a petition to review the same should be filed in ten days after its entry or within the period as extended by the commission. It was held in that state that notwithstanding the failure of either party to file a petition for a review within the statutory time, the commission had jurisdiction to set aside an award and enter a different award if the showing before the commission was sufficient in its judgment to prove that the prior award was based on false testimony. The court said:

> "It certainly was an error or mistake upon the part of the commission, if it was led by the false testimony of the witness for defendants in error to believe, and so find, that the injury sustained by the claimant was not received in

the course of his employment." Industrial Commission v. Employers' Corp., 78 Colo. 267, 272, 241 P. 729, 731.

So it must be held in this state that the strictness with which a litigant is bound at his peril to discover and meet perjury in an ordinary court proceeding, usually designated as "intrinsic fraud," should not be applied to a proceeding before the Industrial Accident Commission in which it must be determined whether "good cause" exists for setting aside a former order, decision or award and ordering a further hearing.

We are not now deciding that Brunski committed perjury, which was the foundation of the order of the commission in question. Nor do we understand that the commission has finally decided that Brunski committed the alleged perjury. We do conclude, however, that the showing made before the commission was sufficient to justify the commission in holding that "good cause" appeared for the setting aside of its former order and ordering a rehearing.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.

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203 Cal. 693

In re FULMER'S ESTATE.

FULMER v. PACIFIC SOUTHWEST TRUST & SAVINGS BANK et al.

(L. A. 9606.)

Supreme Court of California. March 27, 1928.

1. **Vendor and purchaser 🔑18(3)—Intestate's payment and note to vendor executed at expiration date of option created binding contract for purchase of land which administrator might perform.**

Where intestate was given option upon tract of land, and on date of expiration of option paid sum of money on account of purchase price and executed promissory note to seller, intestate's conduct constituted sufficient election to act upon the option, thus creating a binding contract for purchase of land, which administrator might undertake to carry out in behalf of estate.

2. **Executors and administrators 🔑132—Expenditures for necessary repairs held proper.**

Sums of money paid for necessary repairs are such expenses as administrator must pay in the care and management of the estate.

3. **Executors and administrators 🔑110, 132—Administrator's necessary payment of taxes and repairs on property purchased by intestate held allowable on final account, though made under ex parte orders.**

Administrator's payment of taxes and necessary repairs, though made under ex parte orders, *held* allowable on final account, if made pursuant to care and management of property which intestate purchased during her lifetime.

4. **Executors and administrators 🔑109(1)—Disbursements made by administrator in pursuance of his duties in managing estate may be allowed, though made without court order.**

Failure of personal representative to secure prior sanction of probate court for disbursements is not necessarily fatal to their allowance, provided the acts of the administrator are in pursuance and in accordance with law, in which case he is protected in the performance of his duties, though payments made without court order are made at his peril.

5. **Executors and administrators 🔑278—Order permitting administrator's payment of intestate's interest-bearing obligations pending administration of estate was proper (Code Civ. Proc. § 1513).**

Administrator was properly allowed permission to pay intestate's interest-bearing obligations during period of administration under Code Civ. Proc. § 1513, notwithstanding general rule that debts should be discharged upon termination of administration.

6. **Executors and administrators 🔑135—Executor may undertake performance of valid executory contracts of intestate.**

An administrator may undertake the performance of valid and uncompleted contracts which have been entered into by his intestate.

7. **Executors and administrators 🔑135—That property purchased by deceased proved of less value than originally supposed held not to preclude allowance of administrator's good-faith disbursements in payment of purchase price.**

Where deceased assented to terms of option agreement and elected to make payments upon purchase price of property involved, administrator was warranted in making good-faith attempt to comply with terms of purchase agreement, where it appeared that property was worth contract price, and fact that property subsequently proved to be of less value than was originally assumed did not of itself warrant assumption of administrator's bad faith, precluding allowance of disbursements made on purchase price; administrator being bound to complete contract made by intestate.

8. **Vendor and purchaser 🔑8—Subsequently acquired property may be made subject of contract to convey.**

One may contract to convey property which is to be subsequently acquired.

9. **Executors and administrators 🔑135—That deceased's vendor merely held contract for purchase of premises sold, and that vendor's title subsequently failed, did not preclude allowance of administrator's disbursements made on purchase price.**

Fact that deceased's vendor merely had contract for purchase of real estate, and that it subsequently developed that vendor was unable to convey title, did not of itself render payments made by administrator on purchase price under deceased's purchase contract improper, precluding allowance of such disbursements on administrator's final account.

10. Executors and administrators ⚷135—Administrator who in good faith took over intestate's land contract and made disbursements by way of principal, interest, taxes, and repairs, held entitled to proportionate part of disbursements actually due from estate.

Administrator, who in good faith took over his intestate's contract for purchase of real estate and paid purchase-money note together with installments of principal and interest falling due and paid taxes and repairs on property, *held* entitled on final account to allowance of at least such proportionate part as was in fact due from estate or would have been due from deceased had she lived, notwithstanding fact that property subsequently proved to be of less value and vendor subsequently became unable to convey title.

11. Executors and administrators ⚷500—Executor, even if chargeable with certain losses, was entitled to commissions, one being balanced against the other.

Administrator on final account *held* entitled to the statutory commissions, even if he was chargeable with certain losses resulting from his alleged default or neglect, losses and commissions being balanced against each other.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Final account of Glenn A. Fulmer, administrator of the estate of Luella Fulmer, deceased, opposed by the Pacific Southwest Trust & Savings Bank and another. Order disallowing certain items of the account, and the administrator appeals. Reversed with directions.

Superseding opinion of District Court of Appeal (258 P. 120).

Horace W. B. Smith and P. R. Lund, both of San Francisco, and Francis O. Hoover, of Modesto, for appellant.

C. Kelley Hardenbrook, of Lompac, and Fred A. Shaeffer, of Santa Maria, for respondents.

WASTE, C. J. This is an appeal by Glenn A. Fulmer, as administrator, from an order settling and disallowing certain portions of the first and final account of his administration of the estate of his mother, Luella Fulmer, deceased. In the account the administrator charged himself with the receipt of cash in the sum of $39,309.75, and claimed credit for disbursements totaling $42,340.30. The difference of $3,030.55 was charged as an indebtedness owing to him by the estate. Subsequent to the filing of the account, certain creditors of the deceased filed objections thereto, and upon the hearing the court charged the administrator with receipts amounting to $39,609.75 and allowed credits only in the sum of $16,875.25, leaving as a balance "the sum of $22,734.50 in cash belonging to said estate." The court disallowed many items in part, and several items in full. It is from that part of the order which disallowed certain items in full that the administrator has appealed.

[1] Prior to her death the decedent, with certain other parties, on July 5, 1918, executed an instrument in writing, by the terms of which the deceased and her cocontractors were given an option upon a tract of land situate in Tehama county. The California Farms Company was designated therein as the seller, and the purchase price was fixed at $60,805.50. Upon the execution of this instrument the prospective purchasers made an initial payment of $5,000, to which decedent contributed $2,018.61. Thereafter, and on December 1, 1918, other payments having become due under the agreement, the decedent paid $5,044.50 on account of the purchase price of the land, and executed to the seller her promissory note in the sum of $5,700. There appears to be a divergence of opinion between the parties as to the character of the instrument under which these payments and those subsequently made by the administrator were made. The respondent creditors urge that it constituted a mere option, while the appellant contends that the option ripened into a binding contract for the purchase and sale of the real property therein described. The instrument declares, in part, that it "is and shall be construed as an exclusive option until December 1st, 1918, for the purchase of said land." In our opinion it is only reasonable to conclude that the payment by decedent of $5,044.50 on that date, and the execution of her promissory note for $5,700 on the same day, constituted an election to act upon the option, thus causing it to assume the character of a binding contract for the purchase of the land upon the terms specified.

The decedent died on January 1, 1919, and letters of administration of her estate were issued to the appellant on March 26, 1919. During the course of his administration of the estate the $5,700 promissory note (supra), executed by the decedent, matured, and after presentation it was duly allowed as a claim against the estate. On August 15, 1919, the appellant petitioned the probate court for an order authorizing the payment and discharge of the claim as allowed, with the accrued interest thereon in the sum of $313.34, together with the accrued interest on the deferred payments under the contract amounting to $856.11. The payment of these sums, totaling $6,869.49, together with "any further interest not yet accrued when the same shall become due and payable," was authorized and directed by an order of the probate court bearing date August 26, 1919. Under the authority of that order the appel-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

lant paid $6,869.49 as principal and interest under the agreement of purchase, claiming credit therefor in his account. This item was wholly disallowed by the court upon the hearing of the account and the objections thereto.

At various times subsequent to the date of the order, and also under and by virtue of an order dated July 26, 1920, the appellant made other payments from the funds of the estate covering items of principal, interest, taxes, and repairs, all arising out of the agreement to purchase the Tehama county property. These orders, after setting forth the execution by the decedent and her cocontractors of the purchase agreement and the maturity of certain payments thereunder, respectively declare that "it is ordered, adjudged, and decreed that the administrator pay said note [the $5,700 promissory note] and interest, and any further interest not yet accrued when the same shall become due and payable, unless thereafter for good cause this order shall be set aside or modified by the court upon a similar petition and notice," and "it is ordered, adjudged, and decreed that the administrator pay any installments due and that may hereafter become due and payable, unless thereafter for good cause, this order shall be set aside or modified by the court upon a similar petition and notice." In order to clarify and succinctly present the situation, the amounts so paid by the appellant and wholly disallowed by the court below may be tabulated as follows:

Amount	Purpose of Payment.	Authority Claimed Therefor
$3000.00	Principal and interest on purchase contract	Order Aug. 26, 1919
2400.00	" " " " " "	" " " "
6869.49	" " " " " "	" " " "
6078.38	" " " " " "	" July 26, 1920
856.10	" " " " "	" Aug. 26, 1919
1991.55	" " " " "	" " " "
2.30	" " " "	" " " "
342.50	" " " "	" July 26, 1920
60.75	Taxes on property covered by " "	
304.47	" " " " " " "	
266.55	" " " " " " " "	
13.20	Repairs on " " " " "	
76.35	" " " " " " "	
159.60	" " " " " " "	

[2-4] That some of the above-enumerated disbursements may have been made without prior sanction of the probate court is not necessarily fatal to their allowance. The sums of money paid out for taxes and necessary repairs are such expenses as the administrator must pay in the care and management of the estate. People v. Olvera, 43 Cal. 492; Estate of Clos, 110 Cal. 494, 502, 42 P. 971; Estate of Smith, 118 Cal. 462, 466, 50 P. 701. In Estate of Smith, supra, it is stated to be "the duty of the executor, without special direction of the court, to preserve the property of the estate, and he does not require leave of the court so to do, and it is a question how far an order so obtained will protect an administrator either in doing or in omitting to do something which might be deemed important. When the court is so consulted the heirs are not specially cited, but on the settlement of the accounts of an executor they are called in and have a right to question the acts of the executor and to have an appeal to this court upon any determination which may be made. The previous consent to the acts of the executor cannot limit their inquiry as to the lawfulness of the acts done or the duty of the executor to do that which has been omitted. Ordinarily, it would determine the question of good faith, and quite often that is the only matter in issue. Hence, it is always an advantage to have such permission. Still, the failure to obtain it does not render the expenditures made improper. The only result is, that the matter is yet to be passed upon." Application of this rule disposes of the contention of respondents that the court orders above referred to were void as being made ex parte and without the prior giving of notice. Payments made without a court order are made at the peril of the personal representative (Estate of Fernandez, 119 Cal. 579, 581, 51 P. 851); but, if the acts of an administrator are in pursuance of, and in accordance with, law, he need not necessarily secure an order of court to protect him in the performance of his duties (Estate of Bottoms, 156 Cal. 129, 133, 103 P. 849).

[5] It is customary, upon the termination of the administration of an estate to marshal the assets for the purpose of paying and discharging the debts, without preference to those holding unsecured obligations. Section 1513 of the Code of Civil Procedure, however, would seem to warrant a variation from this procedure, in that it provides, in substance for the payment and discharge, at any time pending administration, of interest-bearing obligations existing against the estate. The appellant was therefore justified in seeking and being granted permission to pay, with the accrued interest, the greater number of the above-tabulated amounts. That section 1513 does constitute an exception to the general rule was recognized in Estate of Spanier, 120 Cal. 698, 700, 53 P. 357.

[6] Respondents contend that the amounts were improvidently paid by the administra-

tor. In support of this contention it is urged: (1) That an administrator is without authority to purchase real property with the funds of the estate; (2) that the real property involved did not equal in value the price agreed to be paid; and (3) that the seller, California Farms Company, was unable to deliver title thereto. Failure to seasonably investigate and determine these matters in advance of the making of the above-enumerated payments on the purchase agreement is urged as justification for their disallowance by the probate court. Preliminarily it may be said that the appellant's conduct did not, in any sense of the word, constitute a purchase of real property. The decedent, with her cocontractors, had assented to the terms of the option agreement, and had evinced a willingness and determination to proceed thereunder by electing to make payments upon the purchase price of the property. The appellant, as administrator, merely proceeded to carry out the terms of said agreement as contemplated by the parties. An administrator may undertake to perform valid and uncompleted contracts which have been entered into by his intestate. Estate of Hincheon, 159 Cal. 755, 762, 116 P. 47, 36 L. R. A. (N. S.) 303; McCann v. Pennie, 100 Cal. 547, 551, 35 P. 158; Janin v. Browne, 59 Cal. 37, 44. In Janin v. Browne, supra, the court said that:

> "Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so and enforce the contract. * * * E converso, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets."

This principle has been extended to contracts for the purchase of real property. In Jones v. Hert, 192 Ala. 111 [112], 68 So. 259, 260, the court declares:

> "Purchase money due from a deceased vendee upon a valid contract of sale is such a debt of the decedent as the representative may rightfully pay. 'The presumption is that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain no presumption of the kind can be indulged in. * * * Where a party has entered into a contract to purchase real estate, and dies before it is conveyed to him and before he has paid for it, his heir or devisee is entitled to have his executor pay for the realty out of the personal estate. * * * The executor is not permitted to violate the contract of his testator after the latter's death. * * *' The result is the contract of sale was in full force and effect when the vendee died, and the amount due upon same was a valid charge against her estate, unless the contract was rescinded or terminated by mutual consent. * * *"

To the same effect, see McCann v. Pennie, supra, page 552, 35 P. 160.

In the case of Janin v. Browne, as here, the agreement provided for a forfeiture of all sums paid thereunder in the event of a breach by the vendee. Upon this phase of the matter the court held that this was in no sense an option to the vendee to abandon the contract and defeat her unconditional promise to pay the purchase price of the lot, but was intended for the purpose of giving the vendor some remuneration for the land in case of a default in the purchase-money installments. The case of Farley v. Secor, 167 App. Div. 80, 152 N. Y. S. 787, 789, goes so far as to hold that an option on real property secured by a decedent prior to his death is an asset of the estate which the executor is in duty bound to preserve, if to him it seems valuable.

[7] We are therefore of the view that appellant's attempt in good faith to comply with the terms of his intestate's agreement to purchase the Tehama county property should have received the sanction of the probate court upon the filing of the first and final account. There is nothing in the record to impeach his good faith, and his contention that in this particular transaction he was acting in what he deemed to be the best interest of the estate appears to have substantial support. Among other things, the appellant testified, in effect, that he proceeded to perform said agreement only under advice of counsel, and in the belief that the property was a valuable asset of the estate and an investment upon which it would be well for the estate to complete payment. Having taken this view of the matter, he went into possession of the property, and remained thereon for approximately three years. During this period of occupancy, he paid the several amounts listed above. When it became evident to him that the land was probably worth less than the $19,000 still remaining due under the agreement, he abandoned the property in the month of October, 1921, and made no further payments or disbursements on account thereof. As appellant was bound to complete the contract made by his intestate, the fact that the property subsequently proved to be of less value than originally assumed would not, of itself, warrant an assumption of bad faith, or imprudent conduct upon the part of the administrator. Estate of Armstrong, 125 Cal. 603, 605, 58 P. 183.

[8, 9] Nor do we think the fact, subsequently developed, that the seller was unable to convey title, would, of itself, render the payments made by appellant improper. It appears that the seller, California Farms Company, at the time it executed the contract with the decedent and her cocontractors, had secured, in its own right, the assignment of a contract covering the sale of said real property theretofore executed by the then owner, one Mary K. Spooner. Certain payments were made under this latter agreement by the California Farms Company to

the owner. Upon subsequent default being made in the installment payments, Mary K. Spooner instituted an action for the cancellation of her contract to sell, and to quiet her title in and to said real property. This action terminated in her favor in the month of October, 1924, when a decree was entered as prayed for. It is thus apparent that not until three years subsequent to the appellant's abandonment of the property in 1921 was it judicially determined that the California Farms Company would be unable to perform its agreement to sell and execute a good and sufficient deed to the premises. In passing, it may be said that the decisions are numerous to the effect that one may contract to convey property to be subsequently acquired. Lemle v. Barry, 181 Cal. 6, 9, 183 P. 148; Anderson v. Willson, 48 Cal. App. 289, 294, 191 P. 1016. It follows, therefore, that the appellant could properly make payments to the seller, California Farms Company, under the purchase agreement executed by his intestate even though, at the time such payments were made, the seller had not, as yet, perfected its title.

[10, 11] We therefore conclude that the lower court erred when it disallowed the full amounts we have tabulated (supra). The appellant should have been allowed in full the amount of the promissory note, executed by the decedent during her lifetime, in the sum of $5,700, together with the interest thereon in the sum of $313.34. As to all the other expenditures made by the appellant on the Tehama county property, whether for principal, interest, taxes, or repairs, it would seem that the appellant, as administrator should be allowed at least such proportionate part as was in fact due from the estate, or would have been due from the decedent had she lived. Whether or not it was necessary for the appellant to pay the entire amount of these items in order to protect the property and interest of the estate can be determined upon further proceedings in the court below, and the proportionate amount thereof properly chargeable to the estate of the decedent can be determined and allowed to the administrator. In addition, the court should and must, allow to the appellant the commissions due him as administrator, for the statute contemplates that the amount of such commissions is to be ascertained when the final account is rendered. Estate of Miner, 46 Cal. 564, 572. Under our decisions, an administrator, while chargeable with losses resulting from his default or neglect, is, nevertheless, allowed his commissions. Estate of Carver, 123 Cal. 102, 105, 55 P. 770. The one should be balanced against the other. 11 Cal. Jur. 1158, § 763, and authorities there cited.

The order appealed from is reversed, with directions to the court below to proceed in the manner herein suggested.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

203 Cal. 753

In re SAYERS' ESTATE.

SAYERS v. MERVYN.

(L. A. 10027.)

Supreme Court of California. March 29, 1928.

1. Statutes ⚿231—Code provisions dealing specifically with subject-matter prevail in case of conflict.

In case there are conflicting sections in the Code relating to same subject-matter, those dealing specifically with subject-matter must prevail.

2. Executors and administrators ⚿518(1)—General provisions relating to issuance of letters control except as to special contrary provisions relating to foreign wills.

Except in so far as there are special provisions to the contrary in the article relating to foreign wills, general provisions of Code relating to issuance of letters control.

3. Executors and administrators ⚿518(3)—Resident daughter to whom deceased bequeathed all property within state held entitled to letters in preference to appointee of nonresident surviving wife (Code Civ. Proc. §§ 1299, 1323, 1324, 1350a, 1365).

Under Code Civ. Proc. §§ 1350a and 1365, relative to issuance of letters of administration with the will annexed, resident daughter of nonresident testator, to whom testator bequeathed all of property within state, *held* entitled to letters in preference to appointee of nonresident surviving wife, taking nothing within state under will; section 1299 being inapplicable as to letters of administration with the will annexed, and the first-mentioned general provisions not being in conflict with sections 1323 and 1324, relative to probate of foreign wills.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Application by Elizabeth S. Mervyn for probate of the will of Norman W. Sayers, deceased, and appointment as administratrix with the will annexed. Order admitting the will to probate as a foreign will, and sustaining objections of petitioner to appointment of administrator under petition of Emma L. Sayers, surviving wife, and the surviving wife appeals. Affirmed.

C. E. McDowell, of Los Angeles, for appellant.

Thomas T. Robinson, of Los Angeles, for respondent.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WASTE, C. J. Norman W. Sayers, a resident of Pennsylvania, died testate on or about the 15th day of July, 1926. By his last will and testament he bequeathed his estate to his widow, Emma L. Sayers, and a number of other legatees and devisees. Among the provisions of the will, he left a house and lot in Los Angeles, the only property owned by him in this state, to his daughter, Elizabeth S. Mervyn, for life, with remainder over to her children. The will was admitted to probate in Pennsylvania, but the executors named, failing to apply for letters in California, the widow, Emma L. Sayers, filed in the superior court of Los Angeles county a duly authenticated copy of the will and its probate in Pennsylvania, together with a petition that letters of administration with the will annexed be issued to Sam West, a resident of this state. Elizabeth S. Mervyn, the daughter, also a resident of this state, thereupon filed a petition for the probate of the will, and asked that she be appointed administratrix with the will annexed. At the same time, she filed objections to the appointment of the widow's nominee, urging as grounds of contest that Mrs. Sayers was a nonresident, that she had no interest in the California property, and was not entitled to succeed to any portion of it. The two petitions were heard at the same time. The court admitted the will to probate as a foreign will, and sustained the objections of Elizabeth S. Mervyn to the appointment of West on the ground that the widow was not entitled to succeed to any part of the estate under the jurisdiction of the court. It found that Elizabeth S. Mervyn was entitled to succeed to the whole of the estate in California by life estate with remainder to her children, and made its order appointing her administratrix with the will annexed. The surviving wife appeals.

The sole point to be considered is whether a nonresident surviving wife, who takes nothing in this state under the will, is entitled to letters in preference to a resident daughter to whom the decedent bequeathed all of his property in California. Appellant contends that the provisions of the Code dealing specially with the subject-matter of foreign wills must prevail over all conflicting provisions arising out of the same subject-matter, and that, as a "person interested in the will" (section 1324, Code Civ. Proc.), she, although herself disqualified by nonresidence, is entitled to have her nominee appointed in her place.

[1-3] Appellant is undoubtedly correct in her position that, if there are to be found conflicting sections in the Code relating to the same subject-matter, those dealing specially with the subject-matter must prevail. However, it has been as uniformly held that, except in so far as there is special provision to the contrary in the article relating to foreign wills, the general provisions relating to the issuance of letters control. Estate of Meier, 165 Cal. 456, 459, 132 P. 764, 48 L. R. A. (N. S.) 858, Ann. Cas. 1914D, 121. We are unable to discover any conflict in the special provisions relating to the probate of foreign wills and the general provisions of the Code relating to the granting of letters. Section 1323 of the Code of Civil Procedure provides that, when a copy of a foreign will, and the order or decree admitting it to probate, duly authenticated, are produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed and notice given by the clerk. If, on the hearing, the required facts are made to appear (section 1324), the will "must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon." These sections do not authorize any particular person to obtain letters. There is nothing in their language to indicate, or to direct, to whom letters of administration with the will annexed must issue, if the executor fails to apply. The situation, therefore, appears to be identical with that created by the filing of a domestic will for probate. In such case any executor, devisee, or legatee named in the will, or any other person interested in the estate, may, after the death of the testator, petition the court having jurisdiction to have the will proved. Section 1299, Code Civ. Proc. But it has been decided that that section does not authorize any person to obtain letters testamentary, or letters of administration with the will annexed in case the executor fails to apply. It merely authorizes any person interested in the estate to file a petition for the probate of the will, and in no way changes the rule regarding the persons entitled to letters upon a domestic will where the executor named therein is dead, incompetent, renounces, or fails to apply for letters. Those cases are provided for in section 1350a, which refers to section 1365 as a source of authority for the granting of such letters. Estate of Moran, 176 Cal. 216, 168 P. 18.

Section 1350a provides, so far as is here pertinent, that, if the executor named fails to apply, letters of administration with the will annexed must be issued as designated and provided for in granting letters in cases of intestacy. This section is not restricted to any class of wills, and it certainly must include foreign wills in its provisions. Estate of Coan, 132 Cal. 401, 403, 64 P. 691; Estate of Brundage, 141 Cal. 538, 541, 75 P. 175. Letters in cases of intestacy must be granted in the order prescribed in section 1365—"the relatives of the deceased being entitled to administer only when they are entitled to succeed to his [the] estate or some portion thereof." This provision places a further limitation upon those who shall be entitled to serve as administrator, in addition to the restrictions found in section 1369. The power of the Legislature to put this limitation on the right to letters cannot be questioned. The provision is general, and relates to all estates to be administered in this state. There is nothing anywhere in the law to indicate a contrary view. First in order of those entitled to letters is "the surviving husband or wife, or some competent person, whom he or she may request to have appointed." Second, are "the children."

Under these provisions (sections 1350a and 1365, supra) those only are entitled to letters who, in case of intestacy, are entitled to succeed to the estate of the deceased or some portion thereof, and who, in case of testacy, take by bequest some portion of that estate. One taking nothing at all under a will is not, under these sections, entitled to letters. Estate of Cook, 173 Cal. 465, 472, 160 P. 553; Estate of Walker, 169 Cal. 400, 401, 146 P. 868. If these sections and the decisions apply, the nominee of the appellant is not entitled to letters. Estate of Crites, 155 Cal. 392, 394, 101 P. 316; Estate of Mahoney (Cal. App.) 259 P. 1014. That they should and do apply is, we think, apparent. We have not lost sight of the fact that there are opinions of the court which seemingly lend support to the contention of the appellant that, as a "person interested in the will" now offered for probate, she is entitled to request the appointment of another person to serve as administrator with the will annexed. It may be said, in passing, that, when appellant makes this contention, she destroys her own case, for certainly there is nothing in the sections relating to foreign wills which permits her to nominate any one, and, in order to do so, she must bring herself within the provisions of section 1365, the general provision relating to the granting of letters in cases of intestacy. The decisions relied on by appellant must be considered in the light of the facts involved in each. In Re Bergin, 100 Cal. 376, 34 P. 867, the applicant for letters was a resident of California and a devisee under the terms of the will. It was held, and that was all that it was necessary to decide, that he was entitled to letters, being "a person interested in the will" as against the public administrator, not a party interested. Estate of Meier, supra. The same rule was applied in Estate of Engle, 124 Cal. 292, 56 P. 1022, in sustaining the claim of a resident assignee of a nonresident devisee of property within the state to be appointed over the petition of the public administrator. To the same effect is Estate of Rankin, 164 Cal. 138, 127 P. 1034. In each of these cases it must be noted that the party "interested in the will" took, directly or by assignment under the will, some part of the property of the decedent in this state. Here the surviving wife has no interest in any part of the estate in California.

The rule seems to be now very definitely understood and settled by the later decisions of the court. In the Estate of Rankin, supra, Mr. Justice Angellotti clarified the situation when he said (page 143 [127 P. 1036]):

> "* * * It is the well-established rule in California that in the case of a foreign will, a person 'interested in the will' is by virtue of that fact alone, *if competent to serve* [italics ours] as administrator in this state, entitled to letters of administration with the will annexed as against one who, like the public administrator, is not 'interested in the will.'"

Still later, the court, speaking through the same justice, held that, in the absence of an application for letters by the executor named in a foreign will, letters "must be granted to 'any other person interested in the will' who applies for them, *provided, of course, that the applicant has the qualifications prescribed by our law for* [*an*] *administrator.* * * * As against one not 'interested in the will,' a party 'interested in the will,' who is in all respects competent to serve, is entitled as matter of right to letters of administration with the will annexed by virtue of the provisions of our Code of Civil Procedure dealing especially with the subject of foreign wills." Estate of Meier, 165 Cal. 456, 458, 132 P. 764, 765 (48 L. R. A. [N. S.] 858, Ann. Cas. 1914D, 121). (Italics added.)

The order appealed from is affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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203 Cal. 748

AMERICAN FRUIT GROWERS, INC., OF CALIFORNIA v. JACKSON et al.

(L. A. 7712.)

Supreme Court of California. March 29, 1928.

1. Attachment 🔑308(4)—Evidence held insufficient as matter of law to sustain finding denying third party claim to property seized by sheriff under attachment.

In suit against sheriff for conversion of personal property consisting of farm equipment under writ of attachment after third party claim therefor, evidence *held* insufficient as a matter of law to sustain finding denying claim to property on theory that possession had passed by exercise of option for sale thereof.

2. Attachment 🔑175—Sheriff seizing property under writ of attachment takes only such rights in property as person from whom it was seized had.

Sheriff seizing property under writ of attachment only takes such rights in property as person from whom he seized it had, and in determining right of third party claimant thereto, transaction must be viewed as though controversy were between third party claimant and person from whom property was taken.

3. Account stated ⚷=5—Statement rendered is not account stated unless intended as such and assented to by party to whom it was rendered.

Statement rendered does not constitute an account stated unless it is intended to be such, and is expressly or impliedly assented to as such by party to whom it is rendered.

4. Evidence ⚷=271(9)—Buyer's statement as to ownership without presence of seller held inadmissible on seller's third party claim in attachment.

Statements by buyer of farm equipment under option, to effect that he considered himself owner thereof, made without presence of seller or any of its officers or agents, *held* not evidence for consideration on third party claim by seller after seizure thereof by sheriff under writ of attachment; such statements being nothing more, at most, than extrajudicial conclusions.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Suit by the American Fruit Growers, Inc., of California, against Calvin E. Jackson, also known as C. E. Jackson, and another. Judgment for defendants, and plaintiff appeals. Reversed.

Superseding opinion in 258 P. 642.

W. H. Wadsworth, J. N. Owen, and Bordwell & Mathews, all of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus and Fred Forgy, all of Santa Ana, for respondents.

PRESTON, J. This is a suit by plaintiff corporation against the defendant Calvin E. Jackson, as sheriff of Orange county, defendant Fidelity & Deposit Company of Maryland being also included as surety on his official bond. The cause of action is for conversion of personal property, known as farm equipment, after plaintiff had made third party claim therefor in the regular way. The sheriff justified his seizure and detention of the property by virtue of a writ of attachment in his hands sued out in an action wherein the Irvine Company was plaintiff and H. J. Osborne was defendant. In other words, the property was seized by the sheriff under the said writ of attachment as the property of said Osborne. The court made findings against the claim of this plaintiff thereto, except as to three head of live stock found to be of the value of $240, giving plaintiff judgment only for this amount, with a small sum as damages for their detention. Plaintiff has appealed from the whole of the judgment and is here insisting that the findings, denying its claim to said property, are as a matter of law unsupported by the evidence.

[1] We heartily concur with plaintiff in this contention. The learned judges of the District Court of Appeal were not unanimously in accord in the case. Their majority opinion held the findings properly supported, while Mr. Justice pro tem. Walter Perry Johnson, dissenting in an elaborate but learned and convincing opinion, held the evidence insufficient to support said findings. We would adopt this dissenting opinion were it not for the fact that we think the case does not merit such elaborate consideration. We shall, however, quote from it the following:

"Osborne leased from the Irvine Company certain farm lands which had previously been under lease to Roy D. Trapp, who had died. Part of the assets of Trapp's estate consisted of the equipment in question, which plaintiff purchased in September, 1920, for $10,000. Under date of September 1, 1920, plaintiff and Osborne entered into their agreement whereby, among other things, plaintiff agreed to let Osborne have the use of this equipment in his farming operations, and to advance him also such money as he might need for his crops; and Osborne in turn agreed to deliver his vegetables to plaintiff for sale on commission. The agreement further gave Osborne an option until July 1, 1921, to purchase the equipment at the cost price to plaintiff.

"Osborne continued his farming operations until the time of the Irvine Company's attachment in February, 1922, but did not at any time expressly or affirmatively exercise his option to purchase the equipment from plaintiff, nor did he ever receive a bill of sale or its equivalent. No transfer of title to the equipment took place by any overt act of the parties, nor was there any outward circumstance evidencing such transfer. The contention of the defendants is, however, that a change of ownership was brought about by reason of the fact that plaintiff sent Osborne certain transcripts from plaintiff's books of account, and on receipt of those transcripts Osborne remained silent.

"From these facts it is concluded not only that there was an exercise of the option by Osborne, but that, without payment of a single dollar, the title to ten thousand dollars worth of plaintiff's property was forthwith bestowed on Osborne and placed at the disposal of his creditors."

From September 1, 1920, to February 18, 1921, the option account and the vegetable account were kept separate. On the latter day a Mr. Fogg, sent to California by plaintiff's parent company, directed plaintiff, without the knowledge or co-operation of Osborne, to combine the two accounts, giving in writing an explanation as follows:

"To combine accts. This is purely a suspense item but transferred to Osborne's acct. for the purpose of showing at all times amount of money invested in A F G in this project."

Mr. Fogg himself testified:

> "I wanted this information in a concrete form to guide me in making my advances for this corporation."

At the time these two accounts were consolidated, Osborne was indebted to plaintiff for advances in his farming operations in the sum of $9,702.91. On March 17th following, plaintiff rendered a statement to Osborne, containing the item last above mentioned, together with certain additional advances, and then appeared the following: "Trapp Estate equip. $10,000.00." With said item added the debit balance was at said time $21,340.41. Another statement was rendered on April 30, 1921, showing a less balance, to wit, $16,888.28. On July 15, 1921, another statement showed a balance of $15,112.42. On December 8, 1921, another statement was rendered showing an increased balance, to wit, $21,752.41. On February 14, 1922, a reduced balance of $18,871.52 was shown. Following the last-mentioned debit balance said attachment was levied.

It will be seen from this account that Osborne was continuously in arrears on his vegetable account and was in no position to buy said equipment. To this evidence must be added the extrajudicial statements of witnesses Breckenridge and Cogan, the secretary-treasurer and assistant superintendent, respectively, of the Irvine Company, to the effect that Osborne said to them that he owned the property, or, as Mr. Cogan put it, that he "considered himself" to be the owner of said property.

[2] In considering whether this evidence is sufficient to support the findings, it is necessary to keep in mind the fact that the defendant sheriff is not occupying the position of a purchaser or incumbrancer for value. He could at most take under the writ of attachment only such rights in said property as Osborne had. The transaction is to be viewed as though the suit were by plaintiff in this action against the said Osborne as defendant. In this connection it may be observed that neither plaintiff nor said Osborne claim the exercise of the said option, or that a sale of said equipment was made. Plaintiff denies all intention of selling or delivering constructively or otherwise said property to said Osborne. Likewise said Osborne admits that he never thought he had any interest in the property and never claimed to own it, as he never had exercised the option to purchase it.

[3] It appears from the statements of counsel that the court below decided that the rendition of these statements from time to time to Osborne constituted an account stated between plaintiff and said Osborne, and for this reason it was effective to pass the title; but this position apparently is not seriously insisted upon in this court, for it is clear that a statement rendered cannot be said to be an account stated unless it is intended to be such and expressly or impliedly is assented to as such by the party to whom it is rendered. There is in the case before us no element of finality, as the parties were still transacting business. These statements were sent periodically and business was continued between them as before. There is no ground whatever for the contention that the account was rendered and intended to be an account stated, or that said Osborne, either expressly or impliedly, considered that it was such. Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 254, 146 P. 692; Richmond D. Co. v. Atchison, etc., Ry. Co., 31 Cal. App. 399, 160 P. 862.

But it is earnestly insisted that these statements, when taken in connection with the declarations of Osborne, constituted enough evidence to warrant a finding that Osborne had exercised the option made and provided for in said contract of September 1, 1920, reading as follows:

> "The shipper hereby agrees to give to the grower an option to purchase the farming equipment on said ranch at invoice price, as shown by inventory when purchased from the Roy D. Trapp estate; said option expires July 1, 1921."

This option not only requires that it be exercised by a certain date, but, if exercised, it would have to be followed by some evidence of sale thereunder. Inasmuch as neither of the parties contend that the option was ever exercised or that there was ever perfected any sale thereunder or at all, we fail to see how these statements can be held sufficient evidence of a sale.

[4] The statements attributed to Osborne, made without the presence of plaintiff or any of its officers or agents, are clearly not evidence that can be considered in this case for any purpose whatsoever, being nothing more at most than extrajudicial conclusions. The case of Wilson v. Hotchkiss, 171 Cal. 617, 154 P. 1, L. R. A. 1916F, 389, Ann. Cas. 1917B, 570, is relied upon as authority for the admissibility in evidence of such declarations, but that case is clearly not in point. The action there was one by the assignee of a seller against the buyer, wherein it was contended that the seller had tendered to the buyer certain personal property, with the intention of passing title thereto to him. The declarations of the buyer that he owned the property would be admissible as declarations against his own interest in such case. Where the action is between the alleged seller and a third party, the hearsay statement of the alleged buyer that he has purchased the property constitutes no evidence of a sale as against the absent seller.

Judgment reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

SIMONTON et al. v. LOS ANGELES TRUST & SAVINGS BANK et al. (L. A. 8916.)★

Supreme Court of California. March 30, 1928.

Hearing Granted in Bank April 26, 1928.

1. Executors and administrators 🔑315(6)—Decree of distribution held not conclusive of remaindermen's right to establish community character of property retained by widow.

Decree of distribution of probate court *held* not conclusive and binding as respected right of remaindermen under will of deceased to establish community character of property retained by widow acting as executrix.

2. Appeal and error 🔑1097(1)—Decision of Supreme Court on former appeal settles law of case.

Decision of Supreme Court on former appeal must, in subsequent trial, be accepted as settling the law of the case.

3. Husband and wife 🔑274(1)—Remaindermen under father's will filing objections to distribution in widow's estate on mistaken theory were not precluded from equitable action to recover community property (Civ. Code, § 1386, subd. 8).

Where children of testator's former husband claimed entire interest in certain shares of stock as her heirs, under Civ. Code, § 1386, subd. 8, without claim of one-half interest therein as remaindermen under father's will, they were not thereby precluded from obtaining relief in equitable action as to one-half interest as community property as remaindermen in separate equitable action because of having filed objections to petition of distribution.

4. Husband and wife 🔑262(1)—Property acquired during coverture is presumed to be community in character (Civ. Code, §§ 164, 325).

Property acquired during coverture is presumed to be community in character, as, under Civ. Code, § 164, presumption of gift does not arise from mere fact that title was held in name of wife; section 325 relative to transfer of corporate stock by married woman not being intended to change rule declared in former section specifically relating to husband and wife.

5. Husband and wife 🔑264—Evidence held insufficient to sustain finding that property claimed by remaindermen under deceased's will was separate property of widow.

In action to establish right of remaindermen as equitable owners to property claimed to constitute community property of deceased and widow, evidence *held* insufficient to sustain finding that property involved was separate property of the widow, either as acquired with funds constituting her separate estate or because acquired after marriage by devise, bequest, or gift from husband or any other person.

6. Trusts 🔑102(2)—Legatees under husband's will could recover property withheld by widow acting as executrix without showing that she acted fraudulently.

Remaindermen under father's will, in order to recover community property, need not show that widow acting as executrix fraudulently withheld it, knowing it to be community property, since it was immaterial whether she withheld it fraudulently or under mistaken belief that it was her separate property.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by J. G. Simonton and others against the Los Angeles Trust & Savings Bank, as executors of the last will of Jane Simonton, and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Stewart & Stewart, of Los Angeles, for appellants.

Overton, Lyman & Plumb and George W. Prince, Jr., all of Los Angeles, for respondents.

SEAWELL, J. This is an appeal from a judgment in favor of the defendants in an equitable action to establish the plaintiffs as equitable owners of certain property which was distributed in the estate of Jane Simonton, deceased, to defendants herein, other than defendant Los Angeles Trust & Savings Bank, under a provision of the last will of said decedent directing the distribution of the residue of her estate to her "heirs at law as provided by the laws of succession for the state of California." Plaintiff J. G. Simonton is the son of George W. Simonton, predeceased husband of Jane Simonton, by a former marriage, and the other plaintiffs are the children of a predeceased son of said George W. Simonton by said former marriage.

The facts pertinent to the present appeal are stated in Estate of Simonton, 183 Cal. 53, 190 P. 442, and in Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368, wherein this court held that the complaint herein stated a cause of action as to the one-half interest in the shares of corporate stock here sued for in which plaintiffs' rights, if any they had, were as remaindermen under the will of George W. Simonton, deceased. In reversing the order sustaining defendants' demurrer to the complaint for insufficiency of the facts alleged to constitute a cause of action, it was held that the failure of a wife who is acting as executrix of her husband's estate to inventory and account for community property of said husband and herself, through fraud or mistake, constitutes grounds for equitable relief in an action brought by the heirs or devisees of the decedent, as owners in equity of the property. It was further held that the proceedings in the estate of Jane Simonton (183 Cal. 53, 190 P. 442) did not estop plaintiffs herein from establishing the community character of the one-half interest in the shares of stock herein involved, in which their rights were as remaindermen under the will of George W. Simonton.

★Superseded by opinion, 270 P. 672.

[1, 2] Notwithstanding our statement of the law in the opinion in volume 192 of the reports, at page 651 (221 P. 368), the court below declared in its findings and conclusions of law and in the judgment:

> "That the decree of the above-entitled court in said estate proceedings [decree of distribution of probate court in estate of Jane Simonton] is still in full force and effect, and is conclusive and binding upon plaintiffs herein and upon each of them to the effect that all of the property upon which plaintiffs seek to impress a trust in their favor was the separate property of Jane Simonton at the time of the death of George Simonton, and to the further effect that defendants other than defendant Los Angeles Trust & Savings Bank are the owners thereof."

It clearly appears that the court in finding that the property was separate in character attributed a conclusive effect to the decree of distribution. In so doing it was in error. The decision in Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 658, must be accepted as settling the law of the case.

[3] Defendants (respondents) further contend that plaintiffs are estopped from obtaining relief as to the one-half interest as remaindermen in the instant action for the reason that they sought relief as to said one-half by objections filed in the estate of Jane Simonton to the petition for distribution to said defendants. As pointed out in the opinion filed upon the reversal of the order sustaining the demurrer to the complaint (192 Cal. 651, 221 P. 658), the probate court in the estate of Jane Simonton had no power to determine disputes as to title to property between the estate of Jane Simonton, deceased, or heirs and devisees of said decedent, and strangers, which plaintiffs herein must be deemed to be as to the remainder in one-half of the community property dependent upon the termination of the life estate in Jane Simonton, which was devised to them by the will of George W. Simonton. If plaintiffs had any claim to said one-half interest in said property it was adverse to the estate, and the probate court in the estate of Jane Simonton could not have taken cognizance of said claim and distributed said one-half interest to plaintiffs upon the theory that Jane Simonton during her life was a constructive trustee for plaintiffs of said estate in remainder because of her fraud or mistake incident to the proceedings for the probate of the estate of her husband. Although plaintiffs upon their objections filed to the petition for distribution in the estate of Jane Simonton claimed the entire interest in the shares of stock here involved as heirs of Jane Simonton under the provisions of subdivision 8 of section 1386, Civil Code, and did not claim a one-half interest as remaindermen, the proof showed that an interest in fee in one-half of the community property never vested in the wife, but that in said one-half interest she received only a life interest with remainder to the plaintiffs, with the result that plaintiffs could have no rights in said one-half as her heirs. The mere circumstance that plaintiffs claimed the entire interest rather than one-half as heirs of the wife, did not authorize the court in the estate of Jane Simonton to ignore the proof and adjudge the rights of plaintiffs as if the entire interest in the property vested in Jane upon the death of her husband, and from an examination of the portions of the record in said estate proceedings introduced herein it cannot be said that the court assumed to so act. The fact that plaintiffs misapprehended their remedy as to said one-half interest in seeking relief upon objections filed to the petition for distribution and sought relief upon a theory of the facts which the proof did not substantiate, would not estop them from later maintaining a separate equitable action appropriate to the facts actually existing. South San Bernardino Land & Improvement Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 P. 699.

We cannot agree with defendants' argument that, irrespective of the effect of the antecedent proceedings as a bar to the proof of the community character of the property herein involved, the judgment in their favor must be affirmed because plaintiffs failed in the instant case to establish the community character of the property. On the contrary, we are of the view that the evidence is insufficient, as a matter of law, to sustain findings that the property was the separate property of Jane Simonton.

[4] Plaintiffs, in establishing the community character of the property, are aided by the presumption that property acquired during coverture is presumed to be community in character and by the rule that a presumption of gift does not arise from the mere fact that title is held in the name of the wife. Section 164, Civ. Code; Nilson v. Sarment, 153 Cal. 524, 96 P. 315, 126 Am. St. Rep. 91; Rowe v. Hibernia Savings & Loan Society, 134 Cal. 403, 66 P. 569; Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St. Rep. 361; Morgan v. Lones, 78 Cal. 58, 20 P. 248; 5 Cal. Jur. 314, note 14. These principles were not altered by the 1889 amendment to section 164, Civil Code, except as to real property conveyed to the wife. Stafford v. Martinoni, 192 Cal. 724, 221 P. 919. Section 325, Civil Code, providing that "shares of stock in corporation standing on the books of the corporation in the name of a married woman may be transferred by her, her agent or attorney, without the signature of her husband, and in the same manner as if such married woman were a feme sole," which section is found in a chapter of the Code relating to corporate stock, was not intended to change the rules declared in section 164, in a chapter of the Code spe-

cifically relating to husband and wife, in controversies between the husband and wife or those who claim in the right of either upon the death of one of the spouses, but was intended for the protection of third parties relying upon the appearance of title in the wife.

The evidence relating to the acquisition of property by either of the spouses is extremely meager. Jeremiah Leiter, a brother of Jane Simonton, testified that he thought his sister had "some money" when she married because she was always working as a seamstress and teacher and she was economical; that between 1877 and 1882 she received $2,500 from the estate of her father of which the witness was administrator; that he could not say what she did with the money, but he thought she invested it in stocks; that he could not say what was the source of the money with which the stocks here involved were purchased, and that after marriage she received a small legacy, between $100 and $300, from the estate of her sister. This witness and Esther Simonton, the widow of a son of George W. Simonton, testified that George W. Simonton taught school in Vallejo at the time of his marriage with Jane and for several years thereafter, and later moved to Los Angeles, where he owned a vineyard and for many years was business manager for a Mrs. Hollenbeck in an enterprise the nature of which is not stated. Esther Simonton stated that George W. Simonton owned several lots in Vallejo, on one of which was his home, at the time of his marriage. The property accounted for by Jane Simonton as executrix of the estate of her husband was appraised at $13,428.33. The stocks here sued for were appraised at $10,023 in a stipulation filed by the parties herein, in which they adopted the valuation placed upon the said stock by the appraisers of the estate of Jane Simonton.

[5] This evidence and the additional circumstance that the shares were issued in the name of the wife during coverture or are the proceeds of shares so issued is all the record contains on the subject. We deem it insufficient to prove that the property herein involved was separate property of Jane Simonton because acquired with funds constituting her separate estate, or because acquired by her after marriage by devise, bequest, or gift from her husband or any other person.

[6] If the said property is shown to be community property it is not necessary that plaintiffs show that Jane Simonton fraudulently withheld it knowing it to be community property. It matters not whether she withheld it fraudulently or under the mistaken belief that it was her separate property. The legal effect is the same in either case. Estate of Simonton, supra; Simonton v. Los Angeles Trust & Savings Bank, supra.

This is the third time this cause has been before us on appeal in one form or another. The case is returned to the superior court for the sole purpose of determining the character of the omitted property in the light of the evidence that may be adduced and the rules of law applicable to the case. The character of the alleged omitted property, claimed to be community property, has not been, as the trial court seemed to hold, conclusively established by the judgment or decree of the court in any of the other proceedings mentioned.

The judgment appealed from is reversed.

We concur: CURTIS, J.; PRESTON, J.

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203 Cal. 772

MILLER v. PRICE et al. (L. A. 10217.)

Supreme Court of California. April 2, 1928.

1. Appeal and error 🔑607(1)—Court cannot settle transcript for use in lieu of bill of exceptions after appellant failed to give statutory notice (Code Civ. Proc. § 953a).

Where no notice was given to clerk of lower court to prepare transcript to be used in lieu of bill of exceptions under Code Civ. Proc. § 953a, and appellant was not relieved from default in that regard, court could not settle and certify to correctness of such transcript if subsequently prepared and presented.

2. Appeal and error 🔑607(1)—Judgment roll and notice of appeal may be considered by Supreme Court as record on appeal if transcript is filed in time, and notice to prepare transcript is not required (Code Civ. Proc. §§ 950, 953a).

Judgment roll and notice of appeal may be considered by Supreme Court as record on appeal if transcript is filed in time, and they may be furnished to Supreme Court under Code Civ. Proc. § 950, when properly certified to by clerk of lower court, no notice to clerk to prepare transcript being required, since they formed no part of record to be prepared under section 953a, except where judgment appealed from is not included in judgment roll otherwise prepared.

3. Appeal and error 🔑544(3)—Judgment roll is sufficient record to review rulings appearing thereon and sufficiency of pleadings and findings to support judgment.

Judgment roll is sufficient record for review of all rulings which appear thereon and of sufficiency of pleadings and findings to support judgment.

4. Appeal and error 🔑635(3)—When judgment roll is before court, appeal will not be dismissed for absence of record of testimony (Code Civ. Proc. § 953a).

When judgment roll is properly before court, appeal will not be dismissed because of absence of record of testimony prepared under Code Civ. Proc. § 953a.

5. Appeal and error ⚷627(2)—Appeal held not dismissed for delay in filing transcript which was filed on day notice of motion to dismiss was given (Supreme Court Rules 2, 5).

Appeal will not be dismissed for failure to file transcript of record within time provided by rule 2 of Supreme Court, where no great delay resulted and transcript was filed on day notice of motion to dismiss was given, since there was substantial compliance with rule 5 providing that if transcript is on file when notice of motion to dismiss is given, such fact shall be sufficient answer to motion, in absence of showing whether transcript or notice of motion was filed first.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Lorin L. Miller against W. C. Price and another. Judgment for defendants, and plaintiff appeals. On motion to dismiss. Motion denied.

L. C. Woods, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondents.

WASTE, C. J. Respondents move to dismiss the appeal from the judgment on the ground that no transcript of the record, certified to be correct by the clerk of the court below, or the attorneys, has been filed here within the time required by rule 2 of this court, and that no proceeding, either for the settlement of a bill of exceptions, or for the preparation of a transcript under the provisions of section 953a of the Code of Civil Procedure, is pending or may yet be instituted.

Judgment for the defendants on the pleadings was given and filed July 1, 1927. It was docketed and entered July 8, and the judgment roll was made up on that day. Notice of entry of judgment was served on plaintiff and filed July 11. A notice of appeal was filed September 6. From the clerk's certificate, and the affidavit offered in support of the motion to dismiss, it appears that a proposed bill of exceptions was served by plaintiff on the defendants on October 6, 1927, and delivered to the clerk on October 7. It has never been settled, and no order has been made giving or granting appellant additional time in which to prepare, serve and file a proposed bill, and no other proceedings appear to have been instituted to obtain one. In a counter affidavit made and filed by counsel for appellant in opposition to the motion to dismiss, the affiant asserts that no document purporting to be a proposed bill of exceptions was ever delivered to the clerk. We may therefore conclude that, if there was any attempt to present a record on appeal by means of a bill of exceptions, it has been abandoned.

[1] No notice was given to the clerk of the lower court to prepare a transcript to be used in lieu of a bill of exceptions, as provided in section 953a of the Code of Civil Procedure, and it does not appear that appellant has been relieved from his default in that regard. Consequently, the court could not now settle and certify to the correctness of any such transcript should one be prepared and presented. Spear v. Monroe, 181 Cal. 728, 186 P. 149; Brown v. Superior Court, 175 Cal. 141, 165 P. 429; Crocker v. Crocker, 76 Cal. App. 606, 608, 235 P. 438.

[2] But there was filed here on October 24, 1927, what purports to be a transcript on appeal, consisting of copies of the judgment roll, notice of motion to strike out portions of the complaint, notice of motion by the defendants for judgment on the pleadings, notice of entry of judgment, notice of motion for a new trial and notice of appeal. The copies are certified in the usual manner by the clerk of the trial court to be correct. A judgment roll and the notice of appeal may be considered by this court as a record on appeal, if the transcript was filed in time. No notice to the clerk to prepare transcript is required to bring them here. They form no part of the record to be prepared under section 953a, except in a case in which the judgment, order or decree appealed from be not included in a judgment roll otherwise prepared. On an appeal from a judgment, the judgment roll and the notice of appeal are properly furnished to this court under section 950 of the code, when properly certified by the clerk of the lower court. Ramsay v. Rodgers, 189 Cal. 100, 102, 207 P. 516. The decision of the court in Spear v. Monroe, supra, seems to imply a different rule, but a present examination of the record shows that what was said in the opinion should apply only to the record to be prepared under section 953a. Dyer Law & Collection Co. v. Salisbury, 17 Cal. App. 393, 119 P. 947, in so far as it holds that in the absence of the filing of a notice and request, as provided by section 953a, no duty devolves upon the clerk to prepare, authenticate and send up the judgment roll, is overruled.

[3, 4] A judgment roll is a sufficient record for the review of all rulings which appear thereon, and of the sufficiency of the pleadings and findings to support the judgment. Ramsay v. Rodgers, supra. When one is properly before the court, the appeal will not be dismissed because of the absence of a record of the testimony prepared under section 953a. Locke-Paddon v. Locke-Paddon, 194 Cal. 73, 77, 227 P. 715.

[5] Every indicia points to the fact that this appellant did not attempt to proceed under the provisions of section 953a, and that his appeal falls within that part of rule 2 of this court which provides that the appellant in a civil action "shall within forty days after an appeal is perfected" serve and file

the printed transcript of the record. The notice of appeal was timely filed, on September 6, 1927, within 60 days after the entry of judgment. The transcript was not filed here until October 24. Under rule 2 of this court is should have been filed within 40 days after the appeal was perfected. Dating from the filing of the notice of appeal, it was filed 8 days late. Appellant's counsel says in an affidavit, filed in opposition to the motion to dismiss, that he made an arrangement with others to prepare the transcript on appeal and have it certified by the clerk, and to "file the same within the time provided by law." His showing is weak; but no great delay has resulted. The transcript was filed in this court the day notice of the motion to dismiss was given. Rule 5 provides that if the transcript, though not filed within the time prescribed, be on file at the time notice to dismiss is given, that fact shall be a sufficient answer to the motion. Whether the transcript or the notice of motion was filed first does not appear, but there was, at the least, a substantial compliance with the rule. See Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 P. 686.

The motion to dismiss appeal is denied.

We concur: CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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203 Cal. 724

HUTTON et al. v. YOLO ORCHARD CO. et al. (two cases). (Sac. 3837.)★

Supreme Court of California. March 28, 1928.

Rehearing Denied April 26, 1928.

1. Boundaries ⟹14—Deeds describing lots as running to bank of creek established boundary as bank and not center of creek.

Deeds describing lots conveyed as to bank of creek, relating and referring to each other in such manner as to give rise to conclusion that grantor had configuration of official map in mind and also that lots were to run back uniformly, *held* to establish boundary of lots conveyed as bank and not center of creek, in accordance with legal significance assigned to such phrase when found in conveyances.

2. Boundaries ⟹14—Express limitation of lots to bank of stream furnished controlling monument, preventing application of law extending boundary to middle of stream (Civ. Code, § 830; Code Civ. Proc. § 2077, subd. 4).

Express intent shown in deed establishing boundary of lots bordering on creek as bank rather than center of creek furnished a controlling monument, which prevented application of Civ. Code § 830, and Code Civ. Proc. § 2077, subd. 4, so as to extend boundary of lots thus conveyed to middle or thread of stream.

3. Damages ⟹188(1)—Evidence held to sustain finding that plaintiffs suing to quiet title and for damages for removal of sand and gravel had sustained damages of $4,000.

In action to quiet title to land and for damages for removal of sand and gravel therefrom, evidence *held* sufficient to sustain findings and judgment of lower court to effect that plaintiffs had sustained damages in the sum of $4,000.

In Bank.

Appeals from Superior Court, Yolo County; W. A. Anderson, Judge.

Actions by J. A. D. Hutton and others and by Mary E. Hutton, as administratrix of J. A. D. Hutton, deceased, and others, against the Yolo Orchard Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Superseding opinion in District Court of Appeal, 258 P. 96.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellants.

E. B. Mering, of San Francisco, and Hurst & Hurst, of Woodland, for respondents.

RICHARDS, J. The plaintiffs commenced this action in the year 1915 to quiet their title to certain lands and premises in the town of Cacheville, county of Yolo, state of California, lying in and along the bed of a stream known as Cache creek and between the center or water line of said stream and the easterly bank thereof. The plaintiffs also, and in a second count, joined by way of supplemental complaint, have set forth an action for damages against the defendants, alleging that the latter had without right removed certain sand and gravel from the lands in question to their damage in the sum of $25,000. The defendants in their answer to the plaintiffs' second amended complaint deny that the plaintiffs' predecessor was or that the plaintiffs or any of them are the owners of the premises in question, or are entitled to the possession thereof or any portion thereof; and deny that the claim of the defendants and each of them to said lands is without any right, but on the other hand allege that the defendants have an interest in the premises, which interest, however, the defendants' pleadings do not disclose.

Answering the plaintiffs' complaint of damages, the defendants and each of them deny that they have wrongfully or otherwise entered upon said premises and taken therefrom large or any quantities of sand and gravel to the damage of the plaintiffs or any of them in any sum whatever; or that they are now continuing so to do. It is to be observed from the foregoing pleadings that the defendants rely upon the weakness of the plaintiffs' title and right of possession to the premises in question to defeat their recovery upon both causes of action, and that beyond the very general statement that they have an

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★Rehearing denied.

interest in said premises do not affirmatively set forth any paramount title or interest in themselves or any of them.

The issue thus presented to the trial court for decision was as to whether the plaintiffs had shown a sufficiently strong chain of title or right of possession to defeat the defendants, treated as trespassers in possession, or to recover damages for such trespass. The trial court resolved this issue in favor of certain of the plaintiffs and rendered judgment in favor of such of them as it found to be the owners and entitled to the possession of the portion of the lands and premises to which these sought to have their title quieted, and also gave its judgment in favor of these for damages for the wrongful removal of certain quantities of sand and gravel therefrom by the defendants to the damage of said plaintiffs in the sum of $4,000. From this judgment the defendants affected thereby have appealed and upon their appeal present the sole contention that the findings and judgment of the trial court as to said plaintiffs' title and possession to the premises to which they are given recovery are not sustained by the evidence, but are contrary thereto; and also that the findings and judgment of the trial court as to the damages for which the plaintiffs are given recovery are not supported by the evidence, but are contrary thereto.

We are thus brought to an inquiry as to the sources and strength or weakness of the title of the respondents herein to the portion of the premises for which they were awarded judgment, and as to the right of these to recover damages or the amount of damages which they were awarded by the trial court. The chain of title to said premises upon which the respondents herein rely had its origin in a deed dated February 4, 1857, wherein and whereby James M. Harbin et al., grantors, conveyed and confirmed unto James A. Hutton, grantee, a tract of land in the county of Yolo, containing about 316 acres, upon a portion of which the townsite of Cacheville was thereafter to be located. By a deed bearing date the same day James A. Hutton purported to give a quitclaim deed to James M. Harbin of a half interest in 40 acres of land included within said larger tract, whereupon and coincident therewith said Harbin executed to said Hutton a mortgage covering said 40 acres of land to secure the payment of the sum of $857. In the deed from Hutton to Harbin and also in the latter's mortgage back, the east boundary line of the 40 acres thus conveyed and incumbered was described as "thence south of east 18 degrees, one hundred rods to the middle of the bed of Cache creek, thence down said creek east of north 18 degrees sixty rods," etc. It is upon the 40-acre tract involved in these two transactions that the townsite of Cacheville was to be located, if in fact it had not already been located, since the conveyance to Harbin expressly reserved "any and all lots or parcels of land on which any building or buildings I now own may stand, the size and dimensions of which lots or parcels of land to be regulated and fixed by and in accordance with the map or plan of a townplat hereafter to be mutually made by said Hutton and myself in the laying off of a town upon said land and when so laid off these lots by their number and description of block, street, etc., which shall have any such building or buildings on, are by this deed reserved and are not hereby conveyed." This quitclaim deed from Hutton to Harbin of an undivided one-half interest in this 40-acre tract of land has certain other peculiarities which have been much discussed upon this appeal. One of these consists in the fact that said deed, though purporting to have been signed by Hutton as the grantor thereof, was not acknowledged by him but was acknowledged by Harbin, the grantee thereof, and in such a state was recorded. Under the statute concerning conveyances as it read at the time this deed bears date (Compiled Laws of California, §§ 1–3, p. 513), the acknowledgment of a conveyance was a necessary part of the conveyance itself, in the absence of which it may well be questioned whether this instrument had any validity whatever. It is argued, however, by the appellants that the defect in this conveyance due to the failure of the grantor to acknowledge the same was cured by one or more of the curative statutes relating to instruments defectively acknowledged, and particularly by the provisions of section 1207 of the Civil Code relating to instruments defective as to their acknowledgment prior to a certain date. The District Court of Appeal devoted considerable space to the discussion of these conflicting contentions as to the validity of this quitclaim deed, but we do not deem it profitable to pursue the subject further than to state that we agree with the conclusion of that tribunal that whether or not Harbin got any title by that conveyance is quite immaterial, since there is no party to this action claiming under Harbin, who apparently passed out of the picture of this townsite more than sixty years ago, during most of which time the plaintiffs' predecessor was in the exclusive possession of said townsite, except as to those lots therein which he had conveyed to others. It is the terms and especially the descriptions of these later conveyances which are the chief concern upon this appeal.

[1, 2] The townsite of Cacheville as it was laid out in the year 1857 lay along the westerly bank of Cache creek, and a tier of lots in what appear from the map then made to be blocks 2 and 3 thereof ran back from First street toward that stream. The bed of this creek between the bank and the center thereof lying back of these lots forms the subject of controversy in this action, although the defendants herein do not claim to have succeeded to the title of any of these lot owners. On October 10, 1857, James A. Hutton

and James M. Harbin granted and conveyed to one T. F. W. Price the whole of fractional block No. 3 in said town of Cacheville, "being 300 feet on First street and running back on Sacramento and Clay streets to the Bank of Cache creek containing five (5) lots of sixty (60) feet front each." On May 1, 1857, said Hutton and Harbin granted and conveyed to one Philo L. Dustin a lot designated on the official map or plat of said town of Cacheville as "the south half of lot number four (4) in fractional block number two (2) lying 30 feet frontage on First street and running back 150 feet." On May 13, 1857, said Hutton conveyed to Hollenbeck and Noel a certain lot "being in the town of Cacheville and known and designated on the official plat of said town of Cacheville as lot number five (5) in fractional block number two (2), lying sixty feet front on First street and running back one hundred and fifty feet." On September 4, 1857, said Hutton alone conveyed to Selig and Hyman "lot number two (2) in block number two (2) as laid down and delineated on the plat of the town of Cacheville which lot contains sixty feet front on First street and back easterly to the bank of Cache creek, and is bounded on the north by lot number three (3) of the same block, east by Cache creek, south by lot number one (1) of the same block." In October 18, 1858, said Hutton conveyed to one Ferguson "lot three (3), block two (2) of the town of Cacheville as laid down on the official map of said town, containing sixty feet front on First street and running back about 150 feet to the bank of Cache creek, bounded north by Dustin, east by the bank of Cache creek, south by Hyman and west by First street." On February 9, 1860, said Hutton conveyed to one William Campbell those certain premises "commencing at the southeast corner of the junction of Clay and First streets in the town of Cacheville, thence running southerly with the direction of said First street 300 feet; thence easterly to the western bank of Cache creek; thence northerly with the western bank of said Cache creek 300 feet to the south boundary line of Clay street; thence westerly to the place of beginning." On July 18, 1862, said Hutton conveyed to one Moran "lot number one (1) in block number two (2) being sixty feet front on First street and running back one hundred and fifty feet on Sacramento street as laid down on the official map of said town of Cacheville." On August 12, 1867, said Hutton conveyed to Charles S. White et al. those certain premises described as "lot number two in said town of Cacheville; also a strip of land 39 feet 8 inches wide across the whole length of the north side of lot number one (1) in block number two (2) of said town."

It is to be noted that these several conveyances refer directly or impliedly to the official map of the town of Cacheville. When that ancient map and the several unofficial tracings of which were offered in evidence are examined, it will be seen that in all of these Cache creek is delineated both as to its center and as to its banks and that upon the westerly bank of said creek the lots to which the foregoing conveyances relate are laid out, and that as thus originally laid out they each ran not to the center but to the bank of said stream. It is also to be noted as a most significant coincidence that the descriptions of several of the lots thus conveyed relate and refer to each other in a way which leads to the almost irresistible conclusion that the grantor of these not only had the configuration of the official map itself in mind in their description, but that he also had in mind the idea that these lots were to run back uniformly; and thus the phrasing "to the bank of Cache creek" is to be given application to each of said lots so conveyed, and is also to be given its natural significance, viz., that the rear boundary of each and all of these lots was to be "the bank" and not "the center" of Cache creek. This natural significance happens also to be the legal significance which the authorities assign to this phrase when found in conveyances. 4 Am. and Eng. Enc. of Law (2d Ed.) p. 830, and cases cited; Fulton v. New York, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307; 9 Corpus Juris, § 5. The appellants, however, contend that they are entitled to the application of section 830 of the Civil Code and also of subdivision 4 of section 2077 of the Code of Civil Procedure to the descriptions contained in these several conveyances and which would extend the eastern boundary of each of the lots thus conveyed to the middle or thread of the stream. The difficulty in the way of the application of these code sections to the facts of this case lies in the fact that the grant in each instance herein shows, as we have seen, a different intent, viz., the intent that the boundary of these lots bordering on Cache creek should not be the stream but the bank of the stream, and that such express intent on the part of the grantor in each case furnishes a controlling monument which prevents the application of the foregoing provisions of the codes. Hostetter v. L. A. Terminal Ry. Co., 108 Cal. 38, 41 P. 330.

While there is considerable evidence in the record tending to show that the predecessor of the plaintiffs and respondents herein for many years prior to the institution of this action maintained possession of the premises here in dispute and exercised such acts of use and ownership therein and thereover as the nature and character of this portion of the gravel bed of Cache creek reasonably afforded, the trial court made no special finding upon this subject and we do not, therefore, deem it necessary to discuss the sufficiency of such evidence to support such a finding if the same had been made.

[3] Upon the question of damages the appellants herein contend that the findings of the trial court as to the amount of damages to

which the respondents herein were entitled to judgment are entirely too general and amount to mere speculation for which the evidence in the case furnishes no adequate support. An examination of the record, however, discloses that the parties to the action and the trial court each went exhaustively into the matter as to how much gravel had been removed by the appellants from the portion of the bed of Cache creek over which the plaintiffs have successfully asserted ownership and that the trial judge made a personal inspection of the situation during the trial of the cause. Under these conditions we are unable to hold that there was not sufficient evidence to uphold the findings and judgment of the court as to the amount of damages which these respondents have sustained and which amounted to only a modicum of the amount of damages which the plaintiffs in their supplemental complaint asserted as the result of the defendants' unlawful acts.

The judgment is therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

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203 Cal. 680

FRANKLIN v. SOUTHERN PAC. CO.★

(Sac. 4068.)

Supreme Court of California. March 27, 1928.

Rehearing Denied April 26, 1928.

1. Carriers 🔑397½—"Red cap" service without extra charge held not gratuitous, but covered by fare paid for transportation, in action for porter's negligence.

In action against railroad for loss of personal property by "red cap" who was servant of defendant, services of such servant *held* not gratuitous, but covered by fare paid for transportation, though no extra charge was made.

2. Carriers 🔑404—Railroad's liability for porter's loss of plaintiff's property as plaintiff was about to board train held to be that of common carrier, and not of warehouseman, since baggage was in interstate commerce.

Railroad's liability for loss of plaintiff's personal property by red cap employed by such railroad *held* to be that of common carrier, and not of warehouseman, where plaintiff at time of delivery of property to porter possessed railway ticket and was about to board train, since such facts put baggage in interstate commerce.

3. Carriers 🔑108, 145—Carrier is liable as insurer for losses by accident or mistake and as bailee for losses by default or negligence.

Common carrier has two distinct liabilities: One for losses by accident or mistake, where he is liable by custom of realm or common law as insurer; the other for losses by default or negligence, where he is answerable as ordinary bailee.

4. Carriers 🔑150—Tariff curtailing carrier's liability for negligence is void.

Tariff having for its object curtailment of carrier's liability as bailee for losses occasioned by its negligence is absolutely void.

5. Carriers 🔑150—Carrier may limit liability for negligence by contract with shipper, where charges are graduated according to value of property.

Carrier may in effect curtail liability for negligence by special contract with shipper, where charges are graduated according to value of property as fixed by shipper, he having at all times privilege of securing full coverage by paying stipulated charge for such protection.

6. Carriers 🔑405(1)—Carrier held liable for full value of plaintiff's baggage lost by porter as plaintiff was about to board train notwithstanding tariff limitation of liability.

Carrier *held* liable for full value of personal property belonging to plaintiff lost by "red cap," employed by carrier, as plaintiff was about to board train, notwithstanding tariff providing that liability on hand baggage handled by red cap porters was limited to $25.

7. Carriers 🔑405(1)—Tariff limiting railroad's liability on hand baggage handled by red cap porters held ineffective to limit such liability.

Tariff limiting railroad's liability for loss of hand baggage handled by red cap porters to $25 *held* not to affect its liability, since carrier's contracts against liability for its negligence are invalid even though filed with Interstate Commerce Commission.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action to recover the value of personal property lost in transit, brought by Nelita Franklin against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal in 256 P. 214.

Henley C. Booth, of San Francisco, and Levinsky & Jones, of Stockton, for appellant.

Nutter, Hancock & Rutherford and Arthur P. Hayne, all of Stockton, for respondent.

PRESTON, J. This record presents certain complex questions of law controlled by federal decisions. The facts, however, are not in dispute and appear from the judgment roll to be substantially as follows: On June 26, 1925, plaintiff below was the holder of a passenger ticket entitling her to transportation in interstate commerce over defendant's railway system from the city of Lodi, state of California, to the city of Fairhope, state of Alabama, which journey required a change of cars of San Francisco. On said day she embarked on her trip and duly arrived at San Francisco with two pieces of hand baggage, with contents of the value, as found by the court, of $800. This baggage was of the type

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★Rehearing denied.

customarily taken by passengers on board trains for personal use. After plaintiff's arrival at San Francisco and later on the same day when she was about to re-embark upon her journey towards Alabama, she handed her baggage to a porter of defendant, known familiarly as a "red cap," with instructions to redeliver same to her on board the train. The baggage was never redelivered to her, but was lost through the negligence of this servant of defendant. Plaintiff below had judgment for the full amount, and defendant appealed.

Appellant urges that any judgment in excess of $25 was erroneous. Respondent, however, insists that no error is shown by the record and that full liability existed. The case is important both to the railway company and to the traveling public. The principal finding upon which respondent relies for relief is as follows:

> "That when plaintiff was about to embark in the train of defendant in the city and county of San Francisco in the course of her said journey toward Alabama, one of said red cap porters of defendant, acting in the course of his duty as aforesaid, took from plaintiff the said suitcase and said hand bag with their contents, to return the same to plaintiff on said train after plaintiff had embarked therein as such passenger. That while said employee of defendant had said suitcase and said hand bag in his custody, he so negligently and carelessly kept, cared for, and carried said property of plaintiff that the same was lost, and neither the defendant nor any employee of defendant nor any one at all have ever returned said property to plaintiff, either on the train of defendant after plaintiff had entered same or at any other time or place, and plaintiff has never recovered possession of said property or any part thereof."

Appellant, however, chiefly relies upon finding V, which is as follows:

> "That on the 26th day of January, 1925, there was on file, and had been on file ever since the 1st day of September, 1922, with the Interstate Commerce Commission of the United States, and the Railroad Commission of the State of California, that certain tariff known and described as Western Baggage Tariff No. 8, I. C. C. No. 12, which said tariff was filed, issued, and became effective, and was in due and legal force and effect ever since said 1st day of September, 1922, in accordance with the laws of the United States, and with the rules and regulations of the Interstate Commerce Commission of the United States, in such case made and provided. That said tariff, among other things, therein provided, in rule 10 thereof, the following provision and limitation: 'Rule 10. Where red cap porter service is provided, hand baggage will be handled without charge by red cap porters to and from trains of Southern Pacific Company. Liability upon hand baggage handled by red cap porters will be limited to $25.00.'"

[1] The contract to transport respondent admittedly imposed upon appellant the duty of transporting the hand baggage or luggage in question. In considering federal decisions care must be used lest confusion result. The first important consideration at the outset is: Were the services of the porter tendered to and accepted by respondent gratuitous? We think that clearly they were not. Plaintiff paid the full price for her transportation with the knowledge, presumptive or actual, that this service was part of the consideration entering into the purchase. The fact that it might or could be dispensed with did not make it gratuitous. Porter service of all kinds might be withheld, but the answer to this proposition is that good business principles doubtless require it in order to get and retain patronage. This service must be held to have been covered by the fare paid for the transportation. Herbert v. Shanley Co., 242 U. S. 591, 37 S. Ct. 232, 61 L. Ed. 511; Cannon v. Fargo, 222 N. Y. 321, 118 N. E. 796; Great Western Ry. Co. v. Bunch, 13 App. Cas. 31, 5 Eng. Ruling Cases 471.

This holding makes inapplicable such cases as Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742. In said case plaintiff, while riding upon a pass, was held chargeable upon the terms upon which his free transportation was based. The rule of slight care and liability only for gross negligence likewise is not in this case. This makes inapplicable also such California cases as Davis v. Nat. Lbr. Co., 22 Cal. App. 111, 133 P. 509, and Northwestern, etc., Ass'n v. Pacific Co., 187 Cal. 38, 200 P. 934.

[2] The next question which arises is: When did the liability, if any, of the appellant attach, and was it that of a common carrier or that of a warehouseman? We think clearly its liability was that of a common carrier. The train upon which respondent was to be transported, along with her baggage, was about to depart and the purpose of the presence of the porter was to facilitate her entry thereon for the mutual advantage of both the railway company and herself. It cannot be seriously disputed that these facts put the baggage of respondent in interstate commerce and the liability of the carrier began then, it being admitted that respondent was at the time of such delivery to the porter in possession of a railway ticket and then and there about to go aboard the train. The authorities throwing light upon this point are as follows:

Michie on Carriers, vol. 4, §§ 3448 and 3450, where it is said:

> "The liability of a railroad company as insurers of luggage commences from the moment when it is placed under the control of one of their authorized employees for the purpose of putting it in transit. The acceptance of baggage for transportation by the employee of the carrier at the station of another company where the carrier receives passengers for carriage, imposes upon the carrier the obligation of a common carrier. And a steamship engaged in carrying passengers and their baggage from one port to another is responsible to a passen-

ger for the injury to the contents of a trunk by its falling into the water while being carried from a wharf on board the vessel by persons in the employment of the managers of the vessel. * * * To make a carrier liable for baggage delivered to it, it must be delivered and accepted for transportation within a reasonable time before departure of the train. The passenger has the right to deliver his baggage to the carrier such time before the starting of the train upon which he intends to take passage as may be reasonably necessary for obtaining a ticket and checking the baggage. From the time delivery is thus made, the carrier will be responsible for its safety, as a common carrier."

Lovell v. London, Chatham, etc., Ry. Co., 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 R. & C. T. Cas. lxix, 3 R. & C. T. Cas. xx, is a case very similar to the one before us, except for the fact that the passenger there was about to purchase a ticket but had not actually done so. It is there said by Blackburn, J.:

> "The plaintiff, intending to be a passenger, makes a mistake as to the time of her train, thinking that it started at 2:50, while as a fact, it started twenty minutes later. On arriving at the station, the porter said to her that there was no train to Broadstairs at 2:50. She asked him when the next train was, and he replied at 3:13. The luggage was then taken down from the cab, and the porter said he would label the luggage if she would get her ticket. She asked when the booking office would be open, and was told in a few minutes. She therefore went to it and found it was not then open, but it was opened two minutes afterwards, she then got her ticket, went to the porter who had taken her luggage to label it, and discovered that the dispatch box was missing. The question is, had the porter received the luggage as the servant of the company and at the commencement of the journey. I think that he had. I do not see how any railway company could carry on its business as a carrier of passengers if this is not to be considered as the beginning of the journey."

And it was there said by Lush, J.:

> "I own that I think this is a very plain case. A passenger arrives at the station just before the time when she expects her train to start for Broadstairs. She was, however, mistaken in the hour of the departure of the train. A porter comes up to the cab. 'Am I in time for the 2:50 train?' she asks. 'There is no such train,' he replies, 'but there is one at 3:13.' 'Can I get my ticket?' she inquires. 'Yes, in a few minutes,' is the answer, and then while she goes to take her ticket, the porter takes the luggage away to label it. She therefore did not go for the purpose of leaving her luggage at the station, but intending to go by the train, and the luggage was delivered in the ordinary way to the servants of the company not to be kept, but for the very purpose for which people go with luggage to railway stations, that is to say, to have it labeled and put in the train. Under these circumstances, I have no doubt that the company are liable for its loss."

Hutchinson on Carriers, vol. 3 (3d Ed.) p. 1524, § 1281, states:

> "The passenger has the right to deliver his baggage to the carrier such time before the starting of the train upon which he intends to take passage as may be reasonably necessary for obtaining a ticket and checking the baggage. From the time delivery is thus made, the carrier will be responsible for its safety as a common carrier."

We therefore can accord no weight or strength to the position of appellant denying liability for full value, because, as expressed by it, "the hand baggage was not received for transportation and was not being handled by defendant as a common carrier," and the act of the porter was "the tender of a non-common carrier service which was furnished without charge."

[3] We next approach the rules of law which govern the liability of carriers of baggage and freight. The common-law liability of such carriers has a dual aspect—the liability practically as insurer and its liability for negligence on the part of itself or its servants. This principle is expressed in 5 R. C. L. p. 187, § 803, as follows:

> "A common carrier has in truth two distinct liabilities; the one for losses by accident or mistake, where he is liable by the custom of the realm or the common law as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee."

[4] Appellant's liability, if any, as an insurer is not before us, as the finding of negligence is specific. In so far as the negligence of the carrier or its servants is concerned, it seems to be everywhere conceded that, generally speaking, under the common law, a tariff having for its object the curtailment of this liability is absolutely void. As early as the case of Railroad Co. v. Lockwood, 17 Wall. (84 U. S.) 357, 381, 21 L. Ed. 627, it is said:

> "Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary."

The above statement was approved in Bank of Kentucky v. Adams, 93 U. S. 174, 181, 23 L. Ed. 872.

In other types of bailment, we find the same rule. In the case of Patterson v. Wenatchee Canning Co., 59 Wash. 556, 110 P. 379, it is said:

> "It is well settled that a bailee may by contract exempt himself from liability except for his own fraud or negligence."

In Pilson v. Tip-top Auto Co., 67 Or. 528, 136 P. 642, it is said:

> "It is the better rule that a bailee for hire cannot by contract so limit his responsibility to the bailor as not to be liable for his own negligence or the negligence of his agents and servants."

Northwestern Mutual Fire Ass'n v. Pacific Co., 187 Cal. 38, 41, 200 P. 934, 936:

> "The general rule that a depositary or bailee for hire in the course of his ordinary business cannot relieve himself by contract or notice from responding in damages for loss arising from his own negligence or that of his agents or servants may be conceded"—citing Railroad Co. v. Lockwood, supra, and other cases.

The same rule also applies to contracts by telegraph companies attempting to exempt themselves from negligence, except on the conditions of reduced rates. Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883. The rule applies to warehousemen. Cleveland, etc. v. Dettlebach, 239 U. S. 588, 36 S. Ct. 177, 60 L. Ed. 453.

[5] This doctrine, as regards carriers, has undergone a few changes to modernize it, but only one qualification thereof touches the situation before us and that is that what amounts to a limitation of liability may be made by special contract with the shipper where the charges are graduated according to the value of the property as fixed by the shipper, he having at all times the privilege of securing full coverage by paying the stipulated charge for such protection. This qualification of the rule appears to rest upon the doctrine of estoppel. It is found as early as the case of Hart v. Penn. R. R. Co., 112 U. S. 331, 340, 5 S. Ct. 151, 28 L. Ed. 717. It was followed in Kansas So. Ry. v. Carl, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683, where it is said:

> "A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability."

In Cincinnati, etc., Co. v. Rankin, 241 U. S. 319, 327, 36 S. Ct. 555, 558 (60 L. Ed. 1022), it is said:

> "Under our former opinions the settled doctrine is that where alternate rates fairly based upon valuation are offered a railroad may limit its liability by special contract. Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 283 [35 S. Ct. 351, 59 L. Ed. 576]. The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

In Boston & Maine R. R. Co v. Piper, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, we find the following language:

> "In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier."

In the case of Union Pac. R. R. Co. v. Burke, 255 U. S. 317, 321, 41 S. Ct. 283, 284 (65 L. Ed. 656), we find the following:

> "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 [5 S. Ct. 151, 28 L. Ed. 717] and 246 U. S. 439, 444 [38 S. Ct. 354, 62 L. Ed. 820], supra), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where 'the rate was tied to the release.'"

The cases of Boston & Maine v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, and Galveston, etc., Ry. Co. v. Woodbury, 254 U. S. 357, 41 S. Ct. 114, 65 L. Ed. 301, are not at variance with these last two mentioned cases as the shipper there was given a choice of rates. These cases harmonize because the Interstate Commerce Act (49 USCA § 1 et seq.; Comp. St. § 8563 et seq.) adopts the common-law rule as modified by a tariff allowing a choice of rates.

Appellant relieves the court of much labor in making the following frank statement:

> "We freely admit, and have never denied, that if this were a case of the loss of baggage checked from one state to another and we were defending on the basis of a clause in a tariff which provided that 150 pounds of baggage might be checked free on each full fare ticket and that the liability of the carrier in the event of loss or damage to such baggage should in no case exceed the sum of $100, and if it were further shown that the tariff gave the passenger no option or privilege of declaring a higher value and paying an additional amount in consideration of the railroad company assuming the obligation of paying loss at such declared value, we would have no defense at all."

We are also indebted to appellant for the further concession as follows:

> "It also was undoubtedly the common law, as restated by section 20 of the Interstate Commerce Act [49 USCA § 20; Comp. St. § 8592], that a common carrier could not contract against the consequences of its own negligence, and it cannot do so today except indirectly, as is pointed out in the Burke Case, by a valuation agreement where a choice of rates is given."

[6] Our problem then becomes reduced to this question: Is there any difference between the case at bar and the case of liability of the carrier for checked baggage in a case where no graduated scale of valuation is allowed by the tariff? We have already seen that the articles in question were mov-

ing in interstate commerce at the time they were lost and that the liability of the carrier as such for the loss in some amount had attached thereto. We can think of no reason why there should be any difference between baggage in the custody of a porter as a servant of the carrier, and lost through his negligence, and baggage in the custody of a baggageman, likewise a servant of the carrier, and lost through his negligence. It seems clear on principle that the case before us is the same as though the baggage had been tendered for checking and lost in the process of checking or the shipper had been denied the right to secure full protection and had been given no alternative but to accept the limited valuation against negligence placed thereon by the carrier, which, as above shown, is illegal from its inception. This is not a case of joint control with the passenger nor a case where the passenger's conduct or negligence in any way contributed to the loss. It is a clear case of loss by negligence where the control was exclusively in the carrier, who had allowed no opportunity to the shipper to secure better protection from loss or damage.

"With regard to hand baggage, the question of the duty and liability of the carrier seems ordinarily to depend upon who has the custody or control of the baggage. If the passenger has entire control and custody to the exclusion of the carrier, then the carrier cannot be held as an insurer, and will not be liable at all, unless guilty of negligence which results in its loss or damage, in the absence of contributory negligence on the part of the passenger. The element of the degree of control respectively exercised by the passenger and the carrier enters largely into the decisions in the American cases; and the degree of liability varies with the degree of possession." 5 R. C. L. § 795, p. 176.

The case of Great Western Ry. Co. v. Bunch, supra, treats of both hand baggage and checked baggage, and is for that reason directly in point. There a porter labeled two articles of respondent and took all the luggage to the platform, the train not then being at said platform. Respondent told the porter she wished the bag put into a carriage with her and asked if it would be safe to leave it with him. It would be quite safe, he assured her, and he promised to take care of the luggage and put it into the train. She then went to get her ticket. Ten minutes after she had left the luggage she and her husband returned together to the platform and found that the two labeled articles had been put into the van of the train, but that the porter and the bag had disappeared. The court said:

"If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van or hand-luggage, they received, for carriage to Bath, all the luggage of the passenger; they received the van luggage to be put into the van; they received the hand luggage to be put into the passenger carriage; and I think the learned judge was entitled to infer that their practice, and therefore their contract, in receiving hand luggage, was to put it into the passenger carriage, or if the railway company did not then bring up the train to the platform, to take care of it until the carriage was drawn up and in a position to receive the hand luggage, which, in my view, the porter, as the agent of the railway company, had accepted and received for that purpose. * * *

"Further, it was contended that the contract as regards van luggage is altogether distinct and different from the contract as regards hand luggage; that, in fact, there are two separate contracts, and that whatever may be the case as regards van luggage, railway companies come under no liability of any sort as regards hand luggage until it is placed in the passenger's carriage.

"I cannot think this view correct. The services rendered by railway porters in receiving passengers' luggage, in taking it to the platform, and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to afford. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from, or relates back to, the commencement of the journey; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely."

[7] No strength is added to appellant's position because of the filing of this kind of a tariff with the Interstate Commerce Commission. As stated in Boston, etc., R. R. Co. v. Piper, supra:

"While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact."

As said in Roberts Federal Liabilities of Carriers, vol. 1, § 330a, pp. 578, 579:

"Contracts of shipment in contravention of the settled principles of the common law preventing the carrier from contracting against liability for loss or damage resulting from his own negligence, are invalid. The fact that such contracts have been filed with the Interstate Commerce Commission does not modify this rule."

Appellant cites many cases, however, to the effect that limitations may be made or authorized with respect to liability for baggage and that these regulations, when made, have the force of a statute and can only be overthrown by application in the manner required by law to the Interstate Commerce Commission. But these cases must be held inapplicable to agreements or contracts which undertake to provide in advance against the consequences of negligence of the carrier in violation of the common-law rule.

"Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception." Union Pac. R. R. Co. v. Burke, supra, at pages 322, 323, 41 S. Ct. 285 (65 L. Ed. 656).

This rule has been consistently applied in all the other federal jurisdictions. A. C. Lawrence Leather Co. v. Compagnie Generale Transatlantique (D. C.) 12 F. (2d) 83; Id. (C. C. A.) 18 F. (2d) 930; Toyo Kisen Kabushiki Kaisha v. Willits & Co. (C. C. A.) 17 F. (2d) 762, 764. This position we understand appellant to concede.

These views render it unnecessary to give consideration to the contention of respondent that the limitation contained in the tariff with reference to red cap porter service does not purport, as a matter of construction, to be a provision attempting to limit its liability for negligence of itself or its porters. We have treated it as an express attempt to limit liability for loss due to its own negligence. If it does not mean this, then, of course, all the more reason exists for upholding the judgment of the court below.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

203 Cal. 766

JOHNSTON et al. v. KITCHIN. (L. A. 8278.)★

Supreme Court of California. April 2, 1928.

Rehearing Denied with Modifications May 2, 1928.

1. Executors and administrators ⚷383—Decree of court having jurisdiction to sell interest of estate may not be invalidated by errors in exercising jurisdiction.

Where administrator's notices of sale of interest of estate in hotel property were regular and petition for confirmation was sufficient so that court had jurisdiction, no errors in exercise of jurisdiction would render court's decree void.

2. Trusts ⚷110—In suit to establish trust, evidence sustained finding that administrator's sale to defendant was not fraudulently procured.

In action by heirs brought against tenant in common with deceased in hotel property to establish trust, evidence *held* sufficient to sustain finding and judgment that sale of estate's property to defendant was not procured by fraud.

3. Appeal and error ⚷1010(1)—Findings may not be disturbed unless reviewing court can say as matter of law that they are wholly unsupported.

Unless reviewing court is able to say as a matter of law that the findings and judgment of the trial court are wholly without evidentiary support, findings and decision may not be disturbed.

4. Partnership ⚷9(1)—Tenants in common of hotel property, one of whom managed property as other's agent accounting for half of net profits, held not partners.

Persons owning hotel property as tenants in common, one of whom acted as manager, collecting and receipting for rents and paying other cotenant half of net profits after deducting expenses, *held* not partners.

5. Executors and administrators ⚷375—Surviving cotenant, who managed property as deceased's agent, held not required to disclose their joint affairs to court to procure confirmation of sale to him of deceased's interest (Code Civ. Proc. § 1524).

Tenant in common, on death of cotenant holding undivided interest in hotel property, *held* not required to inform court and administrator as to management of hotel and as to condition of affairs resulting from joint ownership, to procure confirmation of sale to him of deceased's interest under Code Civ. Proc. § 1524, relative to disclosure by surviving partner as to personal property.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Charles Johnston and others against George W. Kitchin. Judgment for defendant was reversed by the District Court of Appeal (259 P. 102). On hearing after judgment. Judgment of superior court affirmed, and opinion of District Court of Appeal superseded.

Bicksler, Smith & Parke, Marshall Stimson, and Noel C. Edwards, all of Los Angeles, for appellants.

Anderson & Anderson, of Los Angeles, for respondent.

SEAWELL, J. This cause is before us on an order of transfer to this court after decision by the District Court of Appeal, First Appellate District, Division 1.

The cause was taken over by us for the reason that we were not in accord with that portion of the decision which held that a copartnership existed between David S. John-

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★Rehearing denied.

ston, the decedent, and defendant, George W. Kitchin, as to the ownership of the real property in suit. We are of the opinion that section 1524, Code of Civil Procedure (which has to do solely with personal property) and other Code sections relied upon by appellants, which prescribe the procedure for sale of partnership interests belonging to estates and the duty of the court or judges in such matters, are not applicable to the present case. It was on the assumption that the ownership of the property created a partnership relation, and that the purchaser, who was held to be the surviving partner of the decedent, had not, contrary to his bounden duty, acquainted the representative of the estate and the court with full information as to all the facts within his knowledge "from which a sound judgment as to the value of the interest of the estate" might be gained, that the reversal of the trial court was placed. On all other questions of fact, including fraud alleged to have been practiced upon the heirs of the decedent by a public officer, an attorney at law, and the defendant, acting in furtherance of a conspiracy to acquire the real property in suit at an inadequate price and by unfair methods, the findings of the trial court were sustained.

[1] That portion of the opinion appended below is a correct statement of the facts, except in the single particular noted in the matter contained within brackets, and of the law of the case, and is adopted by us as a part of our opinion with respect to the subjects therein considered. It follows:

"An action to have a trust declared as to an interest in certain real property purchased by the defendant from the estate of David S. Johnston, deceased.

"The property, which consists of lots 15 and 16 in block 1 of Wiltshire Boulevard Tract, in Los Angeles county, was acquired by the deceased and the defendant in the year 1910, and in 1911 was improved by the erection thereon of a four-story brick apartment hotel, known as the Hotel Shoreham.

"David S. Johnston died intestate in Los Angeles county on November 18, 1919, and at the time of his death the property was incumbered by a mortgage originally executed for $35,000, but of which $5,000 had been paid, and the time for the payment of the balance extended to December 28, 1921.

"None of the heirs of the deceased resided in California, and on December 17, 1919, letters of administration on the estate were granted to the public administrator of Los Angeles county.

"An inventory and appraisement of the estate was filed on January 23, 1920, from which it appears that the deceased, in addition to his interest in the hotel, the appraised value of which was $40,000, owned other real and personal property, the total appraised value of the estate being $59,801.80.

"Thereafter, on January 28, 1920, the administrator caused to be posted and published, in accordance with the provisions of the statute, a notice that the interest of the estate in the hotel property would be sold at private sale to the highest and best bidder for cash, subject to confirmation by the court.

"The defendant, who so far as shown was the only bidder, agreed to assume and pay the proportionate part of the mortgage chargeable to the estate, viz., $15,000, and in addition to pay the estate, the sum of $21,000, a total of $36,000, this sum being 90 per cent. of the appraised value of the interest of the estate in the hotel.

"It was alleged in the petition for confirmation that the sale would be for the best interest of the estate and was necessary in order to pay claims, and, further, that the amount bid by the defendant was fair and reasonable and not disproportionate to the value of the interest sold.

"The notices of sale were regular and the petition sufficient to give the court jurisdiction, and no errors in its exercise would render the decree void. Burris v. Kennedy, 108 Cal. 331, 41 P. 458; Estate of Bette, 171 Cal. 583, 153 P. 949; Estate of Spriggs, 20 Cal. 121.

"After a hearing, which was duly noticed, the sale was confirmed to the defendant on March 3, 1920, following which a deed was executed by the public administrator.

"Upon the petition of plaintiff Charles Johnston, who was a brother of the deceased, the letters granted to the public administrator were revoked on March 9, 1920, and letters of administration were duly issued to the petitioner.

"The complaint alleged, with respect to the hotel: 'That at the time said property was acquired said David S. Johnston and G. W. Kitchin were and had been for some time past partners, and during the years of 1910 and 1911 as partners they erected the building on the above described property known as the "Hotel Shoreham," and that from the date that they acquired the property until the death of said David S. Johnston they were partners in the ownership and conduct of the business connected with the above described property and the Hotel Shoreham, and that the defendant, George W. Kitchin, managed the affairs of the partnership, collected the rents, and paid all of the charges and attended to all of the business of the partnership, giving to the said David S. Johnston monthly statements of account,' these allegations not being denied by the answer. [Before any allegation is made in said second amended complaint as to a partnership relation existing between decedent and defendant, Kitchin, it is alleged specifically that at the time of the death of decedent and for a long time prior thereto defendant, Kitchin, and decedent was each the 'owner of an undivided one-half interest in and to' the property in suit.]

"It was also averred that by a fraudulent arrangement between the public administrator and the defendant the fact that the sale proceedings were pending was concealed from the heirs and their attorneys; that the defendant, to induce the public administrator to institute the proceedings and procure the decree mentioned, represented to the latter that in the event the sale was not made it was his intention to bring suit for a partition of the property, falsely represented the terms of the mortgage thereon, that there would be difficulty in renewing the same, that the hotel was in need of repairs, that the lessee in possession was in default in the payment of rent, and that the lease was about to expire; that the public administrator, influenced by the defendant, made no effort to procure higher bids, and that the price paid to the knowledge of both was less than the reasonable market value of the interest sold; that the public administrator, induced by the representations of the defendant as to the value and condition of the property, falsely represented to the court that the sale was necessary in order to pay claims, was for the best interests of the estate, and that the amount bid by the defendant was fair and reasonable.

"The allegations of fraud were denied, and all the allegations of the complaint, with the exception of those admitted by the answer, were found by the trial court to be untrue, and upon its findings judgment was entered for the defendant.

"The plaintiffs appealed, and urge as grounds for reversal that the facts shown by the evidence and those admitted sustain their contention that the conduct of the defendant was actually and constructively fraudulent, and that the findings and judgment are unsupported.

"Without reviewing in detail the evidence in support of the allegations of a fraudulent arrangement between the defendant and the public administrator, a concealment by the latter of the fact that the proceedings were pending, and a failure to use due diligence in the matter of obtaining higher bids, it will be sufficient to say that the findings of the trial court on these issues were fully sustained, as was also the finding against the allegation that the administrator fraudulently misrepresented the value of the hotel property and the condition of the estate to the probate court.

"It was testified by the defendant that it was his intention in the event he was unable to purchase the interest of the estate in the hotel to bring suit for a partition, and that he so stated to the administrator; that he further stated that both the mortgage and the lease had something over a year to run; that the hotel could not be again leased without repairs; and that the rent had previously been in arrears, but that subsequently the payments were made.

"The evidence shows that certain repairs were necessary, and that with the exception of the statements as to the date of the maturity of the mortgage and that there would be difficulty in renewing the same, the other representations were substantially true."

[2, 3] We agree with the District Court of Appeal in its conclusion that the evidence is sufficient to sustain the judgment that the sale was not fraudulently procured, and that the statutes providing for the sale of real estate where the property is not owned in copartnership were fully observed. The trial court's findings upon the disputed questions of fact which are urged upon this appeal for reversal by us have been finally disposed of by said trial court, and unless we are able to say as a matter of law that the findings and judgment are wholly without evidentiary support, we are not permitted under the law to disturb either. That we cannot say.

[4] No fiduciary copartnership relation existed between the decedent and his cotenant in the real property in suit. Neither were they copartners in conducting any sort of business. They were simply tenants in common in the ownership of the city lots described in the complaint, and the necessary repairs and rentals were but incidents of ownership. Their relationship was no whit different from the ownership of leased farm lands held by tenants in common. One of the tenants in common as the agent of the other was the manager, collecting and receipting for rents and attending to such matters as are incidental to the ownership of property. After all expenses were deducted he paid to the other one-half of the net profits. That was far from making them copartners in the ownership of said real property. As above remarked, the rentals were but the usual incidents that follow the ownership of real property. After decedent's death the rentals, of course, continued automatically to accrue. They were collected generally by the administrator, who, after deducting current expenses, paid one-half of the residue to defendant. No copartnership business was offered for sale or could have been sold, as none existed. The matter of collecting the rentals and managing the affairs appertaining to the building was not regarded by either administrator, court or defendant or any one else as a copartnership affair, as the administrator was in full charge of the management of the estate throughout.

[5] As to the point that the defendant was bound, as a surviving partner, to inform the court and administrator as to all the affairs of the copartnership, and, further, that it was the duty of the court to examine him if in the county and able to be present in court (Code Civ. Proc. § 1524), the public administrator was fully informed as to the title by which the decedent and defendant owned said real property, as is shown by the returns and reports made to the administrator and by him to the court. Aside from the record, there is other evidence that he had knowledge of the nature of the tenure by which both owners held. It was practically impossible that either he or the court could have administered the estate without full knowledge of everything affecting the value of said real property, the title to which was a public record. What secret, may we ask, could be suppressed that would or could affect the value of a commercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public? We know of none and think in a practical sense none can exist.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; PRESTON, J.; SHENK, J.

203 Cal. 782

PEOPLE v. MOUSE. (Cr. 3070.)

Supreme Court of California. April 6, 1928.

1. Criminal law 🔑97(4)—United States has exclusive jurisdiction to punish offenses committed in places over which jurisdiction has been expressly ceded.

United States government has exclusive jurisdiction to punish criminal offenses committed in places over which such exclusive jurisdiction has been expressly ceded by the state Legislature.

2. Criminal law 🔑97(4)—United States had exclusive jurisdiction of offense committed on grounds and property of National Home for Disabled Volunteer Soldiers (Const. U. S. art. I, § 8; St. 1897, p. 51).

Under Const. U. S. art. 1, § 8, granting exclusive jurisdiction over criminal offenses to United States as to forts, arsenals, and needful buildings purchased by consent of state Legislature, and St. 1897, p. 51, ceding to United States exclusive jurisdiction over all lands within state occupied by federal government for military purposes, the United States had exclusive jurisdiction of criminal offense committed on grounds and property of National Home for Disabled Volunteer Soldiers, a corporation formed and existing under laws of the United States, since nature of institution, purpose for which and manner in which it was maintained, and mode in which it was governed conclusively established exclusive use for military purposes.

3. Criminal law 🔑97(4)—That deed to property used exclusively for military purposes runs to public corporation held immaterial, as respected exclusive jurisdiction of United States.

The fact that deed to property runs to National Home for Disabled Volunteer Soldiers, a public corporation, is immaterial, as respected exclusive jurisdiction of United States of offenses committed thereon, on ground it was used exclusively for military purposes, where grantee was a governmental agency brought into being for purpose of maintaining a governmental institution.

4. United States 🔑3—United States' consent to cession of exclusive jurisdiction over lands used for military purposes will be presumed (St. 1897, p. 51).

Consent of United States to cession to it of exclusive jurisdiction over lands used for military purposes, pursuant to St. 1897, p. 51, will be presumed.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

William M. Mouse was convicted of an infamous crime against nature, and he appeals. Reversed and remanded for a new trial as to one count, and reversed, with directions as to other count. Superseding 259 P. 762.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

PRESTON, J. Defendant was convicted of two felonies of the same class on verdicts simultaneously rendered. Judgment was imposed upon him for both offenses; the sentences, under section 669 of the Penal Code, would run consecutively. He then moved for a new trial and in arrest of judgment, both of which motions were denied, and he has appealed from said judgments and from the orders denying his said motions.

The record presents solely the question of state jurisdiction over the offenses charged. Admittedly one of them, and a fair construction of the evidence shows that the other also, was committed upon the grounds and property in Los Angeles county known as the National Home for Disabled Volunteer Soldiers, at Sawtelle, Cal. Deeds to the property were admitted in evidence, naming the grantee as the "National Home for Disabled Volunteer Soldiers, a corporation formed and now existing under the laws of the United States." The nature of this institution and the manner in which it is governed, maintained, and supported may be well described in the language of the case of Sinks v. Reese, 19 Ohio St. 306, 313, 314, 2 Am. Rep. 397:

"And first, as to the character, in law, of the institution. It was established under and in conformity to the provisions of the act of the Congress of the United States of March 21, 1866, entitled 'An act to amend an act entitled an act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States.'

"The first three sections of the act [24 USCA §§ 71, 73, 74] provide for 'an establishment for the care and relief of the disabled volunteers of the United States army, to be known by the name and style of the national asylum for disabled volunteer solders,' with a board of managers, consisting of the President of the United States, Secretary of War, Chief Justice of the United States, for the time being, together with nine others, no two of whom shall be residents of the same state, to be appointed by joint resolution of the two houses of Congress, to have perpetual succession, with power to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations for carrying on the business and government of the asylum, and affix penalties thereto. The fourth section [24 USCA § 77] confers power on the board of managers to procure sites and to have necessary buildings erected thereon of sufficient capacity to accommodate the persons to be provided for. The fifth section [24 USCA § 111] appropriates various forfeited and unclaimed funds in the treasury of the United States to the support of the asylum, and authorizes the acceptance of donations for its benefit. The ninth section [24 USCA § 137] provides: 'That all inmates of the asylum shall be, and they are hereby, made subject to the rules and articles of war, and will be governed thereby, in the same manner as if they were in the army of the United States.' And the thirteenth and last section [Comp. St. § 9282] provides: 'That Congress may at any time hereafter alter, amend, or repeal this act.'"

[1] Exclusive jurisdiction in the United States to punish criminal offenses exists in at least two classes of cases, to wit: First, offenses committed in "all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Article 1, § 8, Constitution of the United States. And, second, offenses committed in places over which exclusive jurisdiction has been expressly ceded by the state Legislature. U. S. v. Tucker (D. C.) 122 F. 518. This subject has had consideration by the United States Circuit Court of Appeals in the very recent case of Williams v. Arlington Hotel Co., 22 F.(2d) 669, 670, where in our opinion it is completely covered as follows:

> "We think the trial court was in error under the authority of the three so-called Leavenworth reservation cases (Ft. Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 5 S. Ct. 1005, 29 L. Ed. 270, and Benson v. United States, 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991). In the first of these cases, Mr. Justice Field sets out that there are three ways in which the United States can acquire or hold land within the limits of a state. The first of these ways is in accordance with article 1, § 8, of the Constitution, where a cession is made by the state of the land for governmental purposes defined in that section; the second is by purchase or condemnation of land belonging to a private party; the third is by having public land at the time of the admission of the state into the union. The opinion declares that the manner of acquiring the land has controlling effect upon the political control and the sovereign jurisdiction of the government. The rule is that, if the cession is made under the above provision of the Constitution, the jurisdiction of the United States is exclusive; that, if the land is acquired or held in any other way, the United States holds merely as a proprietor and the jurisdiction of the state is complete, except that it cannot interfere with the use of the land for governmental purposes; that, if the land is not acquired under the above constitutional provision, the state may cede such jurisdiction as it sees fit to the government and that the extent of the jurisdiction of the government depends upon the terms of such cession."

See, also, People v. Hillman, 246 N. Y. 467, 159 N. E. 400, 402.

If, then, the offenses here charged were committed on property of the United States being used for "forts, magazines, arsenals, dockyards," or "other needful buildings," such property was under the exclusive jurisdiction of the United States under said provision of the United States Constitution above set forth. It has been expressly decided that a soldiers' home of the type here found is such "needful building." Sinks v. Reese, supra, at pages 313, 319, 2 Am. Rep. 397. See, also, Foley v. Shriver, 81 Va. 568; Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, and section 451, subd. 3, tit. 18, U. S. Code Annotated.

This statement, of course, presupposes the consent of the state Legislature, which in California, if not previously given, was certainly conferred by the act of 1897 (Stats. 1897, p. 51), which reads:

> "Section 1: The state of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this state now held, occupied, or reserved by the government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands. This act shall take effect immediately."

[2-4] But under the rule above announced we are not required to rely wholly upon the contention that this institution is a "needful building," for under the California statute above quoted exclusive jurisdiction has been ceded to the United States over all grounds being used for military purposes. If, then, the institution in question, or the grounds in connection therewith, is being used either as a "needful building" within the meaning of said section of the Constitution of the United States, or is being used for military purposes within the meaning of said act of the state of California, jurisdiction of the United States is exclusive.

We think the nature of the institution, the purpose for which and the manner in which it is maintained, and the mode in which it is governed leaves no doubt that its use is exclusively for military purposes. The fact that the deed to the property on which it stands runs to the grantee public corporation is of no significance as the said corporation is a governmental agency brought into being for the purpose of maintaining a governmental institution. Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. Ed. 699; Overholser v. National Home, 68 Ohio St. 236, 67 N. E. 487, 62 L. R. A. 936, 96 Am. St. Rep. 658.

The consent of the United States to the cession to it of exclusive jurisdiction over these lands will be presumed. Ft. Leavenworth R. R. Co. v. Lowe, supra, at page 528 (5 S. Ct. 995, 29 L. Ed. 264); U. S. v. Watkins (D. C.) 22 F.(2d) 437, 440.

Our attention has been directed to the case of In re Kelly (C. C. A.) 71 F. 545, a district court opinion, where, it is contended, a different holding is found. In a large measure this statement is correct, but it is also true that the legislative authority of the state of Wisconsin did not make it plain that exclusive jurisdiction had been ceded to the government, the phrase in that act being, "That jurisdiction over the several tracts of land hereinafter mentioned be and hereby is ceded to the United States * * *"; but no words are found indicating that the cession was exclusive. This fact is relied upon in part by the court in that case, and greatly weakens the previous statements made therein which are opposed to the views here set forth. But by virtue of the express approval of the Supreme Court of the United States of the case of Sinks v. Reese, supra, in the case of Ft. Leavenworth R. R. Co. v. Lowe, supra, and by reason of the plain facts of this case, we are satisfied to follow the holding made in other cases and not that made in the case of In re Kelly, supra.

Judgment reversed, and cause remanded for a new trial as to count 2, and with directions to dismiss count 1.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

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203 Cal. 776

AUCKLAND v. CONLIN et al. (L. A. 8946.)

Supreme Court of California. April 3, 1928.

1. Fraud ⚷27—Complaint to recover attorney's fees, alleging attorney's father recommended attorney and stated plaintiff would lose property without counsel, stated no cause of action against father.

Complaint seeking recovery of money paid as attorney's fees against attorney and his father, alleging father recommended his son as attorney at a time when plaintiff was seeking to employ one of that profession, and that he stated that it was his opinion that plaintiff would lose her property if she did not have legal counsel, *held* insufficient to state a cause of action as against father.

2. Money received ⚷17(1)—Pleading ⚷192(2)—Common count for money had and received held sufficient as against general demurrer, or special demurrer for uncertainty.

Complaint in action to recover attorney's fees against attorney and his father, alleging defendants became indebted to plaintiff in a certain named sum for and on account of money had and received to the use of and for benefit of plaintiff, *held* sufficient as against demurrer; such form of pleading not being subject to attack by general demurrer or by special demurrer for uncertainty.

Department 2.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Jane Auckland against Clarence B. Conlin and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

R. A. Newell and Todd, Pawson & Watkins, all of Long Beach, for appellant.

E. R. Simon and Clarence B. Conlin, both of Los Angeles, for respondents.

LANGDON, J. This is an appeal by plaintiff from a judgment against her after separate demurrers of the defendants had been sustained to her third amended complaint.

The third amended complaint alleges, in substance, that the defendants are father and son; that at all times mentioned in the complaint the father was a doctor and the son was a lawyer; that the father was the physician of plaintiff, and in November, 1921, while said physician was rendering professional services to plaintiff and after plaintiff had stated that she wished to consult an attorney about her domestic affairs, said defendant suggested that she consult his son, the other defendant herein, and that plaintiff permitted said son and attorney to call upon her; that prior to June 22, 1923, defendant attorney claimed to have rendered professional services under an oral agreement with plaintiff, for which he charged and collected the amount of $22,250. It is then alleged that the father secured the employment of the son by false and fraudulent representations to the effect that plaintiff would lose her property unless she employed said son. Plaintiff alleges that part of the $22,250 received by the son in payment of his alleged services has been delivered to the father; that the son represented to plaintiff that his services had been the means of securing to her the sum of approximately $100,599.15, which she would not have received without said services; and that said statement was false and untrue and known to have been untrue by said defendant. It is further alleged that, relying upon said statements of said defendant that he had secured $100,599.15 for plaintiff herein, plaintiff allowed said defendant to retain the said sum of $22,250, and that subsequent to the 1st day of April, 1922, plaintiff discovered that said defendant had not secured for her the sum of $100,599.15, and further discovered that the services of said defendant were not of the reasonable value of $22,250, and were of no value at all to plaintiff. The complaint then proceeds, in a rambling way, to set out various particulars in which the defendant attorney is alleged to have improperly performed his duty to plaintiff in the management of her legal affairs, and alleges that plaintiff was never in danger of losing her property and that the representations made to the effect that defendant attorney had secured $100,599.15 for plaintiff were made for the purpose of securing to said defendant attorney his said fee.

For a second cause of action it is alleged that the defendants became indebted to plaintiff in the sum of $22,250 for and on account of money had and received by defendants and each of them, to the use of and for the benefit of the plaintiff, etc.

[1, 2] It requires no extended argument to demonstrate that the first cause of action contains much that is irrelevant and immaterial as the basis of any cause of action against the defendant father. Said defendant certainly should not be held liable for recommending his son, a licensed attorney, at a time when the plaintiff was seeking to employ one of that profession. Neither can he be charged with an error in the statement of the opinion that the plaintiff would lose her property if she did not have legal counsel. It may be said, also, that the first cause of action might properly be held subject to the attack made upon it by the defendant son, but it is questionable whether such attack would justify the order of the court sustaining a demurrer *without leave to amend.* It is clear, however, that the second cause of action is sufficient as against the demurrers interposed thereto. This form of pleading, a common count, by long-continued practice is not subject to attack by general demurrer or by a special demurrer for uncertainty. Pike v. Zadig, 171 Cal. 273, 152 P. 923. The allegations of the second count are therefore sufficient to require the defendants to answer. The fact that certain preliminary allegations of the first cause of action are incorporated in the second count by reference would not, we think, expose the common count to a successful attack by the demurrers here interposed.

The judgment is reversed, with directions to the trial court to overrule the demurrer of each defendant to the second cause of action.

We concur: RICHARDS, J.; SHENK, J.

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203 Cal. 731

Ex parte ALPINE. (Cr. 3058.)

Supreme Court of California. March 29, 1928.

1. Criminal law 🔑576(3)—Defendant held not entitled to discharge for failure to place him on trial within 60 days after case was sent back for second trial after reversal of conviction (Pen. Code, § 1382).

Defendant awaiting second trial for murder after reversal of conviction *held* not entitled to discharge, under Pen. Code, § 1382, on ground he had not been brought to trial within 60 days after filing of remittitur with county clerk, in view of section 1383, and part 2, tit. 10, c. 8 (sections 1382–1389), also part 2, tit. 9, c. 4 (sections 1258–1265), which includes sections 1261 and 1262 relating to new trial; "mistrial" being equivalent to no trial as distinguished from "new trial," which recognizes completed trial which has been set aside.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistrial; New Trial.]

2. Statutes 🔑47—Lawmaking body, in framing laws, must express intent in clear language.

It is duty of lawmaking body, in framing laws, to express its intent in clear and plain language to end that people on whom it is designed to operate may be able to understand legislative will.

3. Statutes 🔑188—Courts must give effect to statutes according to usual import of language.

Where lawmaking body, in framing laws, has expressed intent in clear and plain language, courts are bound to give effect to statutes according to usual, ordinary import of language employed in framing them.

4. Mandamus 🔑43—Mandamus will lie to compel dismissal of prosecution for failure to bring defendant to trial within statutory period (Pen. Code, § 1382).

Method providing in Pen. Code, § 1382, for securing release in case defendant is not brought to trial within 60 days after finding of indictment or filing of information is by motion to dismiss prosecution, and if trial court wrongfully refuses to dismiss, writ of mandate will lie to compel dismissal.

5. Habeas corpus 🔑25(1)—Habeas corpus held not available, as matter of right, to petitioner awaiting second trial for murder solely by virtue of statute providing time for bringing defendant to trial originally (Pen. Code, § 1382).

Writ of habeas corpus to secure release *held* not available to defendant awaiting second trial for murder, as matter of right solely by virtue of Pen. Code, § 1382, providing that defendant must be brought to trial within 60 days after finding of indictment or filing of information.

6. Constitutional law 🔑56—Statute permitting Supreme Court to consider habeas corpus proceeding after determination in District Court of Appeal held valid (Pen. Code, § 1506,

as added by St. 1927, p. 1061; Const. art. 6, § 4).

Pen. Code, § 1506, as added by St. 1927, p. 1061, under which habeas corpus proceeding may be said to be within Const. art. 6, § 4, providing that Supreme Court may order any case pending before District Court of Appeal to be heard and determined by Supreme Court after judgment discharging accused, *held* not unconstitutional since habeas corpus is subject to statutory control and regulation, in view of 28 USCA §§ 463, 464, and rule 42, Revised Rules of the Supreme Court of the United States, effective July 1, 1925.

Preston, J., dissenting.

In Bank.

Application by Harry Alpine for a writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure the release of petitioner awaiting second trial for murder on the ground that he was not brought to trial within the statutory period. Writ discharged, and petitioner remanded.

Superseding opinion in District Court of Appeal, 259 P. 457.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., amici curiæ.

SEAWELL, J. This is a petition for hearing in this court after decision of the District Court of Appeal, Second Appellate District, Division 1 (259 P. 457), discharging the writ of habeas corpus sued out by petitioner and remanding him to the custody of the sheriff of the county of Los Angeles, by whom he is held to answer to the superior court of said county on an information filed in said court charging him with murder. The petition is brought to us by authority of section 1506, Penal Code, as amended by the Legislature of 1927 (St. 1927, p. 1061), which provides, in part, that an appeal may be taken "in all criminal cases prosecuted by indictment or information in a court of record, where, upon appeal or original application after conviction of the defendant an application for writ of habeas corpus has been heard and determined in a District Court of Appeal, either the defendant or the people may apply for a hearing in the Supreme Court."

Petitioner was tried upon an information charging him with the crime of murder, and the jury returned a verdict finding him guilty of murder in the first degree, affixing the punishment at imprisonment in the state prison for life. He appealed from the judgment and the order denying his motion for a new trial, and the judgment and order were reversed. People v. Alpine (Cal. App.) 254 P. 281. On April 25, 1927, a petition to this court for a hearing resulted in a modification of the decision and opinion of said District Court of Appeal, and as thus modified said petition for a hearing was denied. The order of this court was at once transmitted to said District Court of Appeal and the remittitur of said District Court of Appeal was accordingly filed in the office of the clerk of the superior court of the county of Los Angeles on April 26, 1927. On the sixty-fifth day thereafter, to wit, June 30, 1927, the trial court fixed August 3, 1927, as the trial day. The defendant objected to said order of June 30, 1927, on the ground that he had not been brought to trial within 60 days after the remittitur had been received and filed by the clerk of the superior court wherein the proceedings were pending. The averments of the petition are not traversed, and in substance are to the effect that at the time the superior court set said cause for trial petitioner objected to the making of the order or any order setting said cause for trial at a time beyond said 60-day period and moved for a dismissal of the prosecution, but that his objections and motion were overruled. It is further averred that petitioner at no time consented to a continuance or postponement of the day of trial beyond 60 days from the filing date of the remittitur.

[1] The return alleges the commitment of petitioner by a magistrate after preliminary examination and sets out in chronological order the proceedings had after conviction. No circumstances justifying or excusing the delay in bringing the case to trial within the period prescribed by section 1382, Penal Code, are presented, other than those which are shown by the record reciting the several steps taken by petitioner after conviction and culminating in the issuance of the writ. Said section 1382 provides:

> "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * If a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the finding of the indictment, or filing of the information."

The statute does not specify that a failure to place the accused on trial within 60 days after the filing of the remittitur with the county clerk shall constitute a ground of dismissal. People v. Giesea, 63 Cal. 345; People v. Lundin, 120 Cal. 308, 52 P. 807. In the latter case the point was raised by a motion to dismiss under the provisions of section 1382, supra, upon substantially the same grounds as are urged in this proceeding. The court said:

> "The motion to dismiss the information upon the ground that the defendant had not been brought to trial within 60 days was properly de-

nied. This provision of the statute does not apply to cases where a defendant has appealed to this court and had his case sent back for a second trial. People v. Giesea, 63 Cal. 345."

The cases above cited decided the precise point presented in the instant case. In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, a widely cited case, is relied upon by petitioner as being sufficiently forceful to conclude further argument against his right to the writ. That case is based largely upon People v. Morino, 85 Cal. 515, 24 P. 892, and both cases present a situation unlike the one before us in this proceeding. The Morino Case, which was the earlier, was a plain case of failure to bring the accused to trial within the 60-day limit, and had no connection whatever with a mistrial or new trial of the cause. The defendant was charged with the crime of larceny. Not having been brought to trial within 60 days after the filing of the information, he moved to dismiss the case, which motion was denied. Upon trial he was convicted. The point was presented on appeal and not by writ of habeas corpus. This court, in department, held that the motion to dismiss should have been granted, reversed the case, and directed the trial court to dismiss the information unless good reason for failure to bring the defendant to trial should be shown. In the case of In re Begerow, supra, the facts were that Begerow was held under two informations charging him with two separate murders. He had been tried three times upon one charge and once upon the other. Each trial resulted in a mistrial because the jury failed to agree. Since the last trial neither case had been placed upon the calendar for trial. Eighty-four days had elapsed since the discharge of the last jury before the petition for the writ of habeas corpus was filed. During all of said time one of the three departments of the court in which the informations were pending was occupied only 15 days in the trial of criminal cases, while the other two departments had not been engaged in the trial of criminal cases at all. No reason was shown at any time why the cases had not been brought to trial. The decision of the court sustaining petitioner was concurred in by a bare majority of the court. Two of the justices dissented, and one did not participate in the decision. The force of that opinion has since been materially weakened by a subsequent decision of this court, which will hereafter be considered. Moreover, the Begerow Case presented features of aggravating tendencies which do not exist in the instant case. Begerow had been detained in jail for the greater part of a year, during which time he had been placed on trial four separate times, and each trial resulted in a disagreement of the jury. Eighty-four days had elapsed since the last trial and the case had not been placed on the calendar, nor was any showing made that the prosecution intended to retry it. No delay had been occasioned by any action taken by petitioner. The facts of that case, which were accentuated in the opinion, must have impressed the court as being somewhat aggravative, inasmuch as there had been four vigorous efforts to convict the defendant, and failing therein the prosecution relaxed its efforts to bring the case to trial, during which period the defendant was held in jail. The peculiar facts of that case may have been responsible for carrying a majority of the court beyond a point not necessary for it to have gone in order to justify the discharge of the petitioner. The court may well have placed its decision on the ground that the Constitution, art. 1, § 13, guaranteeing to every person charged with crime a speedy trial, had been violated by a failure to bring the case to trial within a reasonable time after the fourth mistrial. The opinion clearly recognized the right of petitioner to a discharge under the self-executing provision of the state Constitution above cited without resorting to section 1382, Penal Code. The Begerow Case, if petitioner's contention be sound, impliedly overrules People v. Giesea, 63 Cal. 345, and People v. Lundin, 120 Cal. 308, 52 P. 807, without mentioning either. Those cases are directly in point here. Both were reversed on appeal, and in each case more than 60 days intervened, as in the instant case, between the filing of the remittitur in the lower court and the time said causes were brought to trial. It was held in each case that the provisions of section 1382, Penal Code, did not apply to cases where a defendant has appealed to this court and had his case sent back for a second trial.

[2, 3] It is difficult to understand how any other decision could have been reached if the plain, unequivocal language of the statute is to be regarded. It is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will. This being done, courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. Observing these cardinal rules, the soundness of the construction placed upon section 1382, Penal Code, by this court in People v. Giesea and People v. Lundin, supra, as applied to the circumstances of those cases and to the instant case, cannot be doubted. Neither the language of section 1382, Penal Code, nor the ancient evils which the writ of habeas corpus was originally designed to avert, as learnedly pointed out in the Begerow Case, would justify us in enlarging upon the language of the statute. Chapter 8, title 10, pt. 2, Penal Code, has to do with the dismissal

of actions after indictment or information filed. Section 1382 was designed to prevent the holding of persons charged with crime in jail for an unreasonable time without the opportunity of going to trial. Subdivision 1 thereof provides that unless an indictment or information is filed against an accused within 30 days after he had been held to answer for a public offense the prosecution must be dismissed. Subdivision 2 of said section provides that the prosecution must be dismissed unless good cause to the contrary is shown "if a defendant, whose trial has not been postponed upon his application, is not *brought to trial* within sixty days after the finding of the indictment, or filing of the information." (Italics supplied.) No question is raised that petitioner herein was *not brought to trial* within 60 days after information filed and that a jury by its verdict found him guilty of murder of the first degree and affixed the punishment at life imprisonment and that judgment was accordingly entered by the court against him. Thereafter an appeal was taken, and said judgment was reversed.

It is true that the case was not set for trial within 60 days after remittitur received by the clerk, but that circumstance could in no conceivable manner change the meaning of section 1382. An adequate remedy, if he was deprived of a speedy trial, was available to petitioner under the guaranty of the Constitution. In order to bring the case within the provisions of section 1382, Penal Code, the words "after remittitur filed" must be read into the section, or that term must be held to be the equivalent of "after information filed." To so construe the statute would be taking an unwarranted license with the legislative prerogative. If the words "brought to trial" do not mean what the language clearly imports to the mind of the average person, layman, or lawyer, then the words "new trial" as repeatedly used throughout the Penal Code are employed to no effect. A "new trial" cannot be had unless a trial has preceded it. Chapter 4, title 9, pt. 2, Penal Code, provides for "Judgment upon Appeal." Section 1261 thereunder provides:

> "When a *new trial* is ordered it must be directed to be had in the court of the county from which the appeal was taken."

Section 1262:

> "If a judgment against the defendant is reversed without ordering a *new trial*, the appellate court must * * * direct him to be discharged therefrom. * * *" (Italics supplied.)

It follows irresistibly that although a case may be reversed upon appeal the second trial is a new trial of the issues, and if the defendant was "brought to trial" in the first instance within 60 days after the finding of the indictment or filing of the information, the mandate of the law so far as section 1382 is concerned has been complied with. While it is true that an accused may answer, if the matter is brought into question, that he has not suffered a prior conviction by reason of said reversal, this is because the judgment of conviction has been set aside. But that he has been "brought to trial" on the charge and has been accorded the right of trial within the meaning and intent of the statute can scarcely be questioned. The 30 and 60 day periods fixed by section 1382, supra, have to do with initiating the charge. Both deal definitely with the time of *finding an indictment or the filing of an information* after accusation made. Sixty days after indictment found or the filing of an information is the maximum limit prescribed for the postponement of trial unless good cause to the contrary be shown. The next Code section, 1383, is persuasive on the point that the 60-day limit was intended to apply solely to the time of finding the indictment or the filing of the information. It provides:

> "If the defendant is not *charged or tried*, as provided in the last section [section 1382] and sufficient reason therefor is shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued." (Italics supplied.)

[4] It is very apparent that section 1382, supra, was not intended to serve as a handmaid of the writ of habeas corpus. The process by which an accused is detained may be invulnerable as against the writ of habeas corpus and yet, by force of the statute and by no other right, the prosecution will be dismissed unless the accused has been brought to a public trial within 60 days after the charge is laid unless cause is shown to the contrary. No other ground of release need exist except the one which the statute has specifically created. The method provided by the statute for enforcing the remedy is by motion to dismiss the prosecution. If the trial court wrongfully refuses to dismiss the prosecution, a writ of mandate will lie to compel its dismissal. Matter of Ford, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

In the instant case the petitioner abandoned the plain, speedy, and adequate remedy which was open to him by force of the statute which he invoked (Matter of Ford, 160 Cal. 334, 116 P. 757, 35 L. R. A. [N. S.] 882, Ann. Cas. 1912D, 1267) and turned to the writ of habeas corpus. The writ of habeas corpus may not be invoked where the accused has such a remedy under the orderly provisions of a statute designed to rule the specific case upon which he relies for his discharge.

This would be an abuse of process, as his relief under the remedy provided by statute would accomplish all that he was seeking and all that the writ of habeas corpus was ever designed to accomplish, to wit, the discharge of the accused. In order to make the effort of petitioner effective, it becomes necessary in the first instance to hold by judicial decision rather than by statutory warrant, as observed by the District Court of Appeal in its opinion dismissing the writ and remanding the petitioner, that the 60-day period prescribed by section 1382, supra, applies to the filing of the remittitur after the defendant has succeeded in gaining a new trial, contrary to the views of this court in the only cases where the precise question was presented for determination. In other words, the statute which prescribes a remedy for the discharge of persons detained in jail contrary to its provisions, and which is separate and apart from the office of the writ of habeas corpus, is by judicial decision to be made an auxiliary for the employment of the writ of habeas corpus in order that the same result may be reached in another way, in disregard of the law's forms. The right of an accused to a speedy public trial is an absolute guaranty of the Constitution. Whether or not in the circumstances of the particular case there has been a denial of this privilege is a question always open to the determination of the court or judge before whom the writ is made returnable. The writ of habeas corpus is subject to statutory regulation. In fact, it was originally a creature of the statute. Section 1382 being a statute dealing with the detention of persons charged with crime, is independent of the writ of habeas corpus so long as its provisions are not fundamentally oppressive, and it must be given effect according to its tenor. If an accused, for any reason whatsoever, is not accorded a speedy trial, the writ of habeas corpus is available to him if there is no plain, speedy, or adequate remedy by appeal, or by some other appropriate method which the law has provided. Had the District Court of Appeal held upon general grounds that the petitioner had been denied a speedy public trial its action could not be disturbed, except upon a showing of a plain abuse of discretion or upon an apparent misconstruction of a statute bearing upon the case or upon the application of a statute not germane to the case. The sole point raised and urged by petitioner is confined to the right of discharge by virtue of the statute and not upon the general ground of oppressive detention, and our decision must therefore be confined to the right of the petitioner as measured by the statute, which was also the single question raised in the District Court of Appeal, which question we think was correctly decided by that court in the first instance.

The remedy of an accused who has not been brought to trial within 60 days after indictment found or information filed has been the subject of considerable judicial controversy by this court. The question as to whether or not the writ of habeas corpus is the proper remedy within the purview of the statute has been considered on numerous occasions upon application for writs of habeas corpus, writs of mandate, and on appeals from orders refusing to dismiss the prosecution under the provisions of section 1382, supra. The decisions have not been altogether harmonious, nor have they always received the approval of all the members of the court. In re Begerow, supra, went beyond what was actually necessary for a decision of the matter before the court, and gave expression to language that would seem to extend the writ of habeas corpus to include all cases wherein more that 60 days had elapsed without trial had unless good cause to the contrary was shown by force alone of said section 1382.

It is important and interesting to note that Mr. Justice Temple, the learned author of the Begerow decision, had in the earlier case, Ex parte Vinton, 5 Cal. Unrep. 624, 47 P. 1019, joined with Mr. Justice Garoutte, author of the vigorous dissenting opinion in the Begerow Case, in which former case (Ex parte Vinton) the petitioner was discharged. The dissenting opinion filed by Mr. Justice Garoutte, in which Mr. Justice Temple joined, reads:

> "The prisoner is discharged by the court upon the ground that he has not been brought to trial within 60 days after his commitment. I am well satisfied that the writ of habeas corpus cannot be invoked in a case of this character."

In the Begerow Case Mr. Justice Temple, in justification of the abandonment of his position in Ex parte Vinton, said:

> "In this country it has sometimes been denied that a defendant held to answer upon a valid indictment or information can be so discharged [by writ of habeas corpus]. It was so held in this state, in Ex parte Strong [3 Cal. Unrep. 706] 31 P. 574. It was there said that the allegations of the petition, if true, showed that it was the duty of the superior court to dismiss the prosecution, 'but until the information is dismissed, the imprisonment is lawful.' In Strong v. Grant, 99 Cal. 100 [33 P. 733], it was said, in substance, that in passing upon a motion for a dismissal the court acted judicially, and could not be compelled by mandamus. In a concurring opinion, the Chief Justice said relief could be had in such a case through the writ of habeas corpus, and this was finally so held by the court in Ex parte Vinton [5 Cal. Unrep. 624] 47 P. 1019."

The dissenting opinion in Ex parte Vinton followed the earlier doctrine announced by this court in Ex parte Strong, 3 Cal. Unrep. 706, 31 P. 574, where it was held that the writ of habeas corpus was not available to an accused who had not been brought to trial within the provisions of said section 1382, Penal Code. Strong v. Grant, supra, which announced the doctrine that the writ of mandate could not be invoked to compel a superior court to dismiss the prosecution when the trial was not postponed upon the application of the accused and he was not brought to trial within 60 days after the filing of the information against him, was decided prior to Ex parte Vinton. Former Chief Justice Beatty, in a concurring opinion in Strong v. Grant, supra, held that in case of a violation of the right of trial as provided by said section 1382 either habeas corpus or mandamus must lie. His point was that any procedure that would afford speedy and adequate relief satisfied the mandate of the law. It is very clear that the former Chief Justice, in view of the more recent, definite decision of this court (In Matter of Ford, 160 Cal. 334, 116 P. 757, 35 L. R. A. [N. S.] 882, Ann. Cas. 1912D, 1267), holding that a writ of mandate does lie to compel a superior court to dismiss the prosecution, would, as indicated in his opinion, have held that obedience to the statute was amply safeguarded if a dismissal of the prosecution could be compelled by the writ of mandate. Since the Begerow Case was written, the obstacles that were thrown in the way of granting speedy and adequate relief by Strong v. Grant, supra, as pointed out in the Begerow Case, have been swept away by In re Ford, and the reasons urged in support of the Begerow Case as to the remedy of the accused no longer perplex the situation. We have no way of knowing to what extent Strong v. Grant influenced the author of the Begerow Case to finally recede from his former position, but that the former case was a matter of grave concern in the determination of the Begerow Case there can be no serious doubt.

All of the decisions of this court upon which petitioner relies had to do with a failure to bring the defendant to trial at all within the statutory period, or else are cases in which 60 days had passed after mistrial. In none is the rule contended for by petitioner applied where a new trial has been ordered upon a reversal of the case upon the initative taken by the defendant. A mistrial and a new trial are not the same thing in name or effect. A mistrial is equivalent to no trial. Baird v. Chicago, etc., R. R. Co., 61 Iowa, 359, 13 N. W. 731, 16 N. W. 207. It is a nugatory trial; a new trial recognizes a completed trial which for sufficient reasons has been set aside so that the issues may be tried de novo. This court has no power whatever to make any order based upon a mistrial, such as forms the basis of the decisions cited in support of petitioner's argument. An order granting a new trial is appealable and subject to review by this court. The decisions cited by petitioner do not therefore extend or enlarge the statute so as to necessarily apply to the filing date of the remittitur after new trial granted.

The writ of habeas corpus has properly been exalted in fervid language by able exponents of personal liberty. Its beneficent and humane purposes should not be minimized. It came into being during the "wicked, sanguinary, and turbulent" periods in which monarchy ruled with a heavy hand. Subjects charged with frivolous offenses were forced to languish in prison for long periods of time without being afforded the privilege of having their causes presented to the courts and thereby called to the attention of the public. Mr. Justice Temple, in commenting upon the wisdom and justice of affording persons accused of crime with a speedy, public trial, in Re Begerow said:

> "For, no doubt, as said by Blackstone (Commentaries, book 3, p. 138), 'persons apprehended upon suspicion have suffered long imprisonment, merely because they were forgotten.'"

[5] Of course, Blackstone's observation was directed to persons who had never been brought into the courts for trial, and the public had no opportunity of being informed as to the oppression which had cruelly been inflicted upon them. No such danger can menace a citizen whose cause has been brought to the attention of the trial and appellate courts of this state and to the public by a public trial and appeal. What we mean to hold is that the writ of habeas corpus is not available to petitioner as a matter of right solely by virtue of section 1382, Penal Code. Whether he is entitled to his release upon the general ground of unreasonable delay in bringing the case to trial independent of the Code section is a point not raised. But conceding that the section should be by judicial construction extended so as to include this case, petitioner having invoked the remedy provided by said section, which is just as efficacious as the writ of habeas corpus could have been, the appellate court did not deny him any substantial right by requiring him to conform to the statute in such cases made and provided. The writ of habeas corpus was not created for the purposes of defeating or embarrassing justice, but to promote it. Nor can it be used to nullify reasonable statutes enacted for the purpose of regulating procedure.

[6] We now come to the second branch of the case. It will be observed that the petitioner has invoked the provisions of section 1506, Penal Code, and is before this court on a petition for a hearing after decision of the District Court of Appeal. Said section is new and was added to the Code by the Legislature of 1927 (St. 1927, p. 1061). It provides as follows:

> "An appeal may be taken to the District Court of Appeal by the people from a final order of a superior court made upon the return

of a writ of habeas corpus discharging a defendant after his conviction, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases prosecuted by indictment or information in a court of record, where upon appeal or original application after conviction of the defendant an application for a writ of habeas corpus has been heard and determined in a District Court of Appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the judicial council. If the people appeal, or petition for hearing in either the District Court of Appeal or the Supreme Court, the defendant shall not, in any case in which the judgment of conviction has become final, be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in such cases, be retaken into custody if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing."

It is clear from the language of said section that an appeal is only allowable *after conviction* and in those cases where there is an existing judgment against the defendant. In all other cases the law remains unchanged. The petitioner in this case has no judgment standing against him, as the judgment entered by the superior court was reversed by the District Court of Appeal, and so far as the judgment of conviction is concerned it was set aside by the reversal and the order remanding the case for a new trial. Inasmuch as the cause is before us by virtue of the provisions of said section, it becomes important that we pass upon the validity of said section at our earliest opportunity in order that the judicial council may be advised as to the necessity of making rules in accordance with the provisions of said statute. In Matter of Zany, 164 Cal. 725, 130 P. 710, this court held upon the law as it then existed that the decision of any court in a habeas corpus proceeding, provided the court had jurisdiction, could not be reviewed by any other court. Although it had been the uniform practice of the court to refuse to entertain appeals or applications for a hearing after decision by the District Court of Appeal in habeas corpus proceedings, In re Zany, supra, was the first case to bring forth from this court a written opinion stating the ground upon which such denials were ordered. Two learned former Justices of this court, each of whom in turn became Chief Justice, took divergent views of the question and each expressed himself in writing, one writing the main decision of the court, and the other stating his views in a dissenting opinion. Both are illuminating expositions of the law as it then stood. Since In re Zany, supra, amendments to the Constitution and the adoption of section 1506 have removed some of the anomalous situations pointed out in the main opinion in respect to the inequality of power conferred upon superior and appellate courts. Section 1506 provided for the first time in our legislative history that an appeal may be taken from the order of a superior court discharging a defendant after conviction to the District Court of Appeal, except in cases where judgment of death has been rendered, and in such cases to the Supreme Court. In all other respects the plan of review practically follows the law which obtains in criminal appeals generally. Whatever doubt that existed at the time Ex parte Zany was decided, as to whether a habeas corpus proceeding may fairly be said to be included in the terms of the Constitution, which provide that the Supreme Court shall have power to order "any case pending" before a District Court of Appeal to be heard and determined by the Supreme Court (section 4, art. 6, Const.) after judgment rendered discharging the accused, has been removed by the unmistakeable language of the statute that it is so included within the constitutional language. And we can see no objection on constitutional grounds against the power of the Legislature to so provide. While it would not be within the power of the Legislature to absolutely abrogate the privilege vouchsafed by the writ of habeas corpus, it is unquestionably subject to statutory control and regulation. The Constitution does not pretend to hamper the lawmaking power in its regulatory control of the subject.

The Constitution of the United States is substantially identical with our state Constitution, and the Supreme Court of the United States did not find it was impinging upon the parent instrument by formulating rules authorized by an act of Congress (sections 463, 464, title 28, U. S. Code [28 USCA §§ 463, 464]), providing for the custody of prisoners pending a review of proceedings in habeas corpus (Rule 42, Revised Rules of the Supreme Court of the United States, effective July 1, 1925). The state Legislature, by section 1506, has conferred a like power upon the judicial department of this state. We are of the view that the Constitution by conferring the power of transfer of causes from the District Court of Appeal to the Supreme Court did not intend to deprive the Legislature of the power to enact reasonable statutes regulating the exercise of the writ of habeas corpus in a manner that would tend to promote justice and prevent judicial absurdities. Formerly one superior court had the power upon an ex parte proceeding to nullify the judgment of another superior court, which was entrenched with all of the presumptions of regularity and validity, and there was no method by which such ex parte action could be reviewed, however erroneous it may have been. In fact, it was in the power of an inferior tribunal to deprive appellate courts of jurisdiction of pending causes by such interference, thereby defeating the orderly administration of the law. It will be noted that section 1506 is intended to apply to cases where a judgment has been obtained in a court of record and, like the rules of the United States Supreme Court, the custody of the defendant pending appeal or hearing of the petition for hearing is subject to judicial discretion.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff of the county of Los Angeles.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

PRESTON, J. I dissent.

The plain effect of the majority opinion is to so weaken the case of In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, as to pave the way for its early entire abrogation. I think that case is sound law and a proper interpretation of the rights guaranteed a human being under the Constitution.

If the majority opinion be sound, after a lapse of 60 days from the finding of the indictment, the Constitution does not come to the protection of the defendant. To apply the statute only to this 60-day period, and to refuse to apply it to a case where more than 60 days are allowed to elapse after a mistrial or after reversal on conviction, is to say that the longer a defendant is kept under indictment, the less right he has to a speedy determination of the charge against him. The following language of Judge Temple in the Begerow Case is here squarely in point:

> "The imprisonment after the lapse of 60 days is just as oppressive, and, if unnecessary, as much a violation of the rights of the accused person, as within the 60 days. There is no reason why the Legislature should be desirous of protecting the rights of an accused person for 60 days, and be indifferent to his fate afterwards. To attribute such ideas to the Legislature is to charge it with folly."

So far as the second division of the opinion is concerned, the recent amendment to the Penal Code (section 1506), providing an appeal by the people in certain classes of habeas corpus proceedings, is not before us. This section is full of ambiguity and uncertainty and should not be passed upon in this proceeding. Clearly the petitioner here is not in the status required for the invocation of any of its provisions as to him as he is not now under conviction for any offense.

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90 Cal. App. 428

DEPOSIT GUARANTY STATE BANK v. HESSEL MOTOR CAR CO. et al.

(Civ. 6027.)

District Court of Appeal, First District, Division 1, California. March 28, 1928.

1. Chattel mortgages 🔑89—Lien of mortgage on automobile, valid where executed, held not lost by removal of automobile to, and failure to record mortgage in, California.

A mortgage on an automobile executed in Oklahoma being a valid lien in that state, such lien was not lost by removal of property to California without consent of mortgagee, nor was its recordation in California essential to validity of mortgage.

2. Chattel mortgages 🔑229(1)—Verdict of $2,250 for conversion of mortgaged automobile held not excessive.

In action by mortgagee for conversion of mortgaged automobile, judgment for plaintiff for $2,250 was not excessive, where evidence showed that value of automobile exceeded mortgage debt which, with interest, amounted to $1,883.20, and that necessary expenditures by plaintiff to locate property exceeded $400.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Deposit Guaranty State Bank against the Hessel Motor Car Company and others for conversion of an automobile. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank J. Fontes and E. J. Talbott, both of San Francisco, for appellants.

Richard Fitzpatrick, of San Francisco, for respondent.

CASHIN, J. An appeal from a judgment in favor of the plaintiff in an action for the conversion of an automobile.

[1] The plaintiff was the mortgagee of the automobile; the mortgage thereon having been executed in Oklahoma by one Redding, its owner. The latter subsequently removed the property to California without the consent of the mortgagee, and sold the same to defendant Hessel Motor Car Company, which, in turn, sold the car to defendant McCord. The defendants were purchasers for value and without notice of the claim of the plaintiff. The mortgage under the laws of Oklahoma created a valid lien; but the instrument was not recorded in California, and it is contended that by the removal of the property to, and the failure to record the mortgage in, the latter state the lien was lost, and, further, that the damages allowed by the court, namely, $2,250, were excessive.

As held in the case of Mercantile Acceptance Co. v. Frank et al. (Cal. Sup.) 265 P. 190, the mortgage being a valid lien in the state where it was executed, such lien was not lost by the removal of the property to California, nor was its recordation in the latter state essential to the validity of the mortgage.

[2] The value of the automobile, as shown by the evidence, exceeded the mortgage debt, which, with interest, amounted to $1,883.20; and, in addition, the trial court found that the plaintiff, in pursuing the property, expended sums in excess of $400. The expenditure of those sums, and that the same was reasonably necessary in order to locate the property, were facts sufficiently supported by the evidence, and the further contention that the action could not be maintained against the defendant McCord is without merit.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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90 Cal. App. 384

KONDA v. FRUMPKIN et al. (Civ. 5069.)

District Court of Appeal, Second District, Division 1, California. March 26, 1928.

1. Damages ⚷188(1)—Plaintiff makes prima facie case on showing cost of repair of damaged automobile, but judgment will be for diminution in value if proven (Civ. Code, § 3333).

In action for damages to automobile from collision, plaintiff makes prima facie case when he shows reasonable cost of repair of damaged automobile; and, if diminution in value of vehicle is less than cost of repair, defendant may make such showing; and, if he successfully carries the burden, judgment will be for amount that vehicle has lessened in value by reason of collision, under Civ. Code, § 3333.

2. Appeal and error ⚷1004(2)—Judgment based on conflicting evidence of cost of repair of automobile will not be disturbed, absent showing of diminution in value (Civ. Code, § 3333).

Where, in action for damages to automobile from collision, evidence presented by both sides went to cost of repair and there was no showing that diminution in value, which is measure of damages under Civ. Code, § 3333, was less than cost of repairs, and testimony as to cost of repairs was conflicting, judgment based on such testimony will not be disturbed.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Anton Konda against Samuel Frumpkin and others for damages to automobile bus arising out of collision. Judgment for plaintiff, and defendants appeal. Affirmed.

L. B. Stanton and S. H. Scheinin, both of Los Angeles, and Marley Fisher, of Lindsay, for appellants.

Guy Knupp, of Porterville, for respondent.

HAHN, Justice pro tem. Defendants appeal from the judgment rendered against them in the sum of $400 as damages suffered by the plaintiff through injury to his automobile bus, occasioned by a collision with an automobile truck belonging to the defendants.

In their brief appellants concede that inasmuch as the evidence on the question of negligence is in marked conflict, the finding of the court on that issue is not subject to review an appeal.

The only ground urged for a reversal of the judgment is that there is no evidence of competent and material character to justify the amount of damages awarded. This defect, appellants urge, is due to the erroneous theory of counsel for plaintiff, and adopted by the court, that the rule for determining the amount of damages in actions of this character is the cost of making repairs or replacements, when the measure of damages as provided by section 3333, Civil Code, is the difference in the value of the automobile bus prior to the accident and immediately after the accident. It is pointed out that the only evidence offered by the plaintiff on this question was the testimony of witnesses as to the cost of the repairing or rebuilding of the damaged automobile.

The record discloses the fact that the case was tried by both parties, as far as the question of damages was concerned, on the theory that the measure of damages was the cost of repairing the automobile bus.

[1] It is true, as contended by appellants, that the usual measure of damages is the difference in diminished market value of the article damaged from its reasonable market value prior to the injury. However, in this state the rule has been established that in an action for damages of the character involved here, the plaintiff makes a prima facie case when he shows the reasonable cost of repair, if his damaged automobile is susceptible of repair. Rhodes v. Firestone Tire, etc., Co., 51 Cal. App. 569, 197 P. 392. If the diminution in value of the vehicle occasioned by the collision is less than the cost of repair, the defendant is privileged to make such showing; and, if he successfully carries this burden, the judgment will then be for the amount that the vehicle has been lessened in value by reason of the injury.

[2] As stated in the instant case, the evidence presented by both sides went to the cost of repair. The prima facie case made by the plaintiff was not overcome by any evidence showing that the diminution in value of the automobile bus was less than the cost of the repairs.

The testimony on the question of cost of repairs or reconstruction was in sharp conflict, and hence the court's conclusion, there being sufficient evidence to sustain it, as to the amount of damages, will not be disturbed.

Appellants point out that the testimony of one C. A. McGarvin, a witness for plaintiff and whose estimate of the cost of rebuilding the damaged bus is necessary to support the court's findings as to the amount of the damage, related to the cost of rebuilding the body of the automobile bus rather than repairing the body. This would seem to be merely a distinction in terms rather than a difference, for the witness in question testified that the body of the bus was so badly damaged that it could not be repaired and the body had to be rebuilt.

We find no errors in the record, and the judgment is therefore affirmed.

We concur: CONREY, P. J.; YORK, J.

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90 Cal. App. 416

HECKER v. HOGAN et al. (Civ. 6034.)★

District Court of Appeal, First District, Division 1, California. March 27, 1928.

Hearing Denied by Supreme Court May 24, 1928.

1. Execution 🔑177—Judgment enforceable against defendant is enforceable against sureties on bond to stay execution.

Where judgment is enforceable against defendant, it is enforceable against sureties on bond to stay execution.

2. Execution 🔑177—Substituted plaintiff held entitled to enforce obligation against sureties on bond to stay execution, where undertaking showed obligation inured to benefit of plaintiff, not particular person.

Where undertaking of bond to stay execution of judgment showed obligation inuring to benefit of plaintiff in action and not to any particular person, substituted plaintiff *held* entitled to enforce obligation against sureties.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Barbara Hecker against Walter Hogan and others. From and adverse judgment, defendants J. A. Coley and another appeal. Affirmed.

J. L. Smith, of San Francisco, for appellants.

Harry I. Stafford and Dean Cunha, both of San Francisco, for respondent.

KNIGHT, J. This is an appeal from a judgment entered against appellants as sureties on a bond given on appeal to stay the execution of a money judgment in the sum of $11,890, rendered against Walter Hogan in an action to recover upon several promissory notes.

The record discloses that the action was commenced by "Barbara Hecker, as administratrix of the estate of Charles Valentine Hecker, deceased," and on February 19, 1924, judgment was rendered in favor of "plaintiff, Barbara Hecker, administratrix of the estate of Charles Valentine Hecker, deceased, *and sole heir of said estate.*" (Italics ours.) Hogan apppealed to the Supreme Court, but, on respondent's motion, the appeal was dismissed. Two days after the remittitur was filed in the trial court, and on April 10, 1925, pursuant to a motion presented on behalf of Mrs. Hecker, an order was made and entered which, after reciting that the promissory notes sued upon had been distributed to Barbara Hecker by virtue of the decree of distribution made and entered in the matter of the estate of her deceased husband, ordered that "Barbara Hecker, an individual, be * * * substituted as plaintiff herein in place and stead of Barbara Hecker as administratrix," etc. Hogan failed to satisfy the judgment, and on April 18, 1925, on motion of Barbara Hecker as plaintiff in the action, judgment was entered against appellants as sureties on the stay bond given on Hogan's appeal.

The contentions appellants make on this appeal are centered upon the order of substitution of the party plaintiff; it being claimed that at the time said order was made "there was no administratrix in existence," because the estate of Charles Valentine Hecker had been closed and the administratrix discharged, that consequently Barbara Hecker as an individual obtained no valid judgment against Hogan, and that, being invalid against Hogan, the judgment is unenforceable against his sureties, also that "the undertaking given by appellants only authorized the entry of said judgment in favor of the administratrix and not in favor of Barbara Hecker as an individual," and therefore the obligation accruing thereunder did not inure to the benefit of the latter.

The present appeal was taken direct to the Supreme Court upon a "clerk's transcript," certified to by the trial judge, and containing the pleadings, decision, and judgments in the action, also certain motions and orders, most of which formed a part of the judgment roll in the action. But it appears that the points appellants urged in their opening brief for a reversal of the judgment were admittedly founded on certain documents not embodied in the transcript, nor in any manner legally made a part thereof. They were attached to appellants' brief as an appendix, and consisted of the decree of distribution and order of discharge of administratrix in the matter of the estate of Charles V. Hecker, deceased, and the undertaking on appeal. In that state of the record appellants endeavored, by means of a motion for diminution of the record, to have said documents incorporated in the record on appeal, but the Supreme Court denied the mo-

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★Hearing denied by Supreme Court.

tion. Later appellants presented a similar motion, and, acting upon the assumption that it would be granted, restated and reargued the same points for reversal in their closing brief, and, with respect thereto, say:

> "These same papers have been included in the appendix, and referred to in appellants' brief to be considered by this court *in the event alone that appellants' motion last referred to should be granted*, and for the further purpose of showing to this court wherein such papers were material to the consideration of the appeal herein. Had these papers and arguments not been included therein, then the motion for diminution would have been without purpose. Appellants know that the inclusion of such papers in the appendix, and the reference to same in said brief will not be construed as an impropriety or a 'brazen and contemptuous act of effrontry' (as charged by respondent) on the part of appellants herein. *The papers and arguments based thereon will naturally be disregarded by the court if the motion for reconsideration of appellants' motion for diminution of record herein is not granted*, but appellants believe that the motion is a meritorious one, and respectfully ask that the documents in question may be considered in connection with the appeal." (Italics ours.)

But the Supreme Court denied appellants' second motion for diminution of the record, and consequently the effect of such denial has been to nullify the main points urged for a reversal of the judgment; there being nothing in the transcript to support them.

[1] Aside from the matter of the fatal defect in the record on appeal, however, it may be stated that the points now urged by appellants against the regularity of the judgment against Hogan have been heretofore considered and passed upon by this court adversely to appellants' contention in a proceeding brought by Hogan against the superior court to prohibit the enforcement of said judgment against him as it stood after the order of substitution had been made (Hogan v. Superior Court, 74 Cal. App. 704, 241 P. 584); and in the ninth point dealt with in the decision therein it was in effect held that the judgment was valid and enforceable against Hogan. That being so, it is enforceable against the sureties on his bond to stay the execution thereof.

[2] As to the undertaking, it shows by its terms that the obligation accruing thereunder inures to the benefit of the plaintiff in the action and not to any particular person; and the record shows that, prior to and at the time of the entry of the judgment against the sureties, Barbara Hecker was the plaintiff in the action, consequently she was entitled to enforce the obligation against the sureties. Todhunter v. Klemmer, 134 Cal. 60, 66 P. 75.

Appellants make the further contention that the clerk did not enter the judgment as directed by the court; but there is no merit in the point. The minute order thereof, which was made subsequent to the order of substitution, reads:

> "In this cause (entitled Barbara Hecker v. Walter Hogan et al.), on motion of counsel for the plaintiff, it is ordered that judgment be, and the same is hereby, granted in favor of the plaintiff, and against the sureties, J. A. Coley and J. L. Craig, as prayed for."

And the judgment as entered is entitled "Barbara Hecker, Plaintiff, v. Walter Hogan, Defendant," and reads, after the usual recitals:

> "* * * It is ordered, adjudged, and decreed that Barbara Hecker, substituted plaintiff in place of Barbara Hecker, administratrix, plaintiff, do have and recover from J. A. Coley and J. L. Craig, defendants," etc.

In our opinion, the appeal is utterly without merit.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PENNELL v. STANLEY W. SMITH, Inc.★

(Civ. 3385.)

District Court of Appeal, Third District, California. March 17, 1928.

Hearing Granted by Supreme Court May 14, 1928.

1. Trial 🔑395(2)—Finding "that it is not true as alleged in plaintiff's complaint that * * * defendant made the statements and representations * * * with intent to cheat and defraud, or at all" held not to involve negative pregnant.

In action for recovery of money paid for automobile, in which plaintiff alleged fraud, finding "that it is not true as alleged in plaintiff's complaint that * * * defendant made the statements and representations * * * with intent to cheat and defraud plaintiff, or at all," *held* not subject to criticism that it involved a negative pregnant, the words "or at all" saving it from such imputation and rendering it a clear and positive finding.

2. Sales 🔑398—Finding that plaintiff did not believe and rely on defendant's statements in purchase must be construed with finding no statements were made.

In action for recovery of money paid for automobile on ground of fraud, court's finding that plaintiff did not believe and rely on statements made by defendant relative to the automobile was required to be construed with finding that no statements were made at all relative to such matter.

3. Sales 🔑92—Evidence held to show parties did not mutually rescind contract for purchase of automobile.

In action by automobile buyer against seller for recovery of money paid, on ground of

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★Superseded by opinion of Supreme Court, 269 P. 171.

fraud in transaction, evidence *held* to show that contract was not mutually rescinded by the parties.

4. Contracts 🔑350(3)—Agreement to abandon or rescind contract may be proved by, or inferred from, parties' acts or conduct.

It is settled law that an agreement to abandon or rescind a contract may be inferred from the acts or conduct of the parties.

5. Appeal and error 🔑996—Finding of rescission by mutual consent will not be disturbed on appeal, where parties' conduct was such as reasonably or fairly to justify inference rescission was intended.

Where the conduct or acts of parties to a contract are such as reasonably and fairly justify an inference that rescission had been intended and effected by parties' mutual consent, finding to that effect will not be disturbed on appeal.

6. Contracts 🔑253—Rescission effected by mutual consent is new contract requiring meeting of minds.

Rescission, when effected by mutual consent, is a new contract, to effect which there must be a meeting of the minds.

7. Contracts 🔑253—Parties' consent to mutual rescission need not be expressed, but may be manifested by conduct.

The consent of parties to mutual rescission of a contract need not be expressed in words, but may be manifested by conduct.

8. Contracts 🔑350(3)—To permit inference of mutual rescission from parties' conduct, conduct must afford stronger basis for inference of consent than mere conjecture or speculation.

To permit the inference, from parties' conduct, of their mutual consent to rescission of contract, such conduct must afford a stronger basis for the inference of consent than mere speculation or conjecture.

9. Sales 🔑92—Seller's declaration that he would not rescind contract for sale of automobile unless buyer bought new car held to amount to positive refusal to rescind.

Where buyer, on ground of mutual rescission, sought to recover from seller money paid for automobile, *held* that seller's statement to buyer, on buyer's seeking rescission, that under no circumstances would seller rescind contract unless buyer purchased a new car, in which case purchase price of original car could be applied thereon, was positive refusal to rescind, so as to preclude finding of mutual rescission.

10. Sales 🔑332—Seller's resale of automobile after purchaser's return thereof, on rescission not agreed to by seller, held proper.

Where purchaser of automobile returned it to the seller alleging his rescission, which was not agreed to by seller, reselling automobile *held* within seller's rights, where purchaser still owed large amount on purchase price and by the sales contract title was to remain in the seller until the automobile was paid for, though by such sale seller was not exercising his option to forfeit contract for default in payment of any installment.

11. Sales 🔑397—Evidence held to support finding that purchaser of automobile had rescinded contract.

In suit by purchaser of automobile for return of part of price paid, evidence *held* to support finding that such purchaser had rescinded the contract.

12. Sales 🔑119, 391(7)—Purchaser not receiving automobile of quality bargained for could rescind contract and recover money paid (Civ. Code, § 1691, subds. 1, 2).

Under Civ. Code, § 1691, subds. 1 and 2, purchaser not receiving automobile of quality bargained for was entitled to rescind contract and recover money paid on purchase price.

13. Appeal and error 🔑656(3), 1122(2)—Appellate court held empowered to strike findings of trial court relative to rescission of contract and substitute others (Const. art. 6, § 4¾; Code Civ. Proc. § 956a [St. 1927, p. 583]).

In purchaser's action to recover money paid for automobile, appellate court held empowered, under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a (St. 1927, p. 583), to strike trial court's findings and substitute others relative to rescission of contract.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by W. C. Pennell against Stanley W. Smith, Inc. Judgment for plaintiff, and defendant appeals. Affirmed, and remanded.

Newby & Palmer, of Los Angeles, for appellant.

E. O. Leake, of Los Angeles, for respondent.

HART, J. The plaintiff brought this action to recover the sum of $845.25 alleged to be due him by reason of a conditional sales contract for an automobile entered into between him and the defendant. The plaintiff was awarded judgment in the sum of $700, together with interest thereon from May 14, 1923, at the rate of 7 per cent. per annum. The defendant appeals from the judgment on a bill of exceptions.

The defendant is a domestic corporation with its principal place of business in the city of Los Angeles. The second paragraph of the complaint reads as follows:

"That on or about the 6th day of May, 1923, defendant, with intent to cheat and defraud plaintiff and in order to induce plaintiff to enter into a contract to purchase a certain automobile described as Packard roadster, motor No. 151834, and to purchase said automobile, made the following false and fraudulent statements and representations to plaintiff of and concerning said automobile, to wit: That said automobile was in perfect mechanical condition; that in the event plaintiff purchased said automobile it would not be necessary for him to make any repairs thereon or thereto in driving said automobile 25,000 or 30,000 miles; that said automobile had not been driven in excess of the mileage shown by the speedometer thereon, to wit, 24,245.2 miles; that said speedometer correctly showed the mileage said automobile had been driven; that it had said automobile appraised by Earl C. Anthony, Packard dealers in Los Angeles, and had been advised that said automobile was reasonably worth and should sell for $2,500; that they knew the car to be reasonably worth the sum of $2,100."

Paragraph 3 of the complaint alleges:

"That plaintiff believed and relied upon said statements and representations, and was induced to believe and rely upon said statements and representations by defendant, in that defendant, prior to the making of said representations, stated and represented to plaintiff that it was a company of good reputation and would stand behind any automobile which it sold, and would stand behind any representations which it made, and that plaintiff might accept any representations made to him in regard to said car; and plaintiff, being induced solely by reason of the representations so made to him as aforesaid and on account thereof, and without any investigation as to the truth thereof, on or about said 6th day of May, 1923, entered into a contract with defendant to purchase said automobile at and for the price of $2,100, and paid on account thereof the sum of $700, and agreed to pay the balance thereof in installments of $126 per month."

It is alleged in paragraph 4 that all of said statements and representations set forth in paragraph 2 were false and fraudulent, and were known to said defendant to be false and fraudulent, and were made for the purpose of inducing and did induce plaintiff to enter into said contract for the purchase of said automobile and to pay said sum of $700. Paragraph 5 sets forth in detail the alleged defectiveness of the automobile in various parts of the machinery thereof. It is alleged in paragraph 6 that defendant was compelled to pay out the sum of $45.25 for repairs of said machine immediately after purchasing and taking possession of the same, and that he was damaged by reason thereof and loss of time in the sum of $100; that immediately upon learning of the falsity of said representations and on the 14th day of May, 1923, plaintiff did rescind said transaction or contract and notified defendant that he rescinded said transaction, and that he returned and restored to defendant said automobile and demanded of it that it return said sum of $700 received on account thereof; that defendant received and accepted said automobile, and has since said 14th day of May, 1923, been in possession, control, and use thereof, but that defendant has failed and refused to repay and return to plaintiff said sum of $700, and has not returned or repaid the same.

Upon the conclusion of the taking of testimony, the court declared that the evidence was insufficient to support the allegations of the complaint that the execution of the contract for the sale of the automobile was wholly superinduced by fraud practiced upon, or false representations made to, the plaintiff, by the president of defendant during the negotiations leading to the consummation of the transaction as to the mechanical condition of the car. The court at the same time further expressed a doubt as to the sufficiency of the allegations of said complaint to sustain an action for a rescission of the contract by the mutual consent of the parties; whereupon the plaintiff asked and was granted leave to amend the complaint. The important allegations of the amendment are contained in paragraph 4 of the amendment and are as follows:

"That thereafter and on or about the 14th day of May, 1923, plaintiff and defendant each consented to a rescission of said transaction and a rescission thereof was thereupon had by mutual consent, and plaintiff thereupon returned and restored to defendant said automobile and defendant thereupon accepted and received said automobile and has, since said time, exercised exclusive ownership and control thereover."

The prayer is for a decree adjudging that "said transaction has been and was rescinded by the mutual consent of the parties thereto," and for judgment for $700 and the sums alleged to have been expended by plaintiff in repairing the machine.

The defendant answered, admitting the execution of the contract for the amount alleged in the complaint, admitting the sale of the automobile to plaintiff for the amount stated in the complaint and the execution of the contract embracing the terms thereof, admitting that thereupon and on the 6th day of May, 1923, plaintiff took possession of the automobile under said contract, that he paid in cash at said time $700 and agreed to pay the balance thereof in monthly installments of $126, commencing on the 6th day of June, 1923, and ending on the 6th day of May, 1924. The answer denies that the plaintiff was induced to purchase the automobile by or relied upon any representations or statements regarding the character and the condition of the automobile which were false or fraudulent; and further denies that there was any rescission or act of rescission on its part of the contract at the time stated in the complaint or at any other time; denies that plaintiff, "immediately upon learning of the falsity of said alleged representations, did rescind the said transaction and the whole thereof"; denies that the plaintiff did return or restore to the defendant "everything of value received by him, but admits that said plaintiff, without the consent and over the protest of defendant, did leave said automobile at the place of business of the said defendant and demanded the return of the said $700"; denies that defendant received or accepted said automobile, "but, on the contrary, avers that on the said 14th day of May, 1923, it informed the said plaintiff that it would not accept said automobile or rescind the said contract, and that if he (plaintiff) left the said automobile at the place of business of said defendant, that it would be kept subject to the order of the said plaintiff and under the terms of said written contract, and not otherwise. The defendant admits it has failed and refused to repay or return to the plaintiff the said $700 or any part thereof, but denies that the said $700 or any part thereof is due or owing to the plaintiff from the defendant." The answer also denies that the automobile, after having been taken possession of by the plaintiff, was found to be in the defective condition in several of its parts as alleged in paragraph 5 of the complaint.

As a further defense to said action and by way of counterclaim, the defendant declares upon and pleads the terms of the contract; alleges that "the defendant hereby exercises the option contained in said agreement and declares the whole sum of principal and interest due," etc. The setting up of this counterclaim is of no consequence in the decision of this appeal under the view we take of the case as made, and therefore further reference regarding the same need not be herein made.

The defendant answered the complaint as amended, denying all the allegations contained therein, some of which were substantially the same as those in the complaint as originally filed.

The court found (finding II) "that it is not true, as alleged in plaintiff's amended complaint, that on or about the 6th day of May, 1923, or at any other time, the defendant made the statements and representations set forth in paragraph 2 of plaintiff's amended complaint, with intent to cheat and defraud plaintiff or at all"; "that (finding III) it is not true that plaintiff believed and relied upon the statements or representations of defendant as set forth in paragraph 2 of plaintiff's amended complaint, or was induced thereby to purchase said automobile"; "that (finding IV) defendant did represent to plaintiff that said automobile was in good mechanical condition; and that plaintiff believed and relied upon said representation."

After finding that the contract as described in the complaint was entered into by and between the plaintiff and defendant, and that the plaintiff paid the sum of $700 to the former upon the execution thereof, the court proceeds to find and describe specifically the several vital parts of the machinery of the automobile that were in a defective or not in a good mechanical condition, and further found that the plaintiff was compelled, after taking and having possession of the car, to expend the sum of $45.25 in making repairs thereon "in order to keep the same in operation." It was further found that the plaintiff, on the 14th day of May, 1923, notified defendant that "he rescinded said transaction and did return and restore to defendant everything of value received by him and did demand of defendant that it return said sum of $700 received on account thereof"; that "defendant received and accepted said automobile and has, since said 14th day of May, 1923, been in possession, use and control thereof." The tenth and eleventh paragraphs of the findings relate to the counterclaim pleaded by defendant and are to the effect that the defendant did not exercise its option, reserved to it by the contract, by declaring the whole sum of principal and interest due, and that it is not true that defendant "still holds said automobile in its possession for plaintiff and is ready, able and willing to deliver same to plaintiff upon payment of any sum." In said paragraph 11 it is further found that defendant, immediately upon receiving said automobile, and before any default could have been declared under the terms of said contract, advertised the same for resale as its own property, etc., and thereafter did sell said automobile for and on its own account and not under any of the terms of said contract, and kept and appropriated the proceeds of said sale to its own use, not accounting therefor to plaintiff.

[1, 2] It is readily to be seen, from a perusal of the findings, that the sole question presented by this appeal is whether the finding that the contract involved herein was rescinded either by the mutual consent of the parties or by the plaintiff himself derives support from the evidence. The question of fraud is entirely eliminated by the findings. No other conclusion can follow from a reasonable construction or rational view thereof. Finding II, properly read, will be seen to expressly declare that the alleged false statements and representations, as set forth in paragraph 2 of the complaint, were not made by defendant or its president to plaintiff regarding the mechanical condition of the automobile. It will be observed that the language of the finding is "that it is not true as alleged in plaintiff's complaint that * * * defendant made the statements and representations, * * * with intent to cheat and defraud plaintiff *or at all*." (Italics ours.) Had the italicized words "or at all" not been used in the finding as they are therein used, the finding would have been subject to the criticism that it involved a negative pregnant; but the words referred to save the finding from such imputation and render it a clear and positive finding that the representations set forth in paragraph 2 of the amended complaint, and which it is alleged in that pleading were false and fraudulent, were not made by the defendant to plaintiff or its agents on the 6th day of May, 1923, or at any other time, or at all. This

being so, finding III that "it is not true that plaintiff believed and relied upon the statements or representations of defendant as set forth in paragraph 2 of the plaintiff's amended complaint, or was induced thereby to purchase said automobile," construed, as it must be, in connection with finding II, or, indeed, as a part thereof, harmonizes with the latter finding, because, obviously, it would be absurd to say that a person believed and relied upon and was induced to pursue a certain course of conduct by and upon statements or representations that were never made. So, with the question of fraud thus entirely expunged from the case as an issue, the sole remaining question which is to be determined here is whether there was a rescission of the contract for the sale of the automobile.

As will be observed from the statement of the case, as it is hereinabove set forth that, upon the announcement of the court, after the taking of testimony had been concluded, that the evidence was insufficient to support the charge in the complaint that the contract was procured by fraudulent representations by the defendant, or its president, and, further, upon the expression by the court of doubt as to whether the averments of the complaint to the effect that the transaction eventuating in the execution of the contract were sufficient to support the action, the plaintiff, by leave of the court, amended its complaint by setting up a rescission of the contract by the mutual consent of the parties, upon the assumption that the proofs, already made, were sufficient to support that plea. And upon that theory the cause was decided below, and upon the same theory it is sought to sustain this appeal.

[3] That there was no rescission by the mutual consent of the parties is plainly apparent from the testimony. The facts as testified to by the plaintiff are: On Saturday, the 5th day of May, 1923, between the hours of 7 and 8 o'clock p. m. he, with a personal friend, Colonel James T. Toy, called at the place of business of the defendant and asked for Stanley W. Smith, president of the latter. Smith was absent at the time, but within a few minutes thereafter appeared at the establishment of defendant. The plaintiff was introduced to Smith by Toy, the latter saying to the former that the plaintiff desired to buy a car. Smith said to plaintiff that he then had an important appointment and would be required to proceed at once to meet it, and he (Smith) thereupon departed, leaving the plaintiff and Toy with a Mr. Gannon, a salesman in the employ of the defendant and superintendent of its "used car" department. Plaintiff was taken by Gannon to said department, and there Colonel Toy called his (plaintiff's) attention to the car—a Packard roadster—which he (plaintiff) finally agreed to purchase. Gannon said to plaintiff that the car had already been sold and that the defendant had accepted and received a deposit on the sale. Gannon stated that the sale price of the car was $1,950, and further stated (addressing plaintiff) that that price "was quite a bit under the market"; that it was "in good, perfect mechanical condition." "In fact," proceeded plaintiff, "Gannon said the chauffeur from Douglas Fairbanks' studio had been over the car and pronounced it mechanically correct. I looked at the speedometer, and it recorded somewhere near 25,400 and some odd miles. I asked Gannon if that was the mileage, and he said the mileage of the car was indicated by the speedometer. * * * He (Gannon) said that it was mechanically correct and that I would not have to spend any money on it inside of the next twenty-five or thirty thousand miles, other than for incidental adjustments, oiling, and greasings. Colonel Toy said if this car was in the condition represented and it was a Packard Twin Six and only had traveled the mileage indicated that it was a good buy and advised me to offer the party who had the deposit up $200 for his bargain, which I, acting on his (Colonel Toy's) suggestion, authorized Mr. Gannon to do. Colonel Toy and I then went to our office in the Merritt building." Plaintiff stated that the car had "a new coat of paint and evidently a new set of cushion covers. The cushion covers were made of canvas of some kind, put on over the leather. No portion of the leather covers was visible to me at that time." Continuing, the plaintiff testified that on the same evening, between 10 and 11 o'clock, he received a telephone call from Gannon, who stated that he had seen the party who had made a deposit on the car and that the latter said that if plaintiff "would pay a bonus of $150 that he (said party) would release his option, which would allow me to purchase the car." Plaintiff thereupon (the same evening) went to the Stanley Smith's place of business and paid in part the initial payment of $700 on the purchase price of the car. He was then told by the salesman that the car would be ready for him to take out between 1 and 2 o'clock Sunday, which was the following day. Plaintiff, on Sunday and at the hour named, went to the Smith agency's place of business, and, paying the balance of the initial payment ($700), "the premium on the insurance, and some incidental charges," and after executing the contract, took possession of the car. The plaintiff further testified that he did not make any investigation to determine the condition of the car prior to the execution of the contract. He stated that the first time he ever operated an automobile was in the year 1910 or 1911. "I have not," he said, "owned a car continuously since that time, but I have had six automobiles of different

makes. I do my own driving and have during that time."

It is unnecessary to present herein in detail the trouble the plaintiff experienced in trying to operate the car, which trouble began the day he took possession thereof and continued, at very frequent intervals, to the 14th day of May, 1923, at which time he returned the machine to the defendant, announced his rescission of the contract, and demanded the return of the money ($700) he had paid on the purchase price upon the execution of the contract. It is sufficient to state generally that, as he described the condition of the car, it was so defective mechanically in many of its parts that it would "stall" or fail to function many times during some days and that by reason thereof he was compelled to have it repaired a number of times by machinists specializing in auto mechanics; that, even after repairs were made, the car could not be operated for a very great distance without being again repaired; that on one occasion, when it was in a repair shop for a somewhat general inspection and "overhauling," he discovered many defects in the mechanism of the car, all of which are specifically enumerated in the court's findings and which show that the car was mechanically not in good condition. Plaintiff stated, as the court found, that he was compelled to and did expend the aggregate sum of $45.25 in payment for the repairs made on the car.

On the 14th day of May, 1923, the plaintiff returned the car to the defendant's place of business, and there meeting its president (Stanley W. Smith), said to him that he returned the car "because it was mechanically defective and not in the condition represented. I told him (Smith) that I left the car there." Smith at that time had an engagement with some other party and said to plaintiff that he did not then have time to discuss the matter with him (plaintiff), and requested the latter to return at some future time, when he (Smith) would take the matter up. Approximately two weeks thereafter plaintiff again called at the defendant's place of business, and the matter was then discussed between the plaintiff and Smith. As to what was said and done on that occasion, plaintiff testified:

> "In that conversation he had an offer to give me if I would sell a new Peerless, what it amounted to. If I would sell a new Peerless or get a customer for a new Peerless that he would then return my deposit on the Packard. That is what he said to me at that time. I wanted to know what the terms and conditions of that would be, and he set a time limit for January 1, 1924, all this time would be good for, and told me to come back again, that he would think it over and let me know just exactly what he would do—what sort of a definite proposition he would make. I did not take the car away with me again. I never did take the car away. There was nothing said about my taking the car at that time. I have not had the car in my possession since the 14th day of May. That second visit to Mr. Smith which I had been discussing was prior to June the 6, 1923. He said nothing at that time about my taking the car with me. About two or three days passed before I next had any conversation with Mr Smith, in his office again. Nobody else was present. That was still prior to June 6, 1923. At that time he had an instrument drawn up; I think it is a deposit form. It was submitted to me for my approval, and was terms and conditions in that which I would not consent to. I did not approve it. I told him that I could not accept an agreement like that; if that is all he had to offer I would just simply either have to get my money, my deposit on the car, or else lose it all; I could not accept an order of that kind. In reply he said he would leave it just that way, then; it was up to me. He did not at that time offer the car back or say anything about it. It was still in their possession, to the best of my knowledge. That was all prior to June the 6, 1923. I never talked to Mr. Smith after that time or to any of his salesmen."

The testimony of the plaintiff as to the representation made by Gannon concerning the mechanical condition of the car on the occasion of the making of the contract and before the document was signed by plaintiff was corroborated by the testimony of Colonel Toy. In fact, Gannon himself practically admitted that he stated to the plaintiff that the car was "in good condition" mechanically.

Smith, the president of defendant, admitted that the plaintiff returned the car at the time stated above, with the complaint that it was not in good mechanical condition, and left the car at the defendant's place of business. He also testified:

> That he "offered to take the car back on a new car. He" (referring to plaintiff), continued Smith, "claimed he could not afford to get a new car. I said: 'You don't have to buy it now; I will give you a year or two years; might have been three years. I wrote up an order to the effect of transferring the full $700 over on a new car within a certain length of time, and * * * he said he would think it over and come back. When he came back, he wanted to know whether he could dispose of this order, and I said: 'I don't want it farmed, but if he found a buyer of the car, just turn it over to some one else, all right, but as far as advertising it or absolutely farming it out promiscuously, that I would not stand for that sort of thing.' "

During this conversation plaintiff stated to Smith that "he was not going to keep the car, was going to give it back to us, and one time he asked for the money back, which we absolutely refused, unless we made a sale there."

On June 4, 1923, the plaintiff, through his attorney, addressed to defendant a written notice notifying the latter that he did, on the 14th day of May, 1923, rescind the contract of sale by returning the car to defendant and demanding the return to him of the $700 paid on the purchase price of the car. Said notice declared that plaintiff "has rescinded and hereby rescinds that certain contract," etc.; that plaintiff "has restored to you and does hereby restore to you everything of value which he received from you under said contract"; and "demands that you return to him all moneys paid you on account thereof, to wit, $700."

The defendant, through its attorneys, addressed to plaintiff's attorney a notice, under date of June 11, 1923, in reply to the above referred to notice by plaintiff to defendant, notifying the former that:

> Defendant "will not accept the rescission of the contract therein referred to, and you are also hereby notified that our client will insist upon the performance of the said contract, and will expect Mr. Pennell to strictly comply with the terms thereof. If he does not take possession of the car and meet the obligations of the contract forthwith, in accordance with the terms thereof, we shall take steps to enforce the rights of the seller in accordance with the terms of the said contract."

On June 16, 1923, the defendant sold the car to one Genter for $2,065. In the transaction Genter turned over to defendant a Chandler seven-passenger sedan and paid in cash $150, making a total payment on the purchase price of the sum $1,150.

It will not be denied that the finding that the defendant, through its agents, authorized to conduct for it transactions such as the one concerned here, represented to the plaintiff, before the completion of the transaction involving the sale of the automobile, that the car was "in good condition"—that is, that it was mechanically sound—is amply supported by the testimony, of which the foregoing embraces a synoptical statement. Nor will it be denied that the inferences naturally following from the testimony affords sufficient support to the finding that the plaintiff believed and relied upon and was induced by such representation to enter into the contract; and, further, it will not be denied that the finding that the car, at the time of its sale conditionally, to plaintiff, was in a very defective condition, is buttressed by sufficient evidentiary support. But, as stated in the outset of this opinion, the evidence does not support the finding that the contract was rescinded by the mutual consent of the parties thereto. As to this proposition, the plaintiff contends: That the return of the car by him to defendant, with the declaration that he rescinded the contract, and a demand by him for a return of the money he had paid on the purchase price, constituted a notification or offer on his part of a rescission, and that the acceptance, retention, and the subsequent sale of the car to Genter by the defendant constituted conduct on the part of the latter from which the court was justified in finding, as it did find, that it consented and agreed to the abandonment or rescission of the contract.

[4-8] It is settled law that an agreement to abandon or rescind a contract may be proved by or inferred from the acts or conduct of the parties (Treadwell v. Nickel et al., 194 Cal. 243, 259, 228 P. 25; Tuso v. Green, 194 Cal. 574, 229 P. 327; Green v. Wells & Co., 2 Cal. 584), and where the conduct or acts of the parties are such as reasonably and fairly to justify an inference that a rescission had been intended and effected by the mutual consent of the parties, a finding to that effect will not be disturbed on appeal. But, as said in Tuso v. Green, supra:

> "A rescission when effected by mutual consent is a new contract, to effect which there must be a meeting of the minds. It is true that the consent of the parties to such an agreement of rescission is not required to be expressed in words, but may be manifested by conduct. But such conduct must afford a stronger basis for the inference of consent than mere conjecture or speculation."

[9] In the present case it will be noted from the testimony that the defendant refused from the beginning to acquiesce in or consent to the offer or proposal by plaintiff to rescind the contract. The fact that defendant's proposition to the plaintiff to take a new car in the place of the Packard and that the money paid by the latter on the Packard be credited on the sale of the new automobile, and the declaration of Smith that under no other circumstances or upon no other condition would the defendant consent to a rescission of the contract in controversy, amounted to a positive refusal of defendant to rescind. Defendant's reply to plaintiff's written notification of a rescission involved a clear, unequivocal, and emphatic refusal to agree or consent to a rescission.

[10] The sale of the car by the defendant subsequent to the restoration thereof to its possession was only the exercise of a right resting with it in the very nature of the transaction. The title to the car was in the defendant, and was to remain so until it was fully paid for. The written contract, which constituted evidence only of a conditional sale, so provided. Its return to defendant by plaintiff, with the positive, unqualified announcement by the latter, both by word of mouth and in writing, that he would not keep the car, that he rescinded the contract, and that he wanted returned to him the money he had paid on the purchase price, left nothing else for the defendant to do, or that it reasonably could be expected to do under the circumstances, than to retain possession of the property, and, if opportunity offered, to sell it to some third person, if necessary, to enable it to realize on the full value of the property. In other words, the defendant was not required, under the con-

tract as written or under the situation with respect thereto as it finally developed, to sacrifice an opportunity, which might not again become available to it, to sell the car at a proper advantage. As is said in Tuso v. Green, supra, in which, although involving a contract for the sale of real property, the general facts are quite similar to those of the case at bar:

> "In thereafter selling the premises to a stranger plaintiffs did no more than they had a right to do in the absence of a rescission. Defendant had breached his contract and plaintiffs thereafter held the land freed from any claim or right of defendant thereto or therein. * * * In the absence of any other evidence indicating an intention to rescind, the act of the plaintiffs in selling the premises is no more referable to such intent than it is to an intent to stand upon their rights under the contract which defendant had breached and retain to their own use the moneys which he had paid in part performance of his promises. That act indicated nothing more than that plaintiffs did not then intend to thereafter convey those premises to the defendant. It was no more significant than would have been an express refusal on the part of the plaintiffs to convey the premises to the defendant."

See, also, Glock v. Howard, 123 Cal. 1, 14, 55 P. 713.

[11, 12] It is to be understood, of course, that the sale of the car by defendant to Genter, after the return thereof by plaintiff to defendant, was not in pursuance of the exercise of the option by defendant to forfeit the contract because of default in payment of an installment as prescribed. As the court found upon sufficient evidence, the defendant did not exercise the option referred to, and, indeed, could legally not have done so, because the contract had been rescinded by the plaintiff and turned back to the defendant. But, while the decision that a rescission was accomplished by the mutual consent of the parties derives no support from the evidence, it is still true that the evidence unquestionably shows that the plaintiff did rescind the contract, and is sufficient to support a finding to that effect. In brief, the situation, as the evidence shows and the court found, is simply this: That the defendant corporation did not deliver to the plaintiff a car in "the good" mechanical condition which it represented to the latter that the car so delivered was in. In other words, the plaintiff did not receive the car that he bargained for. This being true, the plaintiff was entitled to rescind the contract and upon such rescission entitled to the return of any moneys which he had paid the defendant on the purchase price. Civ. Code, § 1691; Bridges v. Fisk, 53 Cal. App. 117, 200 P. 71, 73; Mettler v. Vance, 30 Cal. App. 499, 158 P. 1044; Hallidie v. Sutter St. R. R. Co., 63 Cal. 575; Condley v. Consolidated L. Co., 53 Cal. App. 8, 200 P. 69; 24 R. C. L. pp. 272, 273, § 551.

The evidence, without conflict, shows that the plaintiff, immediately upon discovering the facts entitling him to rescind, did (or offered to) rescind the contract, and at the same time returned to the possession of the defendant the automobile in the same condition in which he received it; or, stating it substantially in the language of the statute, he "promptly" rescinded "upon discovering the facts which entitle him to rescind" and restored "to the other party everything of value which he had received from him under the contract." Civ. Code, § 1691, subds. 1 and 2. Thus the plaintiff was entitled to have returned to him any moneys he paid to defendant under the contract.

[13] We do not think that, under the state of the case as it was made below, and as it stands here, there should be a reversal. By rather subtle reasoning upon a like analysis of the findings and the conclusions of law, it might, with at least some plausibility, be held, since a rescission of the contract is certainly thereby established, that an ex parte rescission, or a rescission by the plaintiff alone, is necessarily embraced within the decision and the conclusions of law, and that the part of the findings and the like part of the conclusions of law to the effect that a rescission was accomplished by the mutual consent of the parties might be treated, for the purposes of the case as we have found it, as surplusage. But, since the appellate courts now are empowered to change or make findings upon the evidence received into the record or, if necessary, take additional evidence, and modify the conclusions of law accordingly (Const. art. 6, § 4¾; Code Civ. Proc. § 956a [St. 1927, p. 583]; Milton Realty Co. v. Butterfield [Cal. App.] 262 P. 419, opinion by Justice Plummer of this court), it is preferable to make findings as to the matter of rescission in accord with the undisputed evidence and modify the conclusions of law as to said matter so that they will conform to such findings. Accordingly, finding VIII is hereby stricken from the findings of fact, and the following finding by this court is hereby substituted therefor:

> "The court finds that it is true that plaintiff, on the 14th day of May, 1923, did notify defendant that he rescinded said transaction, that the plaintiff did thereby rescind said contract, and at the same time and by reason of said rescission and as an act in pursuance thereof did return and restore to defendant said automobile and everything of value received by him from said defendant under said contract, and did demand of defendant that it return to him said sum of $700 received by said defendant from plaintiff on account thereof."

Finding IX is hereby stricken from the findings, and the following finding by this court is hereby substituted therefor:

> "That it is true, as alleged in paragraph 8 of said amended complaint, that defendant on said 14th day of May, 1923, received into its

possession said automobile, and has, since said date, been in and retained possession, use and control thereof, but that said defendant then and there refused, and at all times since the said 14th day of May, 1923, has refused, to consent to a rescission of said contract."

Paragraph 1 of the conclusions of law is hereby stricken from the conclusions of law, and the following is hereby substituted therefor:

"The said contract for the sale and purchase of said automobile entered into between plaintiff and defendant was and has been rescinded by the plaintiff."

Upon the findings and the conclusions of law of the trial court in all respects other than those made by this court and the findings and conclusions of law made by this court, as above indicated, the court below is hereby directed to enter judgment for the plaintiff in accord therewith, and for the sums stated in the judgment from which this appeal was taken.

I concur: PLUMMER, J.

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90 Cal. App. 270

J. & W. C. SHULL, Inc., v. MERCED IRR. DIST. et al. (Civ. 3420.)★

District Court of Appeal, Third District, California. March 20, 1928.

Hearing Denied by Supreme Court May 17, 1928.

1. Mandamus 🔑10—Writ of mandate lies to review questions of law, not of fact.

Where board of directors for irrigation district found that tract of land would be benefited by irrigation and should be included within irrigation district, application for writ of mandate to review their findings was properly denied, since, in mandamus proceeding, appellate court only considers questions of law, not of fact.

2. Mandamus 🔑4(1)—Writ of mandate cannot serve as writ of error.

Writ of mandate cannot be made to serve purpose of writ of error.

3. Waters and water courses 🔑228—Finding of directors for irrigation district upon conflicting testimony binds appellate court.

Where board of directors for irrigation district have found facts and then misapplied law, such error may be corrected by courts; but where board of directors upon conflicting testimony has found facts, such finding is final and courts of appeal are bound thereby.

4. Waters and water courses 🔑226—Directors of irrigation district, finding that land would be benefited, need not exclude portions which are not irrigable by gravity.

Where board of directors of irrigation district found that tract of land would be benefited by irrigation system about to be established, and certain parts scattered over entire tract were above water level of proposed canals, *held*, that it was not incumbent upon board of directors to exclude by demarcation or any other method such irregular tracts, even though such tracts by reason of their elevation were not subject to irrigation by gravity.

5. Waters and water courses 🔑226—Finding that land within irrigation district would be benefited by inclusion will not be disturbed because portion thereof was not irrigable by gravity.

Where board of directors for irrigation district has found that tract of land would be benefited by being included within district, fact that certain irregular portions could not be irrigated by gravity because of elevation did not establish any reason for disturbing finding of board that all lands would be benefited by retaining them within boundaries of district.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Action by J. & W. C. Shull, Inc., against the Merced Irrigation District and others, for a writ of mandate to compel the exclusion of certain lands from an irrigation district. From an order denying the writ, plaintiff appeals. Affirmed.

Dennett & Zion, of Modesto, for appellant.

Stephen W. Downey and Downey, Brand, Seymour & Dunn, all of Sacramento, for respondents.

PLUMMER, J. The plaintiff, as the owner of 1,260 acres of land situated within the Merced irrigation district, in the county of Merced, filed a petition with the board of directors of the Merced irrigation district for the exclusion of said 1,260 acres of land from such irrigation district upon the ground that said land was not susceptible of irrigation from the source chosen or the system of irrigation adopted by said district, and, further, that the lands were not adapted to irrigation and would not be benefited thereby. The petition for exclusion filed by the plaintiff with the said irrigation district described all the lands included within the said 1,260 acres, by sections, quarter sections, etc., but asked for the exclusion of the entire tract without specifying the particular section, quarter sections, or smaller tracts that would not be benefited by irrigation or that were not susceptible of irrigation. The theory upon which the petition was filed was that the entire tract should be excluded. Upon the hearing before the board of directors of the irrigation district the testimony disclosed the fact that at least 325 acres lying within the boundaries of the 1,260 acres were above the water level of the line of the canal belonging to the district running through the lands owned by the plaintiff. The maps filed upon said hearing exhibited to the trial court and presented to us for consideration show certain irregular

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★Hearing denied by Supreme Court.

tracts which, by considering the contour lines indicated thereon, may reasonably be found to lie above the water level of the canal, and, therefore, not susceptible of irrigation by the simple means of gravity at present provided by the district.

Upon the testimony taken before it, and also upon inspection made by the directors of the irrigation district, it was found by the directors of the irrigation district that the lands belonging to the plaintiff would be benefited by irrigation by their retention within the district, and that the interests of the district would be best subserved by retaining said lands within the exterior boundaries thereof.

In this proceeding the plaintiff prayed for a writ of mandate from the trial court, directing the board of directors of the irrigation district to enter an order excluding the lands owned by the plaintiff. Upon the hearing in the trial court the findings of the board of directors of the irrigation district were sustained and the writ of mandate was denied. The matter is before us upon appeal from the order of the trial court denying such writ.

[1, 2] In presenting its cause to this court the plaintiff has apparently taken the position that this court has the same right to pass upon the evidence introduced before the board of directors of the Merced irrigation district and the same powers in relation thereto as the law vests in the board of directors. This position is not tenable. The law is well established that a writ of mandate cannot be made to serve the purpose of a writ of error. In this proceeding we have only to consider the questions of law, not questions of fact. The limitation upon a court of appeal in such a proceeding as this is well stated in 26 California Jurisprudence, p. 360, § 573, as follows:

> "The inclusion of lands within an irrigation district constitutes a determination by the board of supervisors that such lands will be benefited by the proposed irrigation. Since the question of benefits is one of fact, a finding with reference thereto, if supported by any competent evidence, is conclusive though erroneous, and it is not constitutionally necessary that a right to a rehearing or an appeal should be given. However, if a finding is based upon no evidence, or is contrary to all the evidence before the board, it is subject to review in the same way as a decision upon any other fact of a jurisdictional nature. Where the Legislature itself fixed the boundaries of a district, all land therein is presumptively benefited, and the legislative determination is final, unless such conclusion is contrary to any rational view of the facts and the lands included 'plainly could not by any fair or proper view of the facts be benefited.'"

[3] The case of Inglin v. Hoppin, 156 Cal. 483, 105 P. 583, and Harelson v. South San Joaquin Irrigation District, 20 Cal. App. 324, 128 P. 1010, also set forth the limits of the power to be exercised by a court of appeal. Where the board of directors of an irrigation district have found the facts, and then misapply the law, this error may be corrected by the courts, but where the board of directors, upon conflicting testimony, has found the facts, such finding is final and courts of appeal are bound thereby.

[4] The finding of the board of directors of the irrigation district is to the effect that the 1,260-acre tract of land belonging to the plaintiff will be benefited by the irrigation system about to be established by the defendant. As we have hereinbefore stated, certain irregular portions thereof lie above the water level of the proposed canals. These particular tracts are not designated by any of the ordinary legal subdivisions of land, but are scattered about over the entire tract, and it is upon this testimony it is claimed that 325 acres of said 1,260-acre tract should be excluded. Under such circumstances we do not very well see how it is incumbent upon the board of directors of the irrigation district to exclude, by demarcation or any other method, such irregular tracts, even if it be assumed that such irregular tracts, by reason of their elevation to the canal level, were not subject to irrigation by gravity. Without citing the authorities as to what lands may be included within an irrigation district, it is sufficent to quote from 26 California Jurisprudence, p. 367, § 583, as follows:

> "All lands which in their natural state would be benefited by irrigation, and are susceptible of irrigation from a common source and by the same system of works, including pumping from subsurface or other waters, may be included in an irrigation district. It has been said that the amount of benefit must be substantial and is not limited to the creation of an opportunity to use the land in question for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it produced in reasonable quantities and with ordinary certainty and success without the aid of artificial irrigation. In other words, although land may be used without irrigation, if by the use of artificial irrigation it will be made available for other and more remunerative uses and will also be improved with respect to its original use, it may be included in a district. Indeed, land may be included even though it is only incidentally or indirectly benefited, as where it shares in the general increase of land values owing to the improvements in the vicinity. It is not the duty of the supervisors to exclude by demarcation every minute tract of land that happens to be covered by a building or other structure which unfits it for cultivation. 'The board may include in the boundaries of a district all lands which in their natural state would be benefited by irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced.'"

In the leading case of Board of Directors v. Trega, 88 Cal. 334, 26 P. 237, the question of benefits is considered, and it is there held that it is not necessary to exclude every small tract of land from a larger area that may not be directly benefited by the system of irrigation provided. Indirect benefits may be sufficient to justify the inclusion of the lands within the district. Likewise, in the case of Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 P. 1028, the court, in considering whether a tract of land would be benefited by being included within the district, and answering the argument that the particular tract of land involved was not subject to overflow, said:

> "To say, therefore, that any given parcel or tract of land is not directly subject to overflow is not to say that it cannot be benefited by the carrying out of the proposed plan."

And then, with reference to the Trega Case, uses the following words:

> "Thus, an incorporated city may be embraced within the boundaries of an irrigation district, although much of the land in the city does not require, and could not use, irrigation" (citing a number of authorities).

And then, further:

> "Similarly, in other jurisdictions, it has been held that the inclusion in a drainage district of high lands not subject to inundation does not conclusively show a lack of benefit to such lands" (citing a number of cases).

And then further says:

> "An examination of these cases will show that the courts have regarded an incidental or indirect benefit as sufficient to justify the imposition of a part of the burden of the improvement. Such indirect benefit may result from the improvement of neighboring and surrounding land, and the consequent increase in the value of all the land within the district."

See cases cited on page 126 (169 P. 1031) of Los Angeles County F. C. District v. Hamilton, supra.

The evidence is conflicting as to the susceptibility of the successful irrigation of the 935 acres lying below the level of the canal. A portion of the testimony would lead to the conclusion that such land could never be profitably irrigated, but there is testimony to the contrary, and that being the case, we have nothing to do with the question of fact relating to the susceptibility of the irrigation of said lands.

[5] As to the other portions of the tract, the testimony shows that most of it lies approximately 20 feet above the level of the canal running through the lands owned by the plaintiff. As to this portion, there is considerable testimony to the effect that it would be benefited by irrigation, and that it can be irrigated by installing a pumping plant and lifting the water that distance. The testimony in the record shows that this method of taking water from the canals owned by the district is quite commonly practiced in the vicinity of Livingston and Atwater. The pumping plants appear to be owned and operated by the landowners, and not by the district. In this particular it is urged by the appellant that if it is compelled to install a pumping plant to take water from the defendants' canals, that it would be obtaining water from another source and system than that furnished by the defendants, and, therefore, under the provisions of section 78 of the Irrigation District Act (St. 1897, p. 279), such lands should be excluded. The taking of such water from the canals belonging to the defendants would certainly be taking water from the source supplied by the district, if not technically, by the same system. In this particular it may be stated that there is no showing in the record that the district has provided for the construction of service ditches and that the expense of the construction of service ditches or making provision for the use of water furnished by the district rests upon all the landowners alike. Again, it must be remembered that the burden and expense of lifting water from the canal to the higher lands belonging to the plaintiff would constitute a valid reason for a lower assessment upon such lands. The law provides for an equitable means of assessment whereby all these matters may be taken into consideration, to the intent and purpose that all the lands within the district shall bear its ratable proportion of the burdens of the district. The mere fact that certain irregular portions cannot be irrigated by gravity does not establish any reason for disturbing the finding of the board of directors of the district that all the lands belonging to the plaintiff will be benefited by retaining them within the boundaries of the district.

We have not set forth the testimony in this case in detail because it is conflicting, and also because of the fact that the lands and premises were inspected by the board of directors of the irrigation district and upon the testimony and the fact of physical observation determined that the lands would be benefited by their retention. Under such circumstances, we think the conclusion of the board as to the facts binding upon the courts.

The judgment denying a writ of mandate is affirmed.

We concur: HART, Acting P. J.; BARTLETT, Justice pro tem.

90 Cal. App. 382

HUTCHINGS v. POST. (Civ. 6147.)

District Court of Appeal, First District, Division 2, California. March 26, 1928.

1. Appeal and error 🔑1046(3)—Rulings which kept burden on plaintiff despite counterclaims were not prejudicial, where plaintiff was permitted to prove all material facts.

Rulings of trial court, which kept burden of proof always on plaintiff, in suits involving counterclaims, were not prejudicial, where plaintiff was not prevented from making proof of all material facts.

2. Trial 🔑2—Defendant's recovery under counterclaim in second action held not limited by amount sought as set-off in first action, brought on same indebtedness.

In actions to foreclose mechanic's lien and to recover on promissory note covering same indebtedness, defendant was not bound by the amount of the offset claimed in her pleadings in the first action, and could in second action assert counterclaim for greater amount, and allowance of such increased sum was not error, where actions were not consolidated for trial, but were merely tried together upon separate pleadings.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Actions by Clare Hutchings against Adda M. Post, in which defendant asserted counterclaims. From judgments for defendant, plaintiff appeals. Affirmed.

Alfred J. Smallberg, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to foreclose a mechanic's lien for labor and materials. The defendant answered and set up a counterclaim for damages for failure to complete the work according to the written contract. Before the action came to trial, plaintiff commenced an independent action upon a promissory note which had been given by defendant as part payment on the contract. To the complaint in this action the defendant also set up a counterclaim and asked that the note be canceled. During the progress of the trial of the first action, the parties stipulated that the two might be tried at the same time and upon the same evidence. This was done, and separate findings and judgments were entered. In the first action, the trial court found that, because of plaintiff's failure to complete the contract in accordance with its terms, defendant was entitled to judgment for $128.33. In the second action, judgment went for the defendant for costs. The plaintiff has appealed from both judgments upon a single notice of appeal, and presents the appeal on a typewritten transcript.

[1] Nothing is to be gained by stating the facts of the case other than to say that the trial involved an accounting between the parties as to payments due and offsets claimed because of imperfections in the work performed. The plaintiff was his own witness, and the defendant at great length told wherein she believed the plans and specifications had not been followed. The trial court chose to accept her views, and that ends the controversy. There is some merit in plaintiff's criticism of the rulings of the trial court which kept the burden of proof always on the plaintiff, but we have not found that these rulings prevented the plaintiff from making proof of any fact material to his cause.

[2] The work upon the building stopped in October, 1923, and the defendant then took possession. In April, 1924, she filed her answer in the first action in which she claimed an offset of $216 on account of work undone. In July, 1925, she filed her answer in the second action, in which she made claim for $446 on the same account. It is now argued that defendant was bound by the first pleading and that the trial court erred in allowing her an offset in the full sum of $446. The actions were not consolidated for trial, but were merely tried at the same time upon separate pleadings. In the first action damages were claimed for the delay, and the judgment was well within the sum prayed for.

We find no error in the allowance of a credit to the defendant for her payments of the item to the Diest Company or of the fees for blueprints or the cost of repair to the roof of the garage.

Judgments affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

90 Cal. App. 311

ST. CLAIR v. JOOS. (Civ. 4691.)

District Court of Appeal, Second District, Division 2, California. March 21, 1928.

1. Evidence 🔑471(26)—Testimony of plaintiff, in action to quiet title, that she owned property, is admissible and is not without probative weight.

Generally, ownership of property is fact to which witness may testify and testimony of plaintiff, in action to quiet title, that she owned property involved, cannot be objected to as without sufficient probative weight to support finding, since law does not permit introduction of evidence which, when received, would be without probative force.

2. Appeal and error 🔑1071(5)—Error in finding as to amount of deferred cash payments held immaterial and harmless, where purchaser made none of deferred payments.

In action to quiet title, error in trial court's finding as to amount of deferred payments of cash under contract of sale was immaterial, and consequently harmless, where purchaser made none of the deferred payments and question whether plaintiff was entitled to a decree turned wholly upon consideration surrounding giving of note.

3. Vendor and purchaser 🔑180—Purchaser under contract of sale held in default on failure to pay at maturity note given as part of purchase price.

In action by vendor under contract of sale to quiet title because of purchaser's default in payment of purchase price, purchaser became in default on failure to pay at maturity note given in payment of part of purchase price, especially in view of provision in contract that agreement was to be interest bearing from date of payment of first note and possession of property was to be given at such date.

4. Vendor and purchaser 🔑296—Action to quiet title held proper remedy on default of vendee under contract for sale of land.

Where time was expressly made essence of contract of sale of land and contract provided for release of vendor from all obligations on failure of vendee to comply with its terms and forfeiture by vendee of all right to property, *held*, that, on vendee's default, an action to quiet title was the appropriate remedy.

5. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence cannot be disturbed on appeal.

Trial court's finding on conflicting evidence, in action of unlawful detainer, that rent was payable in advance cannot be disturbed on appeal.

6. Landlord and tenant 🔑116(5)—Vendee remaining in possession after default as tenant under agreement with vendor is entitled only to 3 days' notice on failure to pay stipulated rental (Code Civ. Proc. § 1161, subd. 2; Civ. Code, § 789).

Where vendee under contract of sale retained possession after default under agreement as tenant at a stipulated monthly rental, *held*, that, on her failure to pay rent, 3 days' notice required by Code Civ. Proc. § 1161, subd. 2, was sufficient, and 30 days' notice required by Civ. Code, § 789, did not apply.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Actions of unlawful detainer and to quiet title by Martha J. St. Clair against Rachel E. Joos. Judgments for plaintiff, and defendant appeals. Affirmed.

F. E. Davis and L. E. Dadmun, both of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

WORKS, P. J. Plaintiff commenced two actions against defendant. The first is an action of unlawful detainer and was numbered 111662 in the files of the trial court. The second is an action to quiet title and was numbered 111663 there. Under stipulation the two were tried together, the evidence applicable to each being segregated in the mind of the trial judge for the purposes of decision, and separate judgments were necessarily pronounced. Separate notices of appeal, of course, were filed. There is before us, however, but one bill of exceptions, covering both cases, and there was filed but one transcript on appeal with a single title, presenting the record in both. The two cases pend in this court, therefore, under but one number. These matters are mentioned for the sake of clarity, as we must pronounce two distinct judgments in a litigation which appears from our files to be presented by a single action. To make our judgments intelligible they must refer, respectively, to the appropriate trial court numbers.

Defendant appeals from judgments rendered against her in both actions.

We shall consider, first, the second action commenced, the action to quiet title, trial court No. 111663.

[1] The interest of appellant against which respondent sought to quiet title arose under a contract of sale by which respondent agreed to sell and appellant agreed to buy the real property involved in the action. Following the allegations of the complaint the trial court found that respondent was the owner of the property. The only evidence upon the issue was the statement of respondent while she was on the witness stand to the effect that she was the owner of it—"I own * * * the real property involved in this action." It is contended that the evidence fails to support the finding, but the contention is without merit. The testimony of respondent was received without objection, and the point made by appellant, therefore, is not that the trial court erred in the admission of improper testimony. The only contention open to appellant is that the evidence is without sufficient probative weight to support a finding. "As a general rule ownership of property is a fact to which a witness may testify" (Perkins v. Sunset Tel. Co., 155 Cal. 712, 103 P. 190), and it is idle to assert that the law permits the introduction of evidence which, when received, would be without probative force.

[2] The contract of sale provided that the selling price of the property agreed to be conveyed was $18,000, payable by the giving of a note for $3,000, the payment of $1,500 on or before one year, of $8,000 on or before a specified date, and of $5,500 by the assumption of a certain mortgage. The trial court found that the price was $18,000, but that the payments were to be $3,000 and a first deferred payment of $15,000, a second of $8,000, and a third of $4,500. It will be observed that the payments thus found make a total of $30,500, a result caused by the court finding an installment of $15,000 instead of one of $1,500, as provided in the contract, and one of $4,500

instead of one of $5,500. It is contended that this finding, being divergent from the very terms of the contract, was not supported by the evidence, and it is obvious that it was not. It is probable that the manner in which the finding was cast was the result of misprision, but be that as it may, the finding in its entirety was wholly immaterial and unnecessary to a determination of the action. The evidence shows without dispute that appellant made none of the deferred payments. Whatever their amount, she utterly failed in her promise to pay a single one of them. In truth, the question whether respondent was entitled to a decree quieting title turned wholly upon considerations surrounding and accompanying the giving of the note for $3,000. We therefore determine that the error of the trial court in its finding as to the amounts of the deferred payments of cash was immaterial and consequently harmless.

[3] The next question made by appellant is concerned in the giving of the note for $3,000. In addition to the provisions of the contract which are above stated, it was recited that the $3,000 note to be given was to be due "on or before 60 days." There was no express provision as to when the note was to be delivered. The evidence shows, however, that it was dated June 1, 1922, which was also the date of the contract, and that it provided that it should be due on or before 60 days after its date. The paper therefore became payable on July 30, 1922. The complaint alleged that appellant had been in default ever since September 1, 1922, and that she had never made any payment under the contract. The allegation that appellant was in default was denied in the answer, but the trial court found that she had been so ever since the date last mentioned. Appellant contends that this finding was not sustained by the evidence. It is said that no default could be predicated of a failure to pay the note, for the reason that, under the terms of the contract, the note itself was a payment, as the instrument provided in effect that $3,000 was to be paid by the giving of a note. It is also pointed out that no other payment was provided for by the contract until June 1, 1923.

The evidence is undisputed that appellant never paid the note for $3,000, nor any part of it, nor any interest on it. It would be a strange state of affairs if this evidence were insufficient to support the finding which is assailed by her. If the contention of appellant can be sustained, a vendee under a contract of sale, by the giving of a worthless note—and the one here under consideration appears to have been of that character—could tie up real property and could maintain a cloud upon its title for so long a time as might be fixed in the contract before the date upon which, by express and unmistakable provision, a payment of actual cash was to be made. Indeed, in a case in which the contract provided for the making of a long series of deferred payments, even during a lengthy succession of years, all by the delivery of promissory notes from time to time, a default under the contract could never arise if the notes were given, and the vendee would acquire title to the land by means little better than robbery, for the vendor would be remitted wholly to his actions upon the worthless notes as they fell due. The only possible salve to his injured state would lie in his ability to levy attachments upon the property which, in all conscience, was his own. Such a state of affairs makes no decided appeal to a court of equity. It could not be permitted to exist except under a contract which, by express and absolute terms, allowed such an anomaly to thrive. "It is well settled that the note of a debtor or of a third party, if not itself paid, does not constitute a payment unless received by the creditor under an express agreement to accept it as an absolute payment." This language was used in a case in which one party had agreed to sell real property to others upon the payment of certain installments of cash, but in which, according to the opinion of the court, there was a subsequent agreement "by which the plaintiff agreed to accept from Chambers," one of the defendants, "a promissory note for $2,500 in the place and stead of that amount of money which Chambers had agreed to pay plaintiff," and it is this note which the court had in view in employing the language first above quoted from the opinion. Menzel v. Primm, 6 Cal. App. 204, 91 P. 754. It is true that in that case the note was given to take up a preexisting obligation, but we think that fact does not render the decision inapplicable here. It is true here that the original contract of sale provided that the vendee should make an initial payment of $3,000 "by the giving of a note due on or before 60 days." Notwithstanding that fact, respondent had the right to expect payment of the note at maturity, and we think, upon equitable considerations, the action being one to quiet title, that appellant was in default when she did not pay. This is surely true under a clause of the contract to which we have not yet referred:

> "This agreement is to be interest bearing from the date of the payment of the original first payment note and possession of the property shall be given at such date."

Here a material part of the agreement, on the score of performance, is made to depend on the payment of the note. We think the disputed finding was supported by the evidence.

[4] Appellant's final contention in the action to quiet title is that respondent has mistaken her remedy. It is said that her only recourse was to sue to foreclose appellant's right to purchase, when the court might have rendered decree allowing her time within

which to perform her obligations under the contract. The form of remedy sought was, however, proper. Time was expressly made of the essence of the agreement, and it also contained the provision:

> "In the event of a failure to comply with the terms hereof by [the vendee], [the vendor] shall be released from all obligations in law or equity to convey said property, and [the vendee] shall forfeit all right thereto, and all money theretofore paid thereon, shall be as liquidated damages for the nonfulfillment hereof by [the vendee]."

Under such a contract an action to quiet title is the appropriate remedy. Oursler v. Thacher, 152 Cal. 739, 93 P. 1007.

[5] We come now to a consideration of the action of unlawful detainer.

Appellant, not having acquired the right under the above-mentioned contract of sale to enter into possession of the property covered thereby, made an agreement with respondent under which she became entitled to the possession of a part of the premises as a tenant and at a stipulated monthly rental. The trial court found that appellant was in default in the payment of rental, and this finding was based upon one to the effect that the rental was payable monthly in advance. It is contended that these findings were not supported by the evidence. If the rent was payable in advance, both findings are supported. There was nothing more than a conflict of evidence upon the question whether it was so payable, and the finding to the effect that it was cannot be disturbed on appeal.

[6] Appellant insists that the judgment must be reversed because respondent failed to serve upon her the 30 days' notice required under certain circumstances by section 789 of the Civil Code. The section has no application here. Appellant was served with the 3 days' notice required by subdivision 2 of section 1161 of the Code of Civil Procedure, and by the express mandate of that enactment she was guilty of an unlawful detainer. 15 Cal. Jur. 848, § 275.

Judgment affirmed in superior court No. 111662 and in superior court No. 111663.

We concur: THOMPSON, J.; HAZLETT, Justice pro tem.

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90 Cal. App. 443

SCHENCK v. ROUNTREE. (Civ. 5168.)

District Court of Appeal, Second District, Division 1, California. March 28, 1928.

1. Appeal and error 🔑1011(1)—Finding supported by evidence is conclusive on appeal, though contrary finding may also be supported.

Finding of trial court supported by evidence is conclusive on appeal, no matter how much evidence may appear in support of contrary finding.

2. Evidence 🔑588—Trial court, sitting as jury, may accept merely part of witness' testimony, rejecting other parts.

Trial court, sitting as jury, has right, in exercise of its discretion, to accept a part only of witness' testimony, and reject other parts thought to be inconsistent with other evidence.

3. Highways 🔑184(2)—Evidence held to sustain finding of negligence of defendant's employee driving brush-laden wagon, in knocking over surveyor's transit left standing on road.

In action for damages to surveyor's transit, left standing in public road, which employee of defendant knocked over while driving brush-laden wagon, evidence as to employee's striking the transit while attempting to go around it *held* to sustain finding of negligence.

4. Appeal and error 🔑931(1)—Reviewing court considers evidence most favorable to judgment.

Reviewing court considers evidence most favorable to judgment on appeal.

5. Highways 🔑184(2)—Evidence of overturning of surveyor's transit by wagon driven by defendant's employee warranted inference of negligence under res ipsa loquitur doctrine.

In action for damages to surveyor's transit left standing in middle of road, evidence showing overturning of transit by brush-laden wagon driven by defendant's employee warranted court, sitting as jury, in drawing inference of negligence of defendant under doctrine of res ipsa loquitur.

6. Appeal and error 🔑1033(1)—Error favorable to appellant is not reviewable.

Error in favor of appellant cannot be reviewed on appeal.

7. Highways 🔑183—Plaintiff's negligence in leaving surveyor's transit in road held not to bar recovery against defendant, whose wagon negligently knocked transit down, in view of last clear chance doctrine.

Negligence of plaintiff leaving surveyor's transit standing so as to obstruct travel on road *held* not to bar recovery for damages when transit was knocked down by negligent operation of brush-laden wagon driven by defendant's employee, since employee had last clear chance to avoid accident, and was thus liable, notwithstanding previous negligence of plaintiff.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Harry A. Schenck against Lee L. Rountree. Judgment for plaintiff, and defendant appeals. Affirmed.

Cassell & Stafford and Frank W. Stafford, all of Los Angeles, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

SHAW, Justice pro tem. This action is based on a charge of negligence against the defendant, who appeals from a judgment against him. The case as presented by the findings is as follows: Plaintiff was the owner of surveyor's transit which a party of his employees were using in surveying. They carelessly and negligently left it standing in a certain public road so as to obstruct travel thereon. Thereupon an employee of the defendant, driving a brush-laden wagon, came along this road, plainly saw the transit in plenty of time to avoid running into it, and attempted to drive around it, but carelessly and negligently knocked it over, causing damage for which the judgment in favor of the plaintiff was given.

[1-3] On this appeal no objection is made to the sufficiency of the findings which we have thus briefly summarized, but defendant contends that the evidence does not support the findings as to his negligence. We think this contention cannot be sustained. The evidence shows that plaintiff's employees set up the transit in the middle of the traveled part of the road, and left it there unattended for 15 minutes or more. On their return they found it knocked over and injured. On this day defendant had two employees engaged in driving wagons loaded with brush along this road. In his brief he concedes that the evidence justifies an inference that one of these wagons while so engaged knocked the transit over, but argues that an inference of some other agency is also possible. We cannot follow him upon such an inquiry. Since concededly the finding of the court on this point is supported by the evidence, it is binding upon us, no matter how much evidence may appear in support of a contrary finding. There was no direct testimony as to the knocking down of the transit, but one of defendant's drivers, O'Daniel by name, testified that he saw the transit several times that day; that on his last trip the other driver passed it ahead of him, and that as the witness came along it was still standing in the middle of the traveled part of the road; that he turned out to go around it; that to his knowledge no part of his wagon struck the transit and it looked to him as if the brush was 4 or 5 feet from it, but that he was sitting on the front of the wagon on the opposite side from the transit and could not see it after he passed it; that, when he came back from dumping his load, he saw the transit by the side of the road and some of plaintiff's men inquiring who hit it. This witness testified also that his wagon was between 10 and 15 feet from the transit as he passed it, and that his brush projected 3 or 4 feet over the side of the wagon. Defendant also examined the wheel tracks, and corroborated this witness as to the distances last mentioned. If the whole of O'Daniel's testimony were accepted as true, it would exonerate the defendant, but the trial court, in the exercise of its discretion, was not required to accept or reject his testimony as a whole, as defendant seems to contend. It might properly accept a part of that testimony and reject other parts, if it considered them inconsistent with facts shown either directly or inferentially by other evidence. Here, it being established that one of the defendant's wagons struck the transit, it is obvious that, if O'Daniel was correct in saying that the other wagon preceded him past the transit, and left it still standing, his own wagon must have knocked it over, and he must have been mistaken in his estimate of the clearance between his load and the transit —as he might easily have been in view of the fact that the load prevented him from seeing the transit after he passed it. At any rate, the trial court evidently took this view of the evidence, and we cannot say it was not justified in so doing.

[4, 5] O'Daniel testified that he tried to avoid the transit, and defendant contends that this shows an absence of negligence; but O'Daniel did not explain how the collision between the transit and his wagon occurred. Taking the view of the evidence most favorable to the judgment, it appears that the thing causing the injury to plaintiff's transit was under the control of the defendant, and that the injury was caused by some act incident to its operation by defendant; and it is, of course, clear from the circumstances shown that such an accident does not happen in the ordinary course of things if those having the management use proper care. From these facts the court might infer negligence on the part of the defendant under the doctrine of res ipsa loquitur. 19 Cal. Jur. 704, 712; O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674; Michener v. Hutton (Cal. Sup.) 265 P. 238.

[6, 7] Defendant further calls attention to the finding that plaintiff's employees were guilty of negligence in leaving the transit in the road, and argues that this negligence continued to the very time of the accident, and contributed to it, and that for this reason plaintiff cannot recover. Plaintiff in reply to this contention claims that this finding of negligence is not supported by the evidence, but it is unnecessary to pass on this claim, for the error in this respect, if any, was in favor of the appellant, and cannot be reviewed on this appeal. But in this case negligence on the part of plaintiff is not a bar to a recovery. Although by such negligence the transit was placed in a position of danger, yet, at the time of the accident, plaintiff was entirely unable to extricate it from that position, while defendant's employee plainly saw the deserted transit in this dangerous position in time so that by the exercise of ordinary care he could have avoided injuring it. but he negligently failed to do so. A defendant who thus has the last clear chance to avoid the accident is liable, notwithstanding the previous negligence of the plaintiff.

19 Cal. Jur. 651; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36.

We find no error in the record, and the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

FARBSTEIN v. WOULFE et al. (Civ. 5788.)★

District Court of Appeal, Second District, Division 1, California. March 23, 1928.

Hearing Granted by Supreme Court May 21, 1928.

1. Appeal and error ⚷962—Dismissal and nonsuit ⚷53(3)—Superior court has discretion to dismiss on ground of plaintiff's laches, which is not interfered with unless abused.

Power of superior court to dismiss an action on ground of plaintiff's laches is discretionary, and exercise thereof is subject to reversal only in case of patent abuse of discretion.

2. Dismissal and nonsuit ⚷53(3)—Dismissal of suit to foreclose mechanic's lien for two years' delay held abuse of discretion, where delay was caused by attempted settlement through receiver.

Dismissal of suit to foreclose mechanic's lien on account of delay of more than two years in bringing action *held* abuse of discretion, where delay was caused only by an attempt to settle the matter by receiving payments through the receiver appointed in another action to control property involved, through which arrangement more than half of claim had been paid.

Houser, Acting P. J., dissenting.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by J. Farbstein against Martin Woulfe and others. From a judgment of dismissal, plaintiff appeals. Reversed.

Turner & Grainger, of Los Angeles, for appellant.

Robert M. Pease, of Los Angeles, for respondent Woulfe.

YORK, J. This is an appeal from a judgment of dismissal with prejudice as to defendant Martin Woulfe, also known as Martin J. Woulfe, and as to his fee-simple interest in the real property declared in the complaint. A motion to dismiss having been denied as to the defendants Ethel R. Pease and Robert M. Pease and as to any leasehold interest that they, or either of them, had in or to such real property. The dismissal was granted on account of a delay of more than two years in bringing the action, which was an action to foreclose a mechanic's lien, on for trial. A receiver in another action had been appointed to operate the property involved and certain negotiations had been entered into between the receiver and the plaintiff, which resulted in the payment to the plaintiff by the receiver after the complaint herein had been filed, which reduced the claim of plaintiff from the sum of $6,006.46 to $2,956.46, and appellant had been requested by the receiver not to press this action to trial and had been promised payment of his claim. The respondent was not personally liable for the claim of the appellant, his property only being liable, if at all, under the lien.

Many of the facts and circumstances in the instant case are similar to those in Sunset Pub. House v. Cottage Gardens Nurseries, 70 Cal. App. 452, 233 P. 402. The basis of that opinion is apparently on the ground that it appeared from an affidavit that the delay in prosecuting the proceeding was caused by the actions, conduct, and representations of counsel for a receiver in the matter, and that the defendant had not been prejudiced by the delay, but, on the other hand, had been benefited thereby. The order in that case dismissing the action for want of prosecution was reversed.

In the case of Ferris v. Wood, 144 Cal. 426, 429, 77 P. 1037, 1038, the Supreme Court says:

> "It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve, but rather to impede or defeat, the ends of substantial justice."

The delay in the case of Ferris v. Wood was also similar to that in the case at bar.

[1, 2] The power to dismiss an action on the grounds stated in the case at bar is within the discretion of the superior court, subject only to a reversal of a patent abuse of such discretion. First National Bank v. Nason, 115 Cal. 626, 47 P. 595.

Where the delay is caused apparently only by the attempt to settle and compromise the matter by a payment by the receiver in another action appointed by the court after the filing of the suit, and where such receiver during the course of negotiations has paid to the plaintiff more than one-half of the claim before the notice of motion to dismiss was served, and where the delay in obtaining service of the complaint and the summons is only until knowledge is obtained by the plaintiff that the receiver who had been making very substantial payments on the claim of the plaintiff was no longer to operate the property and would not have funds to pay the remaining balance, and where it appears that thereupon summons and complaint were served upon the defendant Martin J. Woulfe, we are forced to the conclusion that the dismissal as to Martin J. Woulfe was an abuse of the discretion vested in the trial court.

★Superseded by opinion of Supreme Court, 269 P. 446.

The order and decree appealed from are therefore reversed.

I concur: HAHN, Justice pro tem.

HOUSER, Acting P. J. (dissenting). I dissent. From the record herein it appears that the action which forms the foundation for this appeal was commenced in Orange county on April 13, 1922, for the purpose of foreclosing a mechanic's lien on property owned by defendant Woulfe, who was in no wise personally responsible for the indebtedness which was the basis of the action. At about the same time, in Los Angeles county, another action was commenced by a different plaintiff wherein a receiver was appointed with power to take over and operate the property described in the action brought to foreclose the mechanic's lien. It does not appear that Woulfe was a party to the receivership action. An attorney by the name of Adams represented the plaintiff as well as the receiver in the receivership action, and it was he, and not Woulfe, or any one either representing or pretending to represent him, who made the request to the attorney representing the plaintiff in the mechanic's lien action that the latter action be not pressed *"to trial,"* as stated in the opposing affidavit presented on the motion to dismiss the mechanic's lien action.

Although, as shown by affidavit, during all the time in question defendant Woulfe was a resident of the city of Los Angeles, had an office in a downtown business building, his name and address appeared in all telephone directories and city directories, and he owned real property assessed to him with his correct residence address appearing on the tax records of the county of Orange—he was not served with a copy of the complaint and the summons in the mechanic's lien action for a period of two years and seven months after the action was commenced.

With reference to an action for the foreclosure of a mechanic's lien, among other things, section 1190 of the Code of Civil Procedure provides that in case such proceedings "* * * be not prosecuted to trial *within two years after the commencement thereof,* the court may in its *discretion* dismiss the same for want of prosecution. * * *"

For a period of over two years and one-half after the mechanic's lien action was commenced, it lay dormant. Although during all that time defendant Woulfe was a resident of the city of Los Angeles, had a business office therein, was a taxpayer in the county where the action was instituted against him, and his residence and his business address readily discoverable, no attempt was made to serve him with a copy of the complaint and the summons. The only reason given for such neglect is that an attorney representing parties in another action, altogether hostile to the interests of Woulfe and in no wise representing him, made the request of the attorney for the plaintiff in the mechanic's lien action (in which Woulfe was a defendant) "not to press this action to trial or to incur further expense in it," because, forsooth, the attorney in the receivership action apparently hoped or expected that the receiver would pay off the claim covered by the lien. Not a single statement or even suggestion is made that Woulfe was a party to any such arrangement, or that he had any knowledge or suspicion of its existence. It will be noted that the request made by the attorney in the receivership suit to the attorney in the mechanic's lien action was not that a copy of the complaint and the summons *be not served* on the parties defendant in the action, but was that the action be not pressed *"to trial."* It is clear that a wide and unmistakable distinction exists between the service of process on the defendants in an action and in actually getting the case *to trial.* Especially is that so in a practical way in these days when the courts are crowded with the transaction of legal business to the known extent that until very recently in the county of Los Angeles, and probably true to a lesser extent in the county of Orange, it was next to impossible to get a case heard in the superior court within fifteen months after the answer to the complaint had been filed. The reasons therefore assigned by the plaintiff in the mechanic's lien action for his long delay of two years and seven months before even serving the defendant Woulfe with a copy of the complaint and the summons were very slight. True, during the period of more than two and one-half years payments were being made by the receiver to the plaintiff in the mechanic's lien action in reduction of the lien claim, but it is apparent that such payments might just as well have been made had the defendant Woulfe been served with process, at least some time before the statutory period had expired. Certainly, neither he nor his attorney was responsible for the delay, nor was Woulfe personally responsible for the debt from which the lien arose. He was but the owner of the real property on which a sublessee of a sublessee of the original lessee had created an indebtedness which resulted in the claim of lien. It was solely through pecuniary interests presumably wholly hostile to Woulfe that the agreement was reached that the action be not pressed *"to trial."* The payments made by the receiver in the receivership suit to the plaintiff in the mechanic's lien action were made not with any intention of assisting or in any way benefiting Woulfe, but naturally with a view to financially benefiting the plaintiff in the receiver suit, as well as the plaintiff in the mechanic's lien action. Even if, as suggested by the appellant herein, the result of such payments was that Woulfe was apparently benefited by having the amount of the mechanic's lien reduced, it was through no kindly intention on the part of the plaintiff in that action that such was the case. But conceding that the amount of the lien was reduced by virtue of the payments made by the receiver, there is nothing in the record to show but that the remaining sum due on the lien claim is still greater than the value of the property—in which event Woulfe will eventually and through the same process lose his property through no fault of his, notwithstanding the payments made by the receiver to the plaintiff herein. So that it may come about that the plaintiff, in addition to acquiring the three thousand odd dollars paid to him on account of his claim of lien, will also become the owner of Woulfe's property, while Woulfe will not be benefited at all. Appellant makes the statement that Woulfe was in no wise damaged by the delay. The law presumes injury from such a delay. Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 P. 481. But aside from such presumption, taking into consideration the fact that during a part of the two years and seven months of dormancy of the action the property had on it a producing oil well, from which was derived at least sufficient net profits to enable the receiver to make some payments to plaintiff on account of his lien claim, would it not seem reasonable that on some occasion during that period, had the title to the property not been clouded by reason of the pendency of the mechanic's lien action, Woulfe would have been able to dispose of his property at a profit, or at least to some pecuniary advantage to him? Considering the fact that since April 13, 1922, Woulfe's property has been in litigation and that conditions with reference to the use and value of his property may have greatly changed to Woulfe's financial detriment during the two years and seven months elapsing between the time the action was commenced and the date of the service on Woulfe of a copy of the complaint and the summons, it would seem not unlikely that, instead of Woulfe being in any wise benefited by the delay, in truth he sustained very considerable damage.

As hereinbefore set forth, by the express words of the statute, the question of whether the action should be dismissed rested within the discretion of the trial court; and in connection with the language of the statute it should be noted that the statute does not allow the plaintiff two years within which he may *serve* the defendant with a copy of the complaint and the summons, but that it requires that the action be *prosecuted to trial* within such period. In this community, experience teaches that it is a far cry from the time process is served in an action until the case actually goes to trial. As the matter stood at the time when Woulfe was served with a copy of the complaint and the summons, seven months more than the prescribed statutory period within which time the case should be *on trial* had elapsed. In the absence of a motion to dismiss the action, how much longer Woulfe's property would have been clouded by reason of plaintiff's neglect and delinquency would be pure conjecture; but ordinarily, at least within the county of Los Angeles, another year would have elapsed before final disposition by trial could have been made of the action. In the meantime, without any positive showing of benefit accruing to him from the delay, Woulfe is obliged to wait and to continue to wait, notwithstanding the plain words of the law that in the circumstances, *in the discretion of the trial court*, the action may be dismissed. In volume 9 of California Jurisprudence, at page 529, the rule relating to the question here at issue is stated as follows:

> "No fixed or certain rule can be laid down as to the circumstances which will justify a court in exercising its discretion in dismissing an action on the ground of want of prosecution, for the obvious reason that no two cases present precisely the same facts. The exercise of this power must in the very nature of things be left to the discretion of the nisi prius court, subject only to a reversal for a patent abuse of such discretion. In ruling upon a motion to dismiss for want of prosecution, a court will not consider the merits of the action, but it may properly consider any facts appearing in the records of the case and bearing upon the question of diligence and good faith, whether they occurred before the action was begun or afterwards. * * * Whether or not a defendant suffered any material inconvenience or hardship by reason of the delay is not a matter for consideration upon the hearing of the motion, as the law will presume injury from unreasonable delay. And the fact that the defendant did not protest against the delay is immaterial."

In the course of the opinion in the case of Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 P. 481, the following language is used:

> "There is some discussion in the briefs of the proposition whether the respondent suffered any material inconvenience or hardship by the delay. The discussion is without force upon the only question which is involved here—whether the facts disclose an abuse of discretion by the trial court in the granting of the motion. * * * The law will presume injury from unreasonable delay. * * * A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights of the plaintiff; and, if he who starts the law in motion does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default. * * *"

The established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceeding to expedite his case to a final determination.

The rule is universal that it is only where the trial court has *abused* its discretion that its ruling on a motion to dismiss an action will be disturbed by an appellate court.

As is said in Marks v. Keenan, 148 Cal. 161, 82 P. 772:

> "The general rule is that the disposition of a motion to dismiss an action for want of prosecution *rests in the discretion of the trial court,* and that its action on such motion will not be disturbed here unless such discretion has been *grossly abused.* * * *"

If any meaning whatsoever is to be accorded to the word "discretion," as used in section 1190 of the Code of Civil Procedure, it is that the trial court is given the power of being the final judge on the facts as to whether the action should be dismissed. Otherwise, I am unable to see what place the word "discretion" has in legal terminology.

In my opinion, the judgment should be affirmed.

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90 Cal. App. 472

PEOPLE v. CHIAPPELONE. (Cr. 1438.)★

District Court of Appeal, First District, Division 2, California. March 29, 1928.

Rehearing Denied April 25, 1928.

1. Criminal law 🔑696(2)—Motion to strike testimony is necessary, and objection to question is useless, on it appearing from subsequent testimony that the complaint testified to was stale.

Where question in regard to complaint of assault did not fix a date, it was useless to object to the question on it thereafter appearing from answers to other question that the complaint was stale, but the proper attack was by motion to strike; and in the absence thereof no record was made on which to predicate error.

2. Witnesses 🔑405(1)—Defendant may not disprove statements as to collateral matters made by prosecutrix on cross-examination.

Defendant may not disprove statements of prosecutrix in prosecution for rape, on cross-examination as to conduct of defendant towards another girl; this being as to a collateral matter.

3. Criminal law 🔑678(5)—Failure of prosecution to make election between acts in rape prosecution held not error, there being no request and defense not being misled.

There was no error because of the prosecution in a rape case not electing on which act it based its charge, the defense at no time calling on the prosecution to make an election, and the trial court at no time ruling or having a chance to rule on the matter; and it also being clear that the defense was not misled as to the particular act for which defendant was being tried.

4. Criminal law 🔑884—Verdict held not void because of jury using word "determine" instead of "recommend" as to place of imprisonment (Pen. Code, § 264).

That jury in prosecution for statutory rape, under Pen. Code, § 264, providing that they shall by their verdict recommend whether imprisonment shall be in county jail or in state prison, used the word "determine" instead of "recommend" did not render the verdict void.

5. Criminal law 🔑1040—Objection to form of verdict may not be made for first time on appeal.

Objection to form of verdict, it being read and jury polled, is too late when made for the first time on appeal.

Appeal from Superior Court, City and County of San Francisco; James O. Moncur, Judge.

Joseph Chiappelone was convicted of rape and denied a new trial, and he appeals. Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with having committed the crime of rape "on or about the 25th day of October, 1926," on the person of a little girl of the age of 11. The defendant appeared and pleaded not guilty. The trial was had in the lower court before the court sitting with a jury. The jury returned a verdict which was against the defendant. He made a motion for a new trial. The motion was denied. From the judgment entered on the verdict and from the order denying his motion for a new trial, the defendant has appealed.

[1] Some evidence was admitted tending to prove that in July, 1927, the prosecutrix made a complaint to one of the police officers, Mrs. Sullivan, regarding the alleged assault of the defendant. He asserts the complaint was made at a date which was too remote and that the evidence was not admissible. People v. Lambert, 120 Cal. 170, 174, 52 P. 307. When the prosecutrix was on the stand and at a time when she had told what the defendant had done, she was asked:

> "Q. Did you tell Mrs. Sullivan about what you were telling us here now? A. Yes, I did."

She was then asked four other questions which she answered, fixing the time of her complaint made to Mrs. Sullivan. Then the attorney for the defense interposed an objection that the complaint was not a fresh complaint and her statements to Mrs. Sullivan were hearsay. The objection was overruled. At the time the defendant interposed his objection the question regarding statements

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★Rehearing denied.

made by the witness had been asked and answered, four other questions as to dates had been asked and answered, and there was no question unanswered on the subject-matter of the objection. After the court ruled there was no motion to strike out and the record was so left. The question as propounded did not fix a date. Under these circumstances, when it transpired that the complaint was stale, it was useless at that time to interpose an objection, but the proper attack was a motion to strike out. In the absence of that motion, the defendant had made no record on which he could predicate error. People v. Lawrence, 143 Cal. 148, 156, 76 P. 893, 68 L. R. A. 193. The rule is the same in civil and criminal cases. Short v. Frink, 151 Cal. 83, 87, 90 P. 200. Moreover, an examination of the record discloses a set of facts from which we can say that the admission of the evidence, if error, was harmless in this particular case. The verdict rested on a foundation stronger and firmer than the squib of hearsay.

[2] While the same witness was on the stand and under cross-examination, she stated in reply to questions propounded by the defense certain conduct she observed on the part of the defendant toward Evelyn Re, the cousin of the witness. Later the defense attempted to disprove those collateral statements by the testimony of the defendant when a witness in his own behalf. To those questions the prosecution interposed objections that they were addressed to collateral matters. The objections were sustained. The trial court did not err in sustaining the objections.

[3] The prosecution addressed its proof to an occasion on the Saturday before Hallowe'en, 1926, at a spot in Golden Gate Park out near the beach. After having done so it introduced proof to the effect that other acts had been committed on other Saturdays. The prosecutrix designated each of the three or four Saturdays immediately preceding. The defendant asserts that the prosecution committed error in not electing on which act it based its charge. The point is not well taken. At no time did the defense call upon the prosecution to make an election, and at no time did the trial court rule or have a chance to rule on the contention now made. An examination of the whole record discloses that the prosecution introduced specific proof as to the act above mentioned, but, after having done so, the proof of the other acts was introduced in general terms and was not embodied in any certain question and answer. However, on cross-examination, it was made to appear that similar acts occurred on each of the three Saturdays immediately preceding October 23, 1926. It is quite clear, therefore, that the defense was not misled as to the particular act for which he was being tried. There was no error. People v. Scott, 24 Cal. App. 440, 445, 446, 141 P. 945.

[4, 5] Finally, it is claimed that the verdict was void. When the alleged offense is committed on a girl under the age of 18 years, "the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison." Pen. Code, § 264. The form of verdict actually returned was:

> "We, the jury in the above-entitled cause, find the defendant, Joseph Chiappelone, guilty of the crime of felony, to wit, rape, as charged in the information, and hereby determine his punishment as imprisonment in the state prison."

It used the word *determine* instead of the word *recommend*. The variance is harmless. In many equity cases a jury is called and allowed to bring in a verdict. Every verdict is a *determination* of the facts whether that word is used or merely implied. However, it is settled law that in an equity case the verdict of a jury is a mere recommendation to the court, and that the court may accept or reject the recommendation. For the purposes of this case we will assume that Penal Code, § 264, supra, states the same rule as applicable to verdicts in this class of cases. Of course, the rule of law is addressed to the court. It must be presumed that the court followed the law even though the jury erred in selecting its words. The record does not show to the contrary. Moreover, the jury returned its verdict into open court. The verdict was read. The jury was polled. No objection was made to the form of the verdict. So far as the record discloses, the point was never made in the trial court. It is too late to make it at this time. Johnson v. Visher, 96 Cal. 310, 314, 31 P. 106; People v. Cornell, 29 Cal. App. 430, 440–444, and cases there cited, 155 P. 1026; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 664, 128 P. 9.

We find no error in the record. The judgment and order are affirmed.

We concur: BURROUGHS, Presiding Justice, pro tem.; NOURSE, J.

90 Cal. App. 366

PEOPLE v. DI DONATO et al. (Cr. 1426.)

District Court of Appeal, First District, Division 1, California. March 26, 1928.

1. Homicide ⚷308(3)—Overt acts of defendants at time of killing held to constitute an "attempt" to commit burglary, justifying restriction of issue to murder in first degree (Pen. Code, § 189).

Where defendants, in pursuance of conspiracy to burglarize pumping station by stealing pumping machinery, stole the motor on one night, and made machinery ready for its immediate removal on the next night, and, on their return, killed person guarding machinery, *held* that the overt acts of defendants were legally sufficient to constitute an "attempt" to commit burglary, and hence court properly restricted issue before jury to murder in the first degree under Pen. Code, § 189.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Attempt.]

2. Homicide ⚷300(7)—That deceased, killed while repelling burglary, fired first shot, held not to warrant instruction on self-defense.

Where deceased was killed while lawfully engaged in repelling an invasion of property by defendants about to commit a burglary, fact that deceased fired first shot did not warrant instruction on self-defense.

3. Criminal law ⚷829(1)—Requested instructions, fully covered by court's charge, were properly refused.

Requested instructions in homicide prosecution concerning the presumptions of innocence and good character, circumstantial evidence, and responsibility of conspirator for acts of coconspirator, were properly refused, where fully and fairly covered by court's charge.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Alfred Di Donato and another were convicted of murder in the first degree, and the named defendant appeals. Affirmed.

Frank Curran and James W. Campbell, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. The appellant, Alfredo Di Donato, and one George Martin were jointly charged with, and tried for, the crime of murder. Each was found guilty of murder of the first degree, and life imprisonment was fixed as the penalty. From the judgment of conviction and the order denying his motion for a new trial, Di Donato has taken this appeal.

The trial court charged the jury in effect that it should either find the accused guilty of first degree murder or acquit them of any offense whatever; and appellant's main contention on this appeal is that, in thus restricting the issue before the jury, prejudicial error was committed, it being claimed with respect thereto that the evidence adduced at the trial admitted of verdicts either of second degree murder or manslaughter.

Section 189 of the Penal Code declares that all murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, certain felonies enumerated therein, including burglary, is murder of the first degree; and all other kinds of murders are of the second degree; and "It is thoroughly established in this state," says the Supreme Court in People v. Rogers, 163 Cal. 476, 126 P. 143, "that it is proper to refuse to instruct a jury as to a lesser offense or degree included within the offense charged, where the evidence is of such a nature as to warrant, in the event that the defendant is guilty at all, only a verdict for the higher offense or degree. See People v. Swist, 136 Cal. 520, 69 P. 223; People v. Keith, 141 Cal. 689, 75 P. 304; People v. Lopez, 135 Cal. 23, 66 P. 965; People v. Chaves, 122 Cal. 140, 54 P. 596; People v. Chaves, 103 Cal. 407, 37 P. 389; People v. Lee Gam, 69 Cal. 552, 11 P. 183; People v. Turley, 50 Cal. 469." See, also, People v. Watts, 198 Cal. 776, 247 P. 884. If, therefore, in the present case, the evidence was of such a nature as to warrant only a verdict of first degree murder, in the event that the accused were guilty at all, the trial court did not violate the constitutional inhibitions against charging a jury with respect to matters of fact nor otherwise commit error in confining the issue to first degree murder. People v. Watts, supra.

The record discloses that Robert Foote, the victim of the homicide, was shot and mortally wounded on the night of March 15, 1927, while guarding against an anticipated entry by burglars a building which housed one of several unused pumping plants constructed along the side of an irrigation canal in the sparsely settled regions of the west side of Fresno county. He was found wounded the next morning by a fellow employee, having been shot twice, once through the thigh and again through the left half of the back. He died a few days afterwards as the result of the wounds. There were no eyewitnesses to the crime, and the prosecution's case against Di Donato and Martin was based upon circumstantial evidence; but in their defense the accused men took the witness stand, and admitted that Martin had shot Foote while Martin was reconnoitering about the premises in furtherance of a conspiracy which existed between the accused men to burglarize the place and steal therefrom the pumping apparatus, part of which they had stolen the night before. Appellant contends, however, that with respect to the night of the shooting no more than a preparation to commit burglary was shown, as distinguished from an attempt to commit such crime, and that consequently a case of first degree murder was not established.

Assuming the testimony given by appellant and Martin to be true, it reveals the following facts: They are brothers-in-law, and at the time of the homicide lived near the city of Fresno, many miles distant from the scene of the alleged crime. While hunting in the vicinity of said pumping stations, which were not being operated at the time, they conceived the idea to burglarize one of them and steal therefrom the pumping apparatus. Pursuant to such design they obtained iron clamps, cables, blocks and other paraphernalia with which to dismantle and remove the machinery, which weighed more than a ton. On the night preceding the homicide they drove to the pumping station and stole the electric motor. At the same time they detached the pump, hoisted it out of, and suspended it above, the well, so that no unnecessary time would be consumed the following night, at which time they intended to return to dismantle and remove the same. Upon their return the next night Martin drove a Chevrolet car belonging to appellant, and carried a loaded rifle, and appellant drove a small truck with a trailer attached. When they reached a point about three miles distant from the pumping station, they stopped, and Martin was told to go on ahead to ascertain if the way was clear to consummate the theft of the machinery, and to see also whether their operations of the night before had been detected. After some difficulty in locating the particular pumping station he was looking for, he entered the yard thereof, which was inclosed with a barbed wire fence, carrying his rifle in one hand and his electric flashlight in the other. He flashed his light through one of the windows of the stationhouse to confirm his belief, as he claims, as to the identity of the pumping-house, and almost instantly Foote, who was concealed about the premises, shot at him. Martin fired in return; and, in the exchange of the shots which followed, while Martin was attempting to reach the gate, Foote was wounded. Martin then fled, joined appellant down the road, and, after telling him of the shooting, they sped on to their homes near Fresno.

The rules prevailing in this state for determining whether the acts of a person extend beyond the point of preparation to commit an offense and amount to an attempt to do so are fully set forth and discussed in the case of People v. Lanzit, 70 Cal. App. 498, 233 P. 816, and it is there said:

> "It unquestionably is true that mere acts of preparation—acts not proximately leading up to the consummation of the intended crime—will not suffice to establish an attempt to commit the offense, especially when made at a distance from the place where the contemplated crime is to be committed (8 R. C. L. p. 278)"

—and then, after pointing out the lack of harmony in the authorities on the subject, and stating that to a very great extent each case must stand upon its own facts, the court continues:

> "Generally speaking, the attempt, as distinguished from mere preparation, consists of some direct movement towards the consummation of the intended crime after the preparations have been made. People v. Murray, 14 Cal. 159. The difficulty generally is in determining the proximity of the overt act or acts to the complete accomplishment of the substantive crime. The acts proximately leading up to the consummation of the intended crime need not include the last proximate act for its completion. It is sufficient if the overt acts reach far enough toward the accomplishment of the intended offense to amount to the commencement of its consummation. That is to say, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is an attempt to commit the crime. People v. Mayen, 188 Cal. 256, 205 P. 435, 24 A. L. R. 1383. In State v. Roby, 194 Iowa, 1032, 188 N. W. 709, the Iowa Supreme Court correctly states the rule as follows: 'It [the overt act] need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation and what an act done toward the commission of a crime. It would be useless to attempt to lay down any rule by which an act might be characterized as overt or otherwise in a particular case; general principles must be applied in each case as nearly as can be, with a view to working out substantial justice.' Upon this subject the New York Court of Appeals, in the case of People v. Sullivan, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582, speaking through Cullen, J., says: 'The question of what overt act is sufficient to constitute an attempt to commit a crime has been the subject of much discussion by both textwriters and courts, and of some conflict in the decisions. In the early English cases the view seems to have been adopted that to constitute an attempt the overt act must be the final one toward the completion of the offense, and of such a character that, unless it had been interrupted, the offense itself would have been committed. * * * This extreme doctrine has not been accepted in this country, certainly not in this state. * * * But assuming that mere preparation is not in all cases an attempt to commit the crime, it is well settled in this country that it is not necessary to constitute an attempt that the act done should be the last proximate one for the completion of the offense. "However attempt is viewed in England, the act need not, according

to the American idea, be the next preceding the one which would render such substantive crime complete." Bishop's Criminal Law, § 762.' In People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131, it was said by Vann, J., 'An overt act is one done to carry out the intention, and must be such as would naturally effect that result unless prevented by some extraneous cause.' * * *"

[1] Applying the foregoing rules to the facts of the present case, it is evident that the acts of the accused men went far beyond the point of preparing for a burglary, and constituted, at the time of the shooting, an attempted perpetration of such crime as that term is construed and given effect by the authorities above cited. The evidence supporting this conclusion doubtless established a continuing conspiracy (People v. Schmidt, 33 Cal. App. 426, 165 P. 555), having for its ultimate design the theft of the pumping machinery of which the motor was only a part. Even assuming, therefore, that the theft of the motor constituted a distinct burglary, the testimony of the accused men clearly demonstrated that the real object of the conspiracy was not then ended, and that there was still existent an intention and design to steal the balance of the pumping machinery. The first overt act committed in consummation of such design, beyond the stage of mere preparation, was in entering the building the night before the homicide, dislodging the pumping machinery, and making it ready for removal; and the next direct movement toward its execution was in driving to the vicinity of the premises the following night for the declared purpose of again entering the building and removing said pumping apparatus, and in one of them actually going upon the inclosed premises and examining the building to see that the way was clear to complete the crime; and, finally, the evidence shows that there never was a voluntary abandonment of the illegal enterprise, but that the successful accomplishment thereof was prevented only by the fusillade of bullets from Foote's pistol. Although the overt acts above mentioned were not the last proximate acts in the consummation of the burglary, they clearly amounted to direct movements toward, and were the commencement of, its consummation; and approached sufficiently near to it to stand either as the first or some step in a direct movement towards the consummation of the offense after the preparations were made, and would have resulted inevitably in the completion of the crime had not the final acts in the perpetration thereof been prevented by extraneous cause. Therefore, said overt acts were legally sufficient to constitute an attempt to commit said crime (People v. Lanzit, supra); and, that being so, the trial court properly limited the issue before the jury to first degree murder.

[2] There was no element of self-defense presented in the case, and therefore the trial court was justified in refusing to give to the jury appellant's requested instructions upon that subject. The deceased was killed while lawfully engaged in repelling an invasion of property by one about to commit a burglary, and under such circumstances it would be a strange doctrine which would allow a person thus engaged in such an unlawful enterprise to exculpate himself entirely from the consequences of his felonious act by proving merely that the person acting in the lawful defense of property fired the first shot. As held in People v. Perry, 195 Cal. 623, 234 P. 890:

> "If a homicide is committed by one of the confederates while engaged in an attempt to perpetrate the crime of robbery in furtherance of a common purpose, the person or persons so engaged, but who do not actually do the killing, are as accountable to the law as though their own hands had intentionally fired the fatal shot or given the fatal blow, and such killing is murder of the first degree. The jury has no option but to render a verdict of murder of the first degree whether the killing was intentionally or accidentally done. * * *"

[3] Nor do we find any error in the court's refusal to give appellant's proposed instructions concerning the presumptions of innocence and good character, and regarding circumstantial evidence, for the reason that the court's charge fully and fairly covered that field.

As to the final point urged, the case of People v. Kauffman, 152 Cal. 331, 92 P. 861, declares that:

> "Whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of or foreign to, the common design, is a question of fact for the jury (Bowers v. State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; Spies v. People, 122 Ill. 1, 6, 42, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320), and if there be any evidence to support the finding of the jury on this question, its determination is conclusive."

In accordance with this principle of law, the court in the present case fairly submitted such question to the jury's determination under proper instruction reading in part as follows:

> "* * * A conspirator is not responsible for an act of a coconspirator which is not a part of their common design, was not originally contemplated, is not in furtherance of it, and not the legitimate consequence of anything connected therewith."

It was therefore not error to refuse to give appellant's proposed instruction upon the same subject.

No error in the trial of the action being shown, the judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

90 Cal. App. 506

MANCHESTER MONETA AVE. STATE BANK et al. v. SMITH et al.
(Civ. 5798.)

District Court of Appeal, Second District, Division 1, California. March 30, 1928.

Pleading ⚷345(2)—Granting plaintiffs' motion for judgment on pleadings held error where, in answer, defendants had denied material allegations of complaint.

Trial court *held* in error in having granted plaintiffs' motion for judgment on the pleadings where, in their answer, defendants had denied material allegations of the complaint.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by the Manchester Moneta Avenue State Bank, a corporation, and others against Glen A. Smith, J. M. Cooper, A. S. T. Johnson, and another. Judgment for plaintiff, and named defendants appeal. Reversed.

H. L. Carnahan, J. M. Stevens, and Wilbur C. Curtis, all of Los Angeles, for appellants.
W. I. Gilbert, of Los Angeles, for respondents.

WOOD, Justice pro tem. On the day of the trial of this action before any evidence was offered defendants moved for a judgment on the pleadings. This motion was denied, whereupon plaintiffs presented a similar motion, which was granted, and this appeal is prosecuted from the judgment thereafter rendered. Criticism is directed to the complaint on the ground that the allegations are incomplete, uncertain, and made up largely of conclusions. Such defects as appear in the complaint may be disregarded for the reason that the judgment must be reversed, even though every allegation criticized be considered as having been made in proper form. In the complaint it is set forth: That plaintiff bank "had advanced to C. S. Summar a sum in excess of $19,000, a portion of which is represented by certain promissory notes heretofore executed in favor of Manchester Moneta Avenue State Bank, and the remainder of which was advanced by J. C. Smith personally"; that "to better secure the payment of the debts heretofore mentioned" Summar procured the assignment of certain leases covering the land described in the complaint to be made to J. C. Smith to be by him held in trust for the use and benefit of the plaintiff bank; that said Smith entered into possession of the premises; that the leases so assigned provided that the lessees must perform certain drilling work for oil, and in case of their failure to do so the lessors could forfeit the leases upon notice of 30 days; that such notice had been given and 30 days were about to elapse; that a large amount of money had been spent by plaintiffs in the prosecution of drilling work, and valuable equipment had been placed on the land; that defendants, with intent to force plaintiffs to forfeit the leases, had obtained possession of the equipment and had refused to permit plaintiffs to enter upon the land; that no portion of the said indebtedness to plaintiffs had been paid; that "defendants are not financially able to be responsible for damages in the event said lands should be valuable for oil development"; that the equipment on the land had been bought by plaintiff Smith and defendant Summar by a "purchase lease" under which title was reserved in the seller, and that this lease had been assigned to plaintiff Gonsalves; that plaintiff Smith "had leases similar in terms with the lease" covering the land in litigation, which leases would be "forfeited automatically with the forfeit of the lease described in the complaint" for the reason that the last-mentioned lease was "what is commonly called a 'Key Lease'" upon which development should be made. On these allegations plaintiffs seek a permanent injunction restraining defendants from interfering with the possession of said land and equipment.

It does not appear from the record whether defendant Summar was served with process or whether the action was dismissed as to him. He made no appearance in the action. Defendants Cooper, Johnson, and Glen A. Smith filed an answer in which they specifically denied each and every one of the allegations above set forth except the allegation of the assignment of the leases to J. C. Smith, on which point they assert that the assignment was made for the use and benefit of a partnership consisting of J. C. Smith and C. S. Summar, and that this partnership, and not Smith, took possession of the property; and except the allegations concerning the provisions in the lease for a forfeiture upon 30 days' notice and the giving of such notice.

If material allegations are denied in the answer a motion for judgment on the pleadings should not be granted. "A single material issue precludes a judgment on the pleadings." Widmer v. Martin, 87 Cal. 88, 25 P. 264. Here we have many material issues presented by the answer. The trial court, apparently, granted plaintiffs' motion on the theory that the answer, in its "separate and affirmative defense," set forth certain matter which, the court concluded, entitled plaintiffs to the judgment rendered. In this part of their answer the defendants allege: That "C. S. Summar, one of the defendants in this action, and J. C. Smith, one of the plaintiffs herein, entered into an agreement of copartnership; that as a part of said partnership agreement it was agreed between said J. C. Smith and said C. S. Summar that the name under which said partnership would do business should be 'Pioneer Development Company,' and that the object and purpose of said partnership should be to continue the drilling of an oil well upon the premises described in plaintiffs' complaint and the division in equal shares of the profits to be made in such venture; that it was further agreed as a part of said partnership agreement that said C. S. Summar would cause the title to the oil lease mentioned in plaintiffs' complaint to be assigned to said partnership; and that said J. C. Smith would furnish to said partnership for use in said business to be conducted by it such sums of money as might be required for such purpose from time to time, but not exceeding in all the sum of $35,000. That thereafter and in accordance with the said partnership agreement, said oil lease was assigned by A. S. T. Johnson to said J. C. Smith for the use and benefit of said partnership, and said J. C. Smith, pursuant to said assignment, acquired and held the title to the same, as trustee and in trust and for the use and benefit of said partnership and for no other purpose"; that said partnership bought the equipment on the land by "purchase lease" for the "use and benefit of said partnership"; that the purchase price had been paid in full and the equipment had become the property of the partnership; that the partnership had incurred debts in large sums; that J. C. Smith had "repudiated and denied the existence of the said partnership" and refused to pay any of its obligations; that thereafter C. S. Summar sold and assigned the said leases and equipment to defendants Cooper and Glen A. Smith, who bought without notice of the claims of plaintiffs; that Summar applied the proceeds of the sale to the payment of the debts of the partnership; that defendants Cooper and Glen A. Smith went into possession of the property described in the complaint pursuant to said sale and assignment from Summar.

For the purposes of this appeal it is not necessary to determine whether the "separate and affirmative defense" contains matter which, if found to be true, would defeat plaintiffs' action. If the matter therein set forth does not constitute a defense, it can only be considered as surplusage. If it be so considered we have the situation remaining in which many material allegations of the plaintiffs are denied by the defendants. There is a denial of the very debt to secure which, according to the complaint, the assignment was made to plaintiff Smith. It would be useless to again point out the numerous allegations which are denied. In view of these denials it cannot be said that the bare admission of possession of the property on the part of defendants Cooper and Glen A. Smith is sufficient to accord plaintiffs the right to a permanent injunction. Nor it is necessary to discuss the contentions made by defendants in which they argue that the allegations made by plaintiffs, even if true, did not entitle them to a permanent injunction. Suffice it to say that there are material issues of fact presented by the pleadings which made it erroneous to grant plaintiffs' motion for judgment thereon.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 201

ROSS v. BURKHARD INV. CO. et al.

(Civ. 3379.)

District Court of Appeal, Third District, California. March 17, 1928.

1. Public lands 🔑210—Evidence held to show land in controversy was within Mexican grant running along "high-water mark" on seaboard (Civ. Code, § 830).

In action to quiet title, evidence *held* to show that land in controversy was included in tract of land granted by the Mexican government and confirmed by United States patent, a boundary of which ran along the high-water mark on the seaboard, term "high-water mark" meaning, in view of Civ. Code, § 830, neither an extremely high nor an extremely low water line, but referring to the ordinary high-water mark.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, High-Water Mark.]

2. Public lands 🔑144(1)—Plaintiff's predecessor did not acquire title to land by patent, where land lay within two miles of incorporated town (Const. art. 15, § 3; St. 1869, p. 70, § 877, as re-enacted 1887, p. 108; Pol. Code, § 3488).

Plaintiff's predecessor in title under patent issued to him in 1880 did not acquire title, where original patent was to land within two miles of an incorporated town, and, under Const. art. 15, § 3, St. 1869, p. 70, § 877, as re-enacted 1887, p. 108, and Pol. Code, § 3488, patent therefor could not issue.

3. Boundaries 🔑48(2) — Construction and maintenance of intervening fence is insufficient on which to base claim of title by agreement or acquiescence.

The mere construction and maintenance of an intervening fence is insufficient on which to base right of title by agreement or acquiescence; it being only where real boundary line is uncertain that consent to accept specified line as true boundary estops contracting parties from repudiating agreed boundary line.

4. Adverse possession 🔑27—Evidence held not to show plaintiff's adverse possession because of inclosure of tract with substantial fence (Code Civ. Proc. § 323, subd. 2).

In action to quiet title, proof of alleged inclosure of land in question with substantial fence, in compliance with Code Civ. Proc. § 323, subd. 2, *held* insufficient to show title by adverse possession, where fence maintained was not substantial and only partially inclosed the land.

5. Adverse possession 🔑115(2)—Question of what constitutes substantial inclosure within statute to establish adverse possession is fact question (Code Civ. Proc. § 323).

Question of what constitutes a substantial inclosure as required by Code Civ. Proc. § 323, to establish adverse possession is purely question of fact for court's determination.

6. Adverse possession 🔑114(1)—One claiming adverse possession has burden to prove claim by clear and positive evidence.

The burden is on one who asserts possession adversely to prove his claim by clear and positive evidence.

7. Appeal and error 🔑1010(1)—Trial court's findings as to adverse possession, supported by substantial evidence, will be upheld on appeal.

Findings of trial court as to adverse possession, if supported by substantial evidence, will be upheld on appeal.

8. Adverse possession 🔑19—Natural barriers may be utilized with artificially constructed fences to constitute "substantial inclosure" (Code Civ. Proc. § 323, subd. 2).

Where one claims title by adverse possession because of alleged inclosure of land with substantial fence in compliance with Code Civ. Proc. § 323, subd. 2, natural barriers may be used in conjunction with an artificially constructed fence to constitute a "substantial inclosure."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Substantial Inclosure.]

9. Adverse possession 🔑13—Possession, to be adverse, must be shown to have been open, notorious, continuous, and hostile as to entire world for full statutory period.

One claiming title by "adverse possession" must show that his possession was open, notorious, continuous, and hostile, not only to real owners, but also to the entire world, for the full statutory period.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Lucy Banning Ross against the Burkhard Investment Company and others. From a judgment for the named defendant, plaintiff appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Anderson & Anderson, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of the respondent Burkhard Investment Company, a corporation, in a suit to quiet title to lot 18 of sheet No. 4, in tract No. 3192, adjoining Wilmington, Los Angeles county, Cal.

This action involves the title to an irregular crescent-shaped tract of land some 600 feet in depth and 1,600 feet in length, situated within the boundaries of the city of Los Angeles at the southerly outskirts of Wilmington, and is bounded on the west by the Wilmington and San Pedro road, and on the easterly and southerly sides by the extreme western basin of the inner harbor channel of the bay of San Pedro, containing some 15 acres of land. The respondent contends that the tract in controversy is a part of the Mexican grant of the Rancho Los Palos Verdes, which borders on the west inner harbor channel of San Pedro bay; while, upon the contrary, the appellant denies this assertion and claims that it is a bit of "no-man's land" situated above the line of ordinary high tide, which was omitted from the survey of the above-mentioned rancho, and which is a part of a tract of tide land purchased by, and conveyed in 1880 to Phinneas Banning, the father of appellant, by patent from the state of California.

Tide land location No. 57 was adjacent to the southerly outskirts of Wilmington, bordering on the most northerly arm of the western basin of the inner harbor channel of San Pedro Bay. Tideland location No. 68 lies southerly from and adjacent to the extreme westerly arm of the west basin of inner harbor channel, and includes the western portion of Smith's Island. By stipulation, all the land contained within this tideland location No. 68 has been eliminated from this appeal.

Rancho Los Palos Verdes was a vast tract of land granted to Jose L. and Juan Sepulveda by the Mexican government June 3, 1846, and the title to this rancho was confirmed by patent from the United States government in 1856. The description of this ranch contained in the patent commenced at a specified station on the shore of the Pacific Ocean, and continued thence by metes and bounds until it reached the "northwest corner of a warehouse at Sepulveda landing," and then continued as follows:

> "Thence along high-water mark along the Inner Bay of San Pedro, north 18 degrees; * * * thence (to) a rock * * * at station No. 24 of the rancho San Pedro on high-water mark about three chains west of Capt. Ord's wells station; thence leaving the bay of San Pedro," etc.

This Los Palos rancho was partitioned by a decree of the superior court of Los Angeles county in 1882, and divided into two portions fronting on the San Pedro Bay, designated, respectively, lot M and lot K. The last-mentioned lot, consisting of nearly 170,000 acres of land, was subsequently conveyed to E. N. McDonald, and was thereafter sold to Joseph Burkhard in the year 1902, and thence it passed to the respondent Burkhard Investment Company, and was known as the McDonald rancho. In 1866 Phinneas Banning applied to the state registrar to purchase 460 acres of this tract known as "tide land survey No. 57," which included all the land involved in this action. This application to purchase tideland was made pursuant to a statute authorizing the state to sell "swamp, overflow, salt marsh, and tidelands," except that all such land within two miles of any town or village was exempt from sale. Const. of Cal., art. 15, § 3; Stats. of Cal. 1869, p. 70, § 877, re-enacted 1887, p. 108; Pol. Code, § 3488. In spite of this statutory exemption of tidelands situated within two miles of any town or village, a patent was finally issued by the state to Phinneas Banning for all the lands applied for except a small portion located at the foot of Canal street. At the death of Phinneas Banning, the westerly 80 acres of this tract, including the land in controversy, were distributed to the widow Mary Banning. Subsequently the widow died, and her interest in this land passed to the appellant Lucy Banning Ross. In an action instituted in 1911, entitled People v. Banning, 166 Cal. 630, 138 P. 100, a decree was duly entered declaring void this patent to the Banning tract in tideland survey No. 57 on the ground that it was within the two-mile limit of Wilmington, and title to this land was thereupon quieted in the state of California. This decree was subsequently affirmed by the Supreme Court of the United States. Banning Co. v. California, 240 U. S. 142, 36 S. Ct. 338, 60 L. Ed. 569. It will be observed that the application of Phinneas Banning to purchase this tideland was filed in 1866, but the proceeding lay dormant until 1878, when one McFadden made a claim to the land and filed a contest to the Banning petition. Judgment, however, was entered in favor of Banning November 26, 1879, and a certificate of title was duly issued to him April 10, 1880. Wilmington was incorporated in 1872. The Constitution of California was adopted in 1879. Wilmington was annexed to and became a part of the city of Los Angeles in 1909. In 1911 all the tidelands on Wilmington Bay were deeded by the state of California to the city of Los Angeles. Stats. of Cal. 1911, p. 1256; Patton v. Los Angeles, 169 Cal. 521, 147 P. 141. Los Angeles filed a disclaimer in the present action by the terms of which it waived all claims to the land in controversy. In the case of People v. California Fish Co., 166 Cal. 576, 603, 138 P. 79, it was held that the patent to the tidelands in survey No. 57, which lay within the two-mile limit of the town of Wilmington was void, and that it passed no title thereto.

The appellant contends that (1) the tract of land in question was not included within the boundaries described in the grant of the Los Palos Verdes rancho; that (2) she is the owner of this tract as successor in interest to Mary Banning by virtue of the tideland patent formerly issued to Phinneas Banning; and that (3) she acquired title to this tract by adverse possession, the boundaries thereof having been settled by acquiescence.

[1] We are of the opinion that the tract in question was clearly included within the boundaries of the Los Palos Verdes rancho as it is described in the patent issued in 1856. The San Pedro ranch adjoins the Los Palos Verdes ranch on the north. From the description of the last-mentioned ranch, it is apparent that high-water mark along the coast was accepted as the boundary until it reached a point called "La Goleta" on the west side of San Pedro Channel, excepting therefrom a certain government reservation. The government patent reads:

> "Beginning at a point on the shore of the Pacific Ocean at station No. 18, * * * thence along *high-water mark* on the seaboard," etc., until it reached the "northwest corner of the warehouse at Sepulveda landing; thence along *high-water mark along the Inner Bay of San Pedro,* * * * to a rock * * * at station No. 24 of the Rancho San Pedro, on high-water mark, about three chains west of Capt. Ord's wells station; thence leaving the Bay of San Pedro," etc.

And in the decree involving the survey of this inner bay of San Pedro which description appears in the case of Bixby v. Bent, No. 2373, being a case which was tried in the county of Los Angeles, the following courses appear:

> "Thence east * * * to a post marked '15' at the shore of the inner Bay of San Pedro, thence *meandering along said shore* which is a boundary of said Rancho Palos Verdes. * * *"

The boundary line of this inner Bay of San Pedro was the subject of interpretation in the case of De Guyer v. Banning, 91 Cal. 400, 27 P. 761, and also in the case of Los Angeles v. San Pedro Ry. Co., 182 Cal. 652, 189 P. 449. The last-mentioned case accepted as the basis of ordinary high-water mark 5.1 feet above datum plane as the true boundary line of the inner channel of San Pedro Bay.

Since it is manifest that the grant to lot K of the Los Palos Verdes rancho, of which the land in controversy in the present action is a part includes high-water mark along the inner basin of San Pedro Bay, it necessarily follows that the land here involved passed to the grantees of said lot K, and all of the land below high-water mark would belong to the state. The title to that portion which borders upon the San Pedro Bay below high-water mark belonged to the state and passed by deed to the city of Los Angeles, and the title thereto was formally disclaimed by that city in this proceeding. The term "high-water mark" means neither an extremely high nor an extremely low water line, but, upon the contrary, refers to the ordinary high-water mark. Section 830 of the Civil Code provides:

> "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark. * * *"

That portion of the land which borders upon tidewater, and which is below ordinary high-water mark, belongs to the state. Civ. Code, § 670; 26 Cal. Jur. 315, § 532; Ward v. Mulford, 32 Cal. 365; San Francisco Sav. Union v. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823, 66 L. R. A. 242, Am. St. Rep. 72, 1 Ann. Cas. 182. In Hardin v. Jordan, 140 U. S. 371, 406, 11 S. Ct. 808, 811, 35 L. Ed. 428, it is said:

> "Grants of the government for lands bordering on tidewater * * * extend only to high-water mark. * * * The title to the shore and lands under water in front of lands so granted inures to the state within which they are situated."

[2] The appellant did not acquire title to the land in question by virtue of the patent issued to Phinneas Banning in 1880. In the case of People v. Banning Co., 166 Cal. 630, 138 P. 100, the very patent to tidelands situated in survey No. 57, upon which the appellant in this case relies, was declared to be void. The court there said:

> "The land involved is that known as tideland location No. 57, being the same location mentioned by that number in the opinion in People v. California Fish Co., 166 Cal. 576, 138 P. 79. That opinion * * * covers all the points of law involved in the present cases. The first payment upon this tideland location was made on March 5, 1880. The certificate was issued on April 10, 1880, and the patent was executed on December 16, 1881, to Phineas Banning. The land all lies within two miles of the limits of the town of Wilmington as incorporated by the act of 1872, and, under the principles stated in People v. California Fish Co., aforesaid, the patent is void, and all claims of any of the defendants thereunder are invalid."

[3] The appellant's claim to title by acquiescence is not supported by the evidence. The mere construction and maintenance of an intervening fence is not sufficient upon which to base a claim of title by agreement or acquiescence. Staniford v. Trombly, 181 Cal. 372, 186 P. 599; Dauberman v. Grant, 198 Cal. 586, 592, 246 P. 319, 48 A. L. R. 1244; Wilder v. Nicolaus, 50 Cal. App. 776, 195 P. 1068. It is only when the owners of contiguous tracts of lands, who are holding under color of title, are uncertain as to the real boundary line which separates their respective properties, by mutual agreement, either express or implied, consent to accept a specified line as the true boundary, and thenceforth occupy and use their respective properties in accordance therewith for a considerable length of time that the contracting parties and their privies in title will be estopped from repudiating the agreed boundary line. 4 Cal. Jur. 432, §§ 56–59; 4 R. C. L. 126, § 66–71; 4 Thompson on R. P. 202, § 3110 et seq. In the present case there was neither an express nor an implied agreement as to a party line.

[4] The chief contention of appellant is that she acquired title to the land in controversy by means of adverse possession. Upon this subject a score of witnesses were called on either side. The evidence was conflicting. Aside from the payment of taxes, the appellant relies solely upon her proof of an alleged inclosure of the tract in question with a substantial fence in compliance with subdivision 2 of section 323, Code of Civil Procedure. None of the other elements constituting adverse possession are relied upon. The record is devoid of testimony indicating that the tract in question was ever actually occupied by the appellant or her predecessors, or that it was cultivated, improved, or used by them for grazing purposes or otherwise. The court found that the appellant had paid all taxes which had been assessed against the land for the required statutory period. The court also found that it was not true that said land or any part thereof had been inclosed with substantial fences, and that it was not true that substantial fences in conjunction with the waters of the Bay of Wilmington or of the Bay of San Pedro at high tide or otherwise furnished an inclosure of said premises such as is required by the statute. Upon the contrary, it was found that a "partial inclosure with substantial fences continued only from about April, 1904, to the early part of 1905." The court thereupon concluded that appellant had acquired no title to said property by virtue of adverse possession.

[5-7] The question of what constitutes a "substantial inclosure", such as is required by section 323, Code of Civil Procedure, in order to establish adverse possession is purely a question of fact to be determined by the court. Jones v. Hodges, 146 Cal. 160, 79 P. 869; Goodwin v. McCabe, 75 Cal. 584, 17 P. 705; 1 Cal. Jur. 530, § 26. The burden is upon the one who asserts possession adversely to prove his claim by clear and positive evidence. 1 Cal. Jur. 636, § 95. It necessarily follows that the findings of the court as to adverse possession will be upheld on appeal, where they are supported by substantial evidence. The appellant contends that in 1904 she constructed a substantial fence about the premises in question upon the northern and western sides thereof, which fence extended to the line of high tide at the margin of a deep and impassable slough upon the southerly and easterly boundaries, being a part of the inner basin of the San Pedro Bay, and thus completed a substantial inclosure. It does satisfactorily appear that appellant's predecessor in title did in fact build a fence of

posts and wire about part of this tract in controversy extending it approximately to the high tide mark along the water front of the bay, but that the fence soon became dilapidated and was never kept in repair so that it would serve to turn stock or protect the premises. At low tide this fence left uninclosed and open to trespassing stock a strip of land variously estimated at from 100 to 300 feet in width, solid enough for vehicles or stock to travel over, which they frequently did. After the construction of this fence, there was apparently no effort made to keep it in repair. It deteriorated rapidly. Along the line of fence numerous breaches occurred. The posts toppled over, and the wires fell. Many of the posts were hauled away by trespassers. Through these broken spaces in the line of fence, teams entered the premises in search of driftwood and for the purpose of digging clams. The witness Opp testified:

> "I observed the condition of the fence from the time I went there up to that time (1909); from the cross-fence east there were a good many breaks, a good many gaps, where the wires were broken down and the posts bent over; the wires were lying on the ground, and some of the posts were gone. * * * Most of the wires were more or less down all along, but there were some * * * at the west end toward the cross-fence which were in good condition a little longer."

Mr. Hughes testified:

> "In 1906 and 1907, there were numerous breaks through the fence; it was not continuous (between the cross-fence and Vermont avenue). I went through a place * * * where a long stretch of the fence had been removed."

Mr. Carson said:

> "I observed the condition of the fence around the bay. It began to fall soon after it was built."

Mr. Call testified that Johnson, who built the fence, told him "it started to go down right after it was built; * * * that people (seeking firewood) broke through the fence * * * for driftwood; that, if there wasn't enough driftwood, they took the fence posts; that it was practically all down within two years from the time it was built." Mr. Brazee testified:

> "In two or three places the fence was wrecked. Later the vandals wrecked some more. They would open it up along through the west edge, bringing in driftwood. The longer the fence remained there, the more it was being destroyed. I remember some Mexicans digging out the posts and loading them on their wagons."

Mr. Mulherron testified:

> "I had two blocks of that fence removed. * * * We rolled it up and left it out on the road. That fence was never restored."

[8, 9] A dozen other witnesses testified to the dilipated condition of the fence. All agreed that the breaches were never repaired. There was an abundance of evidence to support the court's findings to the effect that the fence did not constitute a substantial inclosure. The margin of the bay to the high-water mark to which the fence was originally extended did not serve as a "natural barrier" which would prevent trespassing of stock. It is true that natural barriers may be utilized in conjunction with artificially constructed fences to constitute a substantial inclosure, but in the case of Mountain Club v. Pinney, 67 Cal. App. 225, 227 P. 630, it is said that, in order to become effective, such natural barriers must be sufficient to turn stock. In the case of Borel v. Rollins, 30 Cal. 408, it is held that, in the absence of actual occupancy by a claimant, a fence is insufficient which is neither substantial in its character nor kept in reasonable repair. Since title by adverse possession implies that the real owner has been ousted and has forfeited his title by laches, it follows that the claimant must establish his title by proof of strict compliance with the statute. His possession must be shown to have been open, notorious, continuous, and hostile, not only to the real owners, but also to the entire world for the full statutory period. 1 R. C. L. 685, § 1. Where the claimant does not actually occupy the premises, but relies solely upon the maintenance of a substantial inclosure, a strict compliance of the statute in this regard should be required. His acts of ownership should be so open and apparent as to leave no reasonable question as to his hostile claim of title. To apply the common figure of speech, his inclosure becomes his rampart for the protection of his fortress. So long as his inclosure is maintained substantially intact, he continues to "fly the flag" of adverse title. 1 R. C. L., 698, § 11. But, when the inclosure deteriorates and becomes a mere inadequate makeshift, with no attempt to repair broken, dilapidated, or missing portions, through the breaches of which stock and vehicles may freely pass, the flag will be deemed to have been hauled down and the adverse claim abandoned. In the case of Stephens v. Leach, 19 Pa. St. 262, holding that an adverse claim of ownership had been abandoned, the court said:

> "Did he keep his flag flying, and present a hostile front? * * * Adverse possession ought to be such as to challenge the right of all the world; but, when an occupant evacuates the place and suffers it to go to wreck, he hauls down his colors, and his challenge is withdrawn."

In support of her claim of the adequacy of her inclosure, the appellant relies upon certain cases which may easily be distinguished from the facts of the present case. In Baldwin v. Durfee, 116 Cal. 625, 48 P. 724, it is said:

> "This claim [of adverse possession] is abundantly established by the evidence, unless the

fact that during flood times in the winter season certain portions of the inclosure were washed away and destroyed changes the legal aspect of the case. These disasters to the inclosure occurred but seldom, and were repaired within a reasonable time in each instance. * * * It is asserted that the * * * inclosure must stand continuously and uninterruptedly for the term of five years. In a general sense this is true; but a mere temporary destruction of portions of the inclosure by fire or flood does not defeat the statute of limitations."

In the case of Andrus v. Smith, 133 Cal. 78, 65 P. 320, the following language is used:

"There was evidence that the plaintiff * * * kept up the fence surrounding it [the premises]; * * * [that he] employed a carpenter to keep the fence in repair; that the fence was kept up the most of the time, but at times was destroyed by the schoolboys pulling off the pickets or breaking the boards."

The evidence in that case showed that the boards and pickets did not remain off the fence for any considerable length of time, but, upon the contrary, the caretaker promptly repaired it whenever he found it out of order. In the case of Jones v. Hodges, 146 Cal. 160, 79 P. 869, it was held that the fence which inclosed the premises in controversy was sufficient to "turn a cow or horse unless they would run into it in madness", and that it was kept intact except "when rails were temporarily off the fence." Adverse possession in the two cases last mentioned was not based solely upon evidence of the maintenance of a substantial inclosure, but there was evidence of the use of the premises by the claimant for grazing purposes and for cultivation, together with the presence of other improvements, and actual possession of the premises.

For the foregoing reasons, the judgment is affirmed.

I concur: HART, J.

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90 Cal. App. 374

KURIHARA et al. v. CITY MARKET OF LOS ANGELES. (Civ. 6274.)

District Court of Appeal, First District, Division 1, California. March 26, 1928.

1. Landlord and tenant 🔑47—Lease providing for contemplated changes and for cancellation on 60 days' notice held not to limit cancellation to changes actually in contemplation at time of executing lease; "contemplate."

Lease of property in City Market, which provided "the lessor contemplates making changes, openings, alterations, additions and improvements in and to the present market buildings and * * * reserves the right * * * to cancel this lease on sixty days' written notice," *held* not to limit lessor's right to cancel lease to changes actually in contemplation at time of execution of lease, or to prevent cancellation, on ground that buildings on leased premises would obstruct new adjacent buildings, since word "contemplate" embraces the future at least to the extent of being opposed to the thought of a fixed determination, and means to have in view as contingent or probable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplate—Contemplation.]

2. Landlord and tenant 🔑37—Language in lease should be construed in ordinary meaning to determine parties' intention (Civ. Code, § 1644).

Under Civ. Code, § 1644, providing that words of contract are to be understood in their ordinary meaning, lease should be construed as any other contract, and court should look to its subject-matter and language of parties in its ordinary significance to determine what was their intent.

3. Landlord and tenant 🔑37—Lease should be construed as a whole to carry out parties' intent.

Scope, purpose, and effect of lease must be determined from considering it as a whole and by giving it a harmonious interpretation to render effective the intention of the parties.

4. Landlord and tenant 🔑37—Ambiguous lease must be interpreted in sense in which lessee believed lessor understood it.

If terms of lease are in anywise ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it; words and sentences being construed to make sense and reason.

5. Landlord and tenant 🔑37—Lease should be interpreted in light of conditions existing when made and should not be so construed as to work obvious injustice to either party.

Lease should be given interpretation which will work no obvious injustice to either party, if language is susceptible of such interpretation, and meaning of lease is to be ascertained in light of conditions existing when made.

6. Money received 🔑1—One party may not unjustly enrich himself at another's expense.

Law does not permit one party to unjustly enrich himself at the expense of another.

7. Landlord and tenant 🔑47—Owner of city market, extending market by erecting adjoining buildings, held entitled to cancel lease of property therein for purpose of demolishing part of leased premises, under provision permitting cancellation for contemplated changes in market buildings.

Lessor owning city market *held* entitled to cancel lease of property in market for purpose of demolishing part of building occupied by lessee, under provision in lease that "the lessor contemplates making changes, openings, alterations, additions and improvements in and to the present market buildings and * * * reserves the right * * * to cancel this lease on sixty days' written notice," where demolition of structure was part of general plan by which

City Market was enlarged by erecting another group of buildings on adjacent property; scope of lease not being confined to changes or improvements on the original buildings.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. Y. Kurihara and another against the City Market of Los Angeles. Judgment for defendant, and plaintiffs appeal. Affirmed.

Meserve & Meserve, of Los Angeles, for appellants.

Anderson & Anderson and E. J. Fleming, all of Los Angeles, for respondent.

PARKER, Justice pro tem. This is an appeal by plaintiffs from a judgment decreeing that plaintiffs are not entitled to a permanent injunction enjoining or restraining defendant from interfering with, removing, altering, taking away, or demolishing, certain leased premises described in the complaint, or the building in which said leased premises are located.

While other issues were joined in the pleadings, at the trial the issue submitted centered about the construction of a certain lease between the parties. The sole question for determination is as to the power of the lessor under the provisions of the lease. The court below held that under the construed provisions the lessor did have the right and power to terminate the lease.

Preliminary to a discussion of the facts, it may be noted again that all other questions have been laid aside, and both parties here are in accord on the proposition that a determination of the lessor's power to terminate the lease disposes of the appeal.

On August 1, 1924, the defendant corporation was the owner of a public market known as the City Market of Los Angeles, which at that time extended from Ninth street on the north to Eleventh street on the south, a distance of nearly 1,000 feet, and from San Pedro street on the east to San Julian street on the west, a distance of nearly 300 feet, comprising what would have been two full city blocks if Tenth street had been projected through the property. The entire area, however, was not covered by one building. We find in the transcript no map or diagram detailing the construction. However, a very general description will suffice. At the time of the execution of the lease here involved, almost the entire outer portion of the land was built upon with frontages on each of the four streets named. There were passageways and openings from the street into the buildings and also between. The center of the area was without buildings, and in such space were provided delivery facilities to the various tenants.

As indicated, the City Market was a large enterprise. Many different dealers conducted business therein, each in a separate capacity, and the whole constituting a distributing center or market for general produce, groceries, meats and such articles as are generally classed as household necessities.

On August 1, 1924, a written lease was executed wherein City Market Company of Los Angeles was lessor, and the appellants herein were lessees. The leased premises are described as "certain stalls or storerooms in the premises located at Ninth, Eleventh, San Pedro, and San Julian streets in Los Angeles, commonly known and called "the City Market premises." The stalls were Nos. 613, 615, 617 East Eleventh street, and were the middle section of an 80-foot building fronting on Eleventh street. The lease contains the stipulation called paragraph 4 of the lease:

> "(4) This lease is accepted by the lessees upon the distinct understanding, stipulation and agreement that the rules and regulations hereinafter set forth shall be considered a part of this lease, and as such shall during said term be in all things observed and performed by the lessees and their employees, servants and customers who may come to or into any part of said premises or buildings at the invitation of the lessees. Said rules and regulations are as follows, to wit. * * *"

Here follows a complete set of rules and regulations of the City Market of Los Angeles buildings, embracing 28 separate paragraphs. Paragraph 24 of the said regulations reads as follows:

> "The lessor contemplates making changes, openings, alterations, additions and improvements in and to the present market buildings, and in the event lessor should deem it necessary (and it shall be the sole judge thereof) to possess for any of the purposes aforesaid the premises hereby demised to lessees, it reserves the right, option and privilege to cancel this lease on sixty (60) days' written notice to lessees, and lessees accept said lease upon the understanding and agreement that this lease may be canceled by the serving of said notice."

On or about June 19, 1925, defendant corporation notified appellants, lessees, as follows:

> "You and each of you will please take notice that the undersigned corporation has elected to demolish that portion of the building that you now occupy under and by virtue of the provisions of the lease dated August 1, 1924. Therefore you will please take notice that under paragraph 24 of said lease this corporation elects to, and does hereby, avail itself of the right, option, and privilege in said lease to cancel said lease on sixty days' written notice to you. In view of the above and foregoing election on our part, your said lease is hereby canceled, annulled, and abrogated 60 days from the date of the service of this notice upon you, and we hereby demand immediate possession of said premises on the expiration of said 60 days' notice."

[1] It is conceded that there was no evidence of fraud, subterfuge, or unfair dealing on the part of defendant, or any attempt to

make use of this clause in the lease purely for the purpose of ejecting plaintiffs. The evidence taken was slight, as the controversy was one almost entirely of construction. However, the testimony showed that the determination of the lessor to demolish the premises occupied by plaintiffs was as of date April 9, 1925. Further, it does not appear from the testimony that all of the market center buildings are to be demolished. In fact, throughout the trial below and here, the concrete question presented is stated thus:

> "The sole question is, does clause 24 of the lease permit the termination thereof on sixty days' notice where the thing intended by the lessor to be done is the demolition of one of the buildings?"

Appellants contend also that the right of termination, as provided in the lease, was tied to changes, alterations, etc., which were in contemplation at the date of the execution of the lease; namely, August 1, 1924. This contention is not supported by any citation of authority, nor is much argument made to support it. Appellants contend that the words "the lessor contemplates making changes," etc., as used in the paragraph here in question, restrict the right to changes then actually in contemplation. However, the entire paragraph indicates some future action, and, as a matter of definition, the word "contemplates" does embrace the future at least to the extent of being opposed to the thought of a fixed determination. The word "contemplate" is defined by Webster (International Dictionary) as follows: "To have in view as contingent or probable; to look forward to." It appears further from the record that, at the time of the execution of the lease here, the defendant owned other property south of Eleventh street not then devoted to market purposes. At or about the time of notice of cancellation defendant had determined to construct, and had constructed, certain buildings on this property south of Eleventh street. When the notice of cancellation was given, it was stated therein that the reason for the destruction of the leased premises was that such leased building might not be considered an obstruction to the new building. Appellants argue, therefore, that the reason for destroying the market building under lease herein was to prevent it from being an obstruction to buildings erected long subsequent to the date of appellants' lease. The argument is not persuasive. The new buildings were erected in furtherance of the general building scheme of defendant with reference to market purposes. The site and such property as was contiguous thereto and owned by defendant continued as a market center and essentially interconnected in business design. The lease provided for "changes, alterations, improvements, in and to the present market buildings." It seems clear to us that the construction of a market building on adjacent property, the whole to constitute the City Market, was at least an improvement to the existing buildings and an addition thereto. What follows hereafter will have equal application to this phase of the contention, and such citation of authority as may appear will likewise apply.

Coming now to what is the main contention, it may be repeated thus:

> "Does clause 24 of the lease permit the termination thereof on 60 days' notice where the thing intended by the lessor to be done is the demolition of one of the buildings?"

Appellants, carrying the negative, contend that the language used precludes the idea of such a power or right being reserved in the lessor. Adopting the language of appellants, they "submit that the five words 'changes, openings, alterations, additions, and improvements' are not sufficiently broad to include the right to demolish the premises leased to appellants." The argument then proceeds with definitions of the separate words. It would be impossible to give all the varying shades of meaning that each word conveys.

The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed. Civ. Code, § 1644.

[2] There is no apparent reason why a lease of real property should not be construed as any other contract pursuant to the Code provisions, by the application of the prescribed tests. We must therefore look to the subject-matter of the contract and the language of the parties in its ordinary signification in order to determine therefrom what was their intention, upon what proposition their minds actually met, and to what they did consciously consent. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, at page 575, 194 P. 1024.

[3, 4] The scope, purpose, and effect of the lease must be determined from a consideration of it as a whole rather than by resort to any individual clause thereof. Such construction should be placed upon it as will render all its clauses harmonious and consistent. So construed, the lease must be given such an interpretation as will make it effective in conformity with the intention of the parties; and, if its terms are in anywise ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it. Words and sentences should be construed to make sense and reason. Lang v. Pacific Brewing Co., 44 Cal. App. 621, 187 P. 81.

[5] It is, of course, true that a lease should be given an interpretation which would work no obvious injustice to either party, if the language used is susceptible of such interpre-

tation. O'Connor v. West Sacramento Co., 189 Cal. 24, 207 P. 527.

The meaning of a lease is to be ascertained in the light of conditions existing when it was made. C. M. Staub Shoe Co. v. Byrne, 169 Cal. 122, 145 P. 1032. See, also, 15 Cal. Jur. 625.

With these general principles in mind, we may proceed with a construction of the lease in the case before us. However, without dispute certain facts are disclosed from the record and from the lease itself.

[6, 7] The Los Angeles City Market was an enterprise in itself covering two square blocks. The lease of plaintiffs was for a small portion thereof, namely, six stalls, to be used for the sale of fruit, produce, and farm products, and for no other purpose. The lease itself indicates the intent of all of the parties thereto that the premises should be occupied and used in conformity with the general design of the premises, and as a market unit rather than as separated therefrom. This is evidenced from the designation of the leased premises as being stalls in the City Market premises, and further from the fact that as a part of the lease the rules and regulations of the City Market were specifically included. The rent reserved was $144 per month. The lessees took possession of the premises mindful of the provisions of the lease whereby the same might be terminated. The lease was subject to termination upon 60 days' notice whenever the lessor might deem it necessary to possess the leased premises for the purpose of making changes, openings, alterations, additions and improvements to the market buildings. Here it may be noted that the lease did not limit improvements or changes in that portion of the market demised to plaintiffs. Indeed, it would seem reasonable to infer that, if alterations, additions, or improvements were intended to be made upon the particular portion leased, then it would have been unnecessary to provide for a termination of the lease or to make any provision therein other than one of temporary possession during the period of time necessary. Obviously, viewing the situation and use of the premises, all parties foresaw the probability of changes and alterations and improvements, and had in mind that they might be of an extent that would require the termination of the lease. It seems apparent that neither of the parties considered that the effect of the provision was merely to permit the lessor to make usual and ordinary improvements and alterations inuring to the betterment of the particular stalls leased. Accepting the trial court's conclusion and the general theory of the case, there is no question of fraud or bad faith involved. The lessors, owners of adjoining property, decided to enlarge the City Market by new buildings on the said property, and, in the working out of a general market scheme embracing the old structures, concluded that the particular premises covered by plaintiffs' lease should be demolished. Under the provisions of the lease, the necessity of this is to be determined solely by the lessor. Both appellants and respondents have presented various and varying definitions of all of the terms in dispute; namely, "changes," "openings," "alterations," "additions," and "improvements." Were we to follow these definitions, we could needlessly extend the limits hereof beyond reason. We are satisfied that the erection of another group of buildings on adjacent property used in connection with the former buildings, and all constituting one general market, was an improvement to the market buildings existing at the date of the lease. Likewise, it was an addition thereto, and it follows that a change was made. Therefore the lessor was within the provisions of the lease as set forth in paragraph 24 hereinbefore noted.

It is not the policy of the law that one may unjustly enrich himself at the expense of another. To sustain the contention of appellants here would in effect amount to just that much. No especial equities are urged, and no degree of injury anticipated by appellants. From the record here they stand squarely upon the proposition that, though all else about them may be ruin and destruction, still the particular portion of the market premises under lease to them must stand and be maintained. They concede that defendant may decide to add a wing to the leased premises, may determine to alter the same to any extent not equal to demolition, and, when this determination is reached, the lessor may terminate the lease. We conclude, however, that the words used give the lessor a greater right and power in the premises; and that, in changing or improving the general market plan, the lessor is not confined to the original buildings.

All other points were disposed of in the court below and nothing but this one is urged here.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

90 Cal. App. 432

MORRIS v. FILOMEO. (Civ. 6196.)

District Court of Appeal, First District, Division 2, California. March 28, 1928.

1. Appeal and error 🔑1010(1)—Appellate court may not disturb judgment based upon findings supported by evidence.

Appellate court may not disturb judgment based upon findings of trial court which were supported by evidence.

2. Trial 🔑397(1)—Where answer contained same allegation of fraud in affirmative defense and cross-complaint, finding that fraud did not exist as alleged in affirmative defense made unnecessary similar finding as to cross-complaint.

Where defendant's answer contained certain denials, an affirmative defense alleging fraud, a cross-complaint alleging fraud, and allegations of fraud in affirmative defense and cross-complaint consisted of same items, *held*, that no duty rested upon court to find twice on subject of fraud merely because defendant's pleadings contained two separate allegations of one and same set of facts.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by H. T. Morris against A. Filomeo upon a contract for sale of an automobile. Judgment for plaintiff, and defendant appeals. Affirmed.

Ezra Cox, of Oakland, for appellant.

Thornton Wilson, of Oakland, for respondent.

STURTEVANT, J. Girola Bros. entered into a contract with the defendant on the 1st day of February, 1926, by the terms of which Girola Bros. sold to the defendant on an installment contract an automobile truck. The defendant defaulted in his payments. The Girola Bros. assigned their interest to the plaintiff. The plaintiff commenced an action against the defendant to recover the payments due and in his complaint he set forth the contract in hæc verba. The defendant filed an answer and a cross-complaint. In the latter pleading the defendant inserted two counts. In the first one he set forth the alleged fraud of Girola Bros. and based thereon the prayer that the plaintiff take nothing. In the second count of the cross-complaint he again alleged the fraud of Girola Bros. and offered to return the truck to Girola Bros. and demanded the payment to him of the $1,000 which he had paid on the truck. The trial court made findings of fact in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

Among others, the court made the following findings:

"IV. That it is not true that at the time the said defendant and said Girola Bros. entered into said written agreement for the sale and purchase of said truck, or at any other time, the said Girola Bros. falsely and/or fraudulently represented to the said defendant that the said truck would carry a load of three (3) tons, and would act mechanically perfect for the purpose; but on the contrary it is true that the said Girola Bros. represented that the truck would carry one (1) ton and one-half (½), and that the said truck was in perfect mechanical condition to and would carry one (1) ton and one-half (½) and such representations were true.

"V. That it is not true that the said Girola Bros., at the time they sold the said truck, knew that the same would not do the work for which it was purchased, and that the same was not in good mechanical condition, but on the contrary the said Girola Bros. represented that the truck would carry one (1) ton and one-half (½), and was in good mechanical condition for that purpose; that it is not true that defendant in purchasing said truck relied upon any false representations of said Girola Bros.; and that no false representations were made by said Girola Bros.

"VI. That it is not true that at the time the said defendant purchased said truck said Girola Bros. falsely and fraudulently represented that the said truck would carry a load of three (3) tons; that it is not true that at that time or at any other place or time or at all said Girola Bros. represented falsely and fraudulently to the said defendant that the said truck was in a perfect mechanical condition.

"VII. That it is not true that the said defendant relied upon said or any false or fraudulent representations in agreeing to purchase the said truck upon the terms set forth in said agreement, or that said Girola Bros. made any false or fraudulent representations whatsoever, and/or that said defendant was induced by any false or fraudulent representations to purchase the said truck.

"VIII. That it is not true that the said defendant at any time thereafter in good faith offered to return the said truck to Girola Bros. but that it is true that the said defendant by lapse of time and use of said truck waived any right of rescission."

[1] The defendant contends that the evidence is insufficient to justify the decision. In support of that point he quotes the testimony introduced by him. The point is not sustained by the record. There was an abundance of evidence introduced by the plaintiff to negative any fraud. Judging from the findings the trial court believed the witnesses produced by the plaintiff. This court may not disturb the judgment under those circumstances.

The defendant contends that the findings of fact are inconsistent. In support of the point he contends that finding No. VIII conflicts with findings IV, V, VI, and VII. But if one turns to the findings and reads them it appears at once that finding No. VIII was addressed to the count on rescission, whereas the other findings were addressed to the alleged defense of fraud and that each finding is addressed to a separate subject.

The defendant contends that he was entitled to plead the fraud of the plaintiff's assignor by way of defense. There is no question about that rule of law presented by this record. Conceding that the pleading of the defendant was in all respects proper, nevertheless, the facts alleged by him were found against him. The record presents no question of a sufficient pleading.

[2] Finally, the defendant complains because the trial court made no findings on the allegations contained in his cross-complaint. The vice of that contention rests in this, it is not true. As stated above, the defendant's answer contained: (1) Certain denials; (2) an affirmative defense alleging fraud; (3) a cross-complaint alleging fraud. The fraud alleged in the affirmative defense and the fraud alleged in the cross-complaint consisted of the same items. As to those items the court made the findings hereinabove set forth. No duty rested on the trial court to find twice on the subject of fraud merely because the defendant's pleading contained two separate allegations of one and the same set of facts. Having found that the plaintiff's assignor had not committed any fraudulent act, it follows that any other allegation contained in the cross-complaint, whether found upon or not, was immaterial.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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90 Cal. App. 410

FAIRBANKS, MORSE & CO. v. STROTHER, Judge. (Civ. 6197.)★

District Court of Appeal, First District, Division 1, California. March 27, 1928.

Hearing Denied by Supreme Court May 24, 1928.

1. Exceptions, bill of 🔑1—Bill of exceptions is intended to preserve record of trial court's rulings for appellate tribunal.

Purpose of bill of exceptions is to preserve record of rulings and decisions of trial court for benefit of appellate tribunal.

2. Exceptions, bill of 🔑45—Draft of bill of exceptions for insufficiency of evidence must specify particulars wherein evidence is insufficient, together with evidence necessary to explain objection (Code Civ. Proc. §§ 648, 650).

Though no particular form of exception is necessary, under Code Civ. Proc. § 650, requiring draft of bill to contain all exceptions and proceedings on which party relies, when exception is to decision on ground of insufficiency of evidence to justify it, objection must specify particulars in which evidence is alleged to be insufficient and must be stated with so much of evidence or other matter as is necessary to explain it, though only substance of reporter's notes of evidence need be set forth, under section 648.

3. Exceptions, bill of 🔑45—Draft of bill of exceptions must be authenticated by indorsement of attorneys or parties.

Proposed draft of bill of exceptions must be authenticated in some form, either by indorsement of attorneys or parties preparing same.

4. Exceptions, bill of 🔑59(1)—Amendment to draft of bill of exceptions, not containing proceedings at trial but only notices after trial and for appeal, held properly denied (Code Civ. Proc. § 650).

Draft of bill of exceptions consisting of copies of pleadings, judgment, notice of appeal, intention to move for new trial, and denial of motion, objection to cause being set for trial, notice of motion to dismiss action, and testimony of witnesses, *held* insufficient as not purporting to be statement of proceedings occurring before trial court nor attempting to set forth any exceptions or proceedings taken at trial on which petitioner relies on appeal, as required by Code Civ. Proc. § 650; notices stated in bill being unnecessary and improper as part of bill of exceptions.

5. Exceptions, bill of 🔑59(1)—Draft of bill of exceptions not showing that objections and motion to dismiss were ruled on, or manner in which lease was used, held insufficient for allowance of amendment.

Draft of bill of exceptions containing written objection to setting cause for trial and motion to dismiss for want of prosecution, but not showing that either was filed, presented or ruled upon, or manner in which copy of lease inserted at end of draft was used in connection with case, *held* insufficient for allowance of amendment to draft.

6. Exceptions, bill of 🔑45—Draft of exceptions, containing no assignment of error or specifications of insufficiency of evidence, held insufficient where grounds for new trial alleged errors of law and insufficiency of evidence.

Where grounds urged in support of motion for new trial were errors of law occurring at trial, and insufficiency of evidence to justify decision, and that decision was against law, proposed draft of bill of exceptions containing no assignments of error or incorporating specifications of insufficiency of evidence *held* insufficient.

7. Exceptions, bill of 🔑59(1)—Allowance of amendment to bill of exceptions containing statements by persons of recollections of own and others' testimony held properly denied.

Testimony inserted in proposed draft of bill of exceptions reciting merely statements prepared by persons claiming to have been witnesses at trial, as to their recollections of nature of testimony given by them, or of transactions connected with case, and not testified to, and statements by persons present at trial as to recollections of what other witnesses testified to, together with opinion of witnesses as to weight and effect of testimony they had given, and containing no part of evidence offered or received in support of plaintiff's case, or alleg-

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★Hearing denied by Supreme Court.

ing that any such evidence was adduced, *held* insufficient, and hence amendment of bill of exceptions was properly denied.

8. Exceptions, bill of 🔑59(4)—Neglect to obtain proper transcript for draft of bill of exceptions held not excused by death of reporter four years after trial.

In mandamus to compel allowance of amendment to draft of bill of exceptions, claim that incomplete form of draft was due to death of reporter four years after trial, which prevented petitioner from obtaining transcript of testimony which necessitated affidavits by witnesses testifying at trial containing résumé of testimony, *held* insufficient to excuse incompleteness where proposed draft showed that petitioner intended to raise question of insufficiency of evidence as to main issues of fact in case, and no reason was given why transcript was unobtainable before death of reporter.

9. Exceptions, bill of 🔑59(1)—Amendment to draft of bill of exceptions held properly refused petitioner who could have procured proper transcript, but did not and made no showing of proposed amendment (Code Civ. Proc. § 473).

Where petitioner seeking mandamus to compel allowance of amendment to proposed draft of bill of exceptions had opportunity to procure transcript of testimony on issues of fact, and made no showing before trial judge, under Code Civ. Proc. § 473, as to how it proposed to amend draft, nor as to nature or form of amendments, refusal to permit amendment of draft containing improper statement of evidence and proceedings before trial court was not an abuse of trial court's power to allow amendment.

10. Exceptions, bill of 🔑59(4)—Amendment to draft of bill of exceptions which would amount to new draft and nullify provision limiting time for presenting bill held properly refused.

Where effort to amend or revise proposed draft of bill of exceptions would amount to preparation of entirely new draft and would nullify mandatory Code provisions limiting time within which proposed bill may be served and filed, which is beyond power of trial or appellate courts to do, trial judge properly refused to allow amendment.

11. Exceptions, bill of 🔑53(3)—Mandamus should not issue to further settlement of bill of exceptions not containing essentials of bill.

Issuance of writ of mandate in matter of settlement of bill of exceptions is not altogether matter of right, and, where insufficiency of draft presented clearly demonstrated that it did not possess any essentials of a proposed bill, writ should not issue in furtherance of settlement.

Application for writ of mandate by Fairbanks, Morse & Co. against Hon. S. L. Strother, Judge of the Superior Court in and for the County of Fresno. Writ denied.

Everts, Ewing, Wild & Everts, of Fresno, for petitioner.

Lindsay & Gearhart, of Fresno, for respondent.

KNIGHT, J. Petitioner applies for a writ of mandate for the purpose of compelling respondent to allow petitioner to amend a document theretofore served and filed by petitioner as a draft of a bill of exceptions. The question as to whether or not the peremptory writ should be granted is raised by respondent's demurrer to the petition.

The following facts appear from the allegations of the petition: On April 1, 1916, Pearl Meeker and William McGuire commenced an action against petitioner and Samuel Bowen in the superior court in and for the county of Fresno for the conversion of certain oil-drilling machinery and equipment, and after a lapse of five years the action was brought to trial. On October 31, 1921, the court ordered judgment for the plaintiffs therein, but on the same day set aside the submission and granted an order to take further testimony upon the issue of the value of the property alleged to have been converted. The action was then allowed to lie dormant for another five years, at the end of which time, to wit, on January 28, 1927, an order of reference was applied for and granted directing a court commissioner to take the testimony relating to the value of the property which the court indicated in 1921 had been converted. Following the taking of such testimony, and on June 10, 1927, the report of the commissioner was adopted by the court, and on June 24, 1927, findings and judgment were entered in favor of plaintiffs and against petitioner, the action having been previously dismissed as to the defendant Bowen. A motion for a new trial was thereafter denied, and on August 25, 1927, petitioner appealed from the judgment. On September 24, 1927, the last day granted under the court's order extending time, petitioner served and filed its draft of a bill of exceptions, which was later presented to the trial judge for settlement. Plaintiffs in the action offered no amendments thereto, contending that the document presented did not contain any of the essentials of a proposed bill of exceptions and was not even a skeleton bill. This contention was upheld by the trial judge, whereupon petitioner offered to amend said draft, but the trial judge declined to entertain such offer, and on November 8, 1927, refused to settle the same as presented. This proceeding was thereupon instituted, not for the purpose of directing a certification of the document as presented, but, as indicated, to compel respondent to allow petitioner to amend and revise the same. The allegations of the petition in this respect are that petitioner "verily believes that there is a sufficient skeleton or structure in said proposed bill of exceptions to allow amendments thereof; * * * that because of the refusal of the said respondent herein to allow your petitioner to offer amendments * * * petitioner is deprived of the right to appeal from the said judgment; * * *" and that petitioner is without a remedy in the ordinary course of law to compel respondent "to allow your petitioner herein to offer amendments to the said proposed bill of exceptions. * * *" The prayer of the petition is that the writ issue compelling respondent to show cause "why he will not allow amendments to said proposed bill of exceptions."

[1-3] The purpose of a bill of exceptions, as the authorities hold, is to preserve a record of the rulings and decisions of the trial court for the benefit of the appellate tribunal (Bedan v. Turney, 99 Cal. 649, 34 P. 442; In re Moore, 78 Cal. 242, 20 P. 558), and the Code of Civil Procedure requires that the draft of the bill shall contain all of the exceptions and proceedings taken upon which the party relies (section 650). Although no particular form of exception is necessary, still when the exception is to the decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient; and the objection must be stated with so much of the evidence or other matter as is necessary to explain it; however, only the substance of the reporter's notes of the evidence need be set forth (section 648); furthermore, the proposed draft must be authenticated in some form either by indorsement of the attorneys or the parties preparing the same (Landers v. Lawler, 84 Cal. 547, 24 P. 307).

A copy of the draft presented in the present case is attached to the petition herein. It consists of copies of the following documents: The pleadings, decision and judgment in the action; notice of and undertaking on appeal; notice of intention to move for a new trial and notice of denial of the motion; written objections to the cause being set for trial, dated May 7, 1926; notice of motion of petitioner and its codefendant, dated January 27, 1927, to dismiss said action for want of prosecution and two affidavits supporting said motion; then follow several typewritten pages headed, "Testimony of witnesses at the trial," and at the end of the draft is inserted a copy of a lease signed by Clara Curry as guardian of Pearl Meeker, a minor, William L. McGuire, and C. H. Holbrook, Jr.

[4-6] It is evident from an inspection of the draft that as served and filed it wholly failed, for several reasons, to comply with well-established legal requirements. It did not purport to be a statement of the proceedings which took place before the trial court, nor was any attempt made whatever to set forth therein, as the Code requires, any of the exceptions or proceedings taken at the trial upon which petitioner would rely on appeal. The insertion of copies of the documents constituting a portion of the judgment roll, and of the notice of appeal and undertaking, was not essential to nor did any of them properly form a part of the bill of exceptions (In re Robinson, 106 Cal. 493, 39 P. 862; White v. White, 112 Cal. 577, 44 P. 1026), and regarding the written objections to setting the cause for trial and the motion to dismiss for want of prosecution, the proposed draft does not show that either was ever filed, presented, or ruled upon; nor does it show in what manner, if at all, the copy of the lease inserted at the end of the draft was used in connection with the case. Moreover, two of the grounds urged in support of the motion for a new trial were errors of law occurring at the trial and excepted to by the defendant, and insufficiency of the evidence to justify the decision and that it was against law; and no assignments of error or specifications of insufficiency of evidence are incorporated in the proposed draft. Neither was the draft at the time of its presentation authenticated in any form; however, the court subsequently granted petitioner's request to sign the same.

[7] As to the section of said draft relating to the testimony of the witnesses, a reading thereof discloses that instead of being a recital in the usual narrative form of the testimony adduced at the trial, the narratives it does contain consist merely of statements prepared by persons claiming to have been witnesses at the trial as to their recollections of the nature of the testimony given by them, or of their recollections of transactions connected with the case and not testified to, and in some instances of statements made by persons present at the trial as to their recollections of what other witnesses testified to; and interwoven in these narratives are the opinions of said witnesses as to the weight and effect of the testimony they had given, such as the following:

> "That he offered certain documentary evidence in support of this statement." "All of this testimony went to show that machinery and equipment was in a very dilapidated condition," etc. "He testified further in corroboration of the testimony of Robert M. Cook as to the dilapidated condition of the machinery." "I cannot exactly recall what my testimony was at the time of the trial with reference to an accounting made by Fairbanks, Morse & Co. to me of the property sold, but I recall, * * *" etc. also, "To the best of my recollection I was of the opinion that the Creme Petroleum Company had every right to dispose of the personal property on the premises, and that the Creme Petroleum Company itself would have done so had not Fairbanks, Morse & Co. levied the attachment."

Moreover, no attempt whatever was made to insert any part of the evidence offered or received in support of plaintiff's case, nor even to mention the fact that any such evidence was adduced.

[8] In explanation of the incomplete form in which the draft was presented for settle-

ment, the petition alleges that the phonographic reporter officiating at the trial of the action in 1921 died in October, 1925, which prevented petitioner from obtaining a transcript of the testimony; that consequently petitioner endeavored to prepare a record by locating the various witnesses who testified at the trial and having them set forth in affidavit form a résumé of the testimony they had given, but that the last affidavit was not received by petitioner until September 24, 1927, which was the last day granted by the court on which to serve and file the draft of said bill. It appears from the draft proposed, however, that petitioner intended to raise the question of the insufficiency of the evidence as to the two main issues of fact in the case; namely, petitioner's liability for the alleged conversion and the value of the property alleged to have been converted. The former issue was in effect decided by the court adversely to petitioner in the year 1921, and although approximately four years elapsed thereafter before the death of the reporter occurred, no reason is assigned why, during that period of time, petitioner could not have obtained a transcript of the testimony upon that issue to protect itself in the event it concluded to appeal; and although the testimony relating to the latter issue was taken before a commissioner in 1927, the petition fails to disclose why a transcript thereof could not have been readily obtained.

[9-11] Even assuming that after the expiration of the time allowed by law to serve and file a bill of exceptions, it was within the power of the trial judge to grant petitioner permission to revise and amend the defective draft already presented, we find no ground upon which to base a fair conclusion that there has been an abuse in the exercise of such power, for, in the first place, it would seem from the facts above stated that petitioner had an opportunity to procure transcripts of the testimony relating to both issues of fact; and, secondly, other than making an abstract offer to amend the draft, petitioner made no showing before the trial judge, under section 473 of the Code of Civil Procedure, or otherwise, so far as the record reveals, as to how it proposed to amend said draft, nor as to the nature or form of the amendments it desired to submit; consequently the trial court was not advised, nor are we from the record before us, whether the amendments petitioner proposed to offer would have added to or detracted from the legal sufficiency of the draft. Irrespective of petitioner's intentions, however, and having in mind the total insufficiency of the present draft, we are in accord with the conclusion reached by the trial judge that any effort to amend or revise the same would amount to the preparation of an entirely new draft; and to allow this to be done would be to effectively nullify the mandatory Code provisions limiting the time within which a proposed bill may be served and filed, which, of course, is beyond the power of the trial judge or of this tribunal to do. As has been held, the issuance of a writ of mandate in the matter of the settlement of a bill of exceptions is not altogether a matter of right; and where, as here, the insufficiency of the draft presented clearly demonstrates that it does not possess any of the essentials of a proposed bill, the writ should not issue in furtherance of its settlement. Derr v. Busick, 63 Cal. App. 134, 218 P. 280.

For the reasons given the demurrer to the petition is sustained without leave to amend, and the alternative writ heretofore issued is discharged.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

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90 Cal. App. 489

DONOVAN v. HIBERNIA SAVINGS & LOAN SOC. et al. (Civ. 6235.)★

District Court of Appeal, First District, Division 1, California. March 30, 1928.

Hearing Denied by Supreme Court May 28, 1928.

1. Gifts ⟹82(1)—Courts must scrutinize carefully facts supporting claim of gift causa mortis.

Courts must scrutinize carefully facts to support claim of gift causa mortis; there being abundant opportunity for fraud and wrongdoing in such class of cases.

2. Gifts ⟹74—Gift causa mortis is revocable and contingent on death of donor.

A gift causa mortis remains ambulatory to some extent and is revocable and contingent on death of donor.

3. Gifts ⟹83—Whether property of deceased was given to another only to enable him to secure funds for hospital and other expenses was question for jury.

Question relative to whether property of deceased was given to another merely to enable him to secure funds to provide against hospital and other expenses likely to arise rather than a gift causa mortis depends on intent and was question of fact for the jury.

4. Gifts ⟹82(2)—Evidence held to sustain finding of gift causa mortis of deposit in bank.

In action to determine ownership of money belonging to deceased on deposit in bank, evidence *held* to sustain finding of gift causa mortis.

5. Gifts ⟹59—Proof of gift causa mortis must show bodily disorder or illness which imperils and eventually terminates donor's life.

In order to establish validity of gift causa mortis, proof must show existence of a bodily disorder or of an illness which imperils donor's life and which eventually terminates it.

★Hearing denied by Supreme Court.

6. Gifts 🔑59—Fear of impending death is not an essential element of gift causa mortis (Civ. Code, §§ 1149, 1150).

Donor's fear of impending death is not an essential element of gift causa mortis, within Civ. Code, § 1149, specifically predicating gift on either contemplation of death or peril of death, in view of section 1150 which raises presumption that gift during last illness of donor, under circumstances which naturally impress him with expectancy of speedy death, is a gift in view of death.

7. Gifts 🔑82(2)—Evidence held to sustain finding that gift was made in view of death (Civ. Code, § 1149).

In action to determine ownership of money on deposit claimed as gift causa mortis, evidence *held* sufficient to support finding that gift during donor's last illness was made in view of death, in accordance with requirement of Civ. Code, § 1149.

8. Gifts 🔑66(2)—Delivery of passbook on savings account, with intention of making gift of deposit, passes title thereto, notwithstanding rule of bank requiring written order or assignment (Civ. Code, § 1147).

Delivery of passbook on savings account, with intention of making gift of deposit represented by book, is sufficient to pass title to deposit, within Civ. Code, § 1147, without a written order or assignment, notwithstanding rule of depository bank requiring written order for withdrawals by one other than depositor.

9. Gifts 🔑76—Revocation of gift in view of death is matter of intent (Civ. Code, § 1151).

Revocation of gift in view of death, as provided by Civ. Code, § 1151, constitutes a matter of intent.

10. Gifts 🔑82(2)—Evidence held to sustain finding that gift in view of death had not been revoked.

In action to recover money on deposit claimed as a gift causa mortis, evidence *held* to sustain finding that gift made in view of death had not been revoked by donor.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by John J. Donovan against the Hibernia Savings & Loan Society and W. J. Hynes, administrator of the estate of Edward O'Kane, deceased. Judgment for plaintiff, and defendant last named appeals. Affirmed.

A. L. O'Grady, Cullinan & Hickey and W. T. Sweigert, all of San Francisco, for appellant.

Cleveland R. Wright, of San Francisco, for respondent.

PARKER, Justice pro tem. This action involves a sum of money deposited with defendant bank by Edward O'Kane. The defendant Hibernia Savings & Loan Society, a corporation, admits holding the amount, but sets up the fact that there is a dispute as to the ownership thereof. The attitude of the bank is simply that of a stakeholder awaiting the final determination of ownership, and it avers its willingness to pay the money to whomsoever the court may award it. The real controversy is between plaintiff, who claims the money by reason of a gift made to him by Edward O'Kane, and the defendant Hynes, the administrator of the estate of Edward O'Kane, who contends that no valid gift was ever made and that O'Kane, never having parted with his title or right of ownership in and to the money, was the sole owner thereof at the time of his death, and that Hynes, as the administrator of the estate of said O'Kane, succeeds to the interest of the decedent for purposes of administration.

The case was tried by the court sitting with a jury, and the verdict of the jury being in favor of plaintiff, the judgment of the court was thereupon entered awarding the money in dispute pursuant to such verdict. Defendant Hynes prosecutes this appeal.

In the court below defendant produced no witnesses, and no evidence was introduced save and except that offered by plaintiff. It is appellant's contention here that, tested by the law and the decisions construing the same, and conceding to plaintiff the benefit of any conflict, nevertheless the case made out by plaintiff and the evidence in support thereof is insufficient to support the judgment. It therefore becomes necessary to detail the facts.

Edward O'Kane was a man of the age of 75 years at the time of the happening of the events hereinafter narrated. He was a single man, without family or relations living in this state, and, as far as the record discloses, had no relatives living elsewhere. His place of residence was a rooming house conducted by the plaintiff, Donovan. Donovan had known O'Kane for a period of 16 years, and for the last 9 years immediately preceding his death O'Kane had lived in rooming houses conducted by Donovan, first on Howard street and for the last few years on Folsom street, both in the city of San Francisco. On or about August 5, 1924, about 4:30 o'clock p. m., while walking down Howard street, O'Kane was struck by an automobile and knocked down. The driver of the car stopped and picked O'Kane up and started with him to the Emergency Hospital. On the way O'Kane stated that he was feeling bad and would rather go to his home than the hospital. He directed the driver of the auto to his rooming house, and upon arrival there he was able to get out of the automobile and declined assistance in going into the house. He was bleeding from the mouth and was limping in his walk. O'Kane got up to his room and went to bed. On the next morning the clerk of the hotel, Patrick Devlin, saw him in bed and gave him such attention as was demanded and upon the arrival of Donovan advised him of O'Kane's injury. Donovan thereupon went to the room of O'Kane and asked if he desired a doctor. O'Kane replied that the driver of the automobile had promised to send a doctor, and he then gave to Donovan the card which the driver had left, upon which card were the name and address of the driver. Efforts were made to get in touch with him, but to no avail. Finally it was learned that the driver's doctor was out of town. O'Kane then remained without medical attention all of the day of the 6th of August and until the day of the 7th. He stated that he felt "fairly well," though he declined food excepting a little coffee. On the morning of August 7th Donovan telephoned to Dr. Haderle requesting that he come. The doctor reached the place about 12 o'clock noon on that day. After examining O'Kane, the doctor stated that in his opinion O'Kane had a fractured skull and should go to a hospital. He inquired then if there were any relatives. Donovan being present with the doctor and O'Kane, and the inquiry being addressed to him, replied that he did not know of any relatives, and suggested to the doctor that he ask O'Kane. The doctor did and O'Kane replied:

> "No, I have no relatives. I am the last of my generation. Mr. Donovan is my only friend."

The doctor then stated to O'Kane:

> "You must go to a hospital, and as a physician I must know the address of your kin, if you have any; that is the duty of a physician,"

—to which O'Kane repeated the former reply. The doctor, having advised the necessity of removal to a hospital, made further inquiry as to the financial ability of O'Kane. Learning that the old gentleman was able to afford the expense, the doctor then prepared an informal document, roughly drawn on the back of an envelope and reading as follows:

> "August 7, 1924—To Whom It may Concern: I hereby authorize John Donovan to spend what money is necesary for all my expenses and promise to reimburse him. I further appoint him as my guardian and benefactor, and give him full authority to act as my attorney in all matters until further notice. [Signed] Edward O'Kane. Witnesses, John J. Haderle, M. D., P. J. Devlin. Mother's maiden name, Ann McGuire."

After this instrument was prepared and signed, the doctor left the room, made arrangements for an ambulance, and departed. After the doctor had gone, O'Kane sent for Donovan and the latter returned to the room. With Donovan and O'Kane in the room, no one else being present, the gift is claimed to have been made. O'Kane said, "Mr. Donovan, I must go to a hospital. Will you go with me?" Donovan agreed. O'Kane then reached under his pillow and took his money belt and his bank book, and he said, "I fear I will not come back. These, my possessions, I give to you." Thereupon he handed to Donovan his bank book and his money belt. O'Kane said, "Here is my possessions. These are yours." Donovan took the belt and the book, and afterwards placed both in his safe. The money belt contained $21, and the bank book was the usual form of savings account, showing deposits to the credit of Edward O'Kane in the amount of $7,871.26, and issued by Hibernia Savings & Loan Society. About 2 o'clock p. m. of the same day an ambulance arrived, and O'Kane was removed from the house to the ambulance on a stretcher and taken to the hospital.

Nothing further of importance happened on that day. On the next day Donovan went to the Hibernia Bank, and showed the document prepared by the doctor, and inquired if money could be drawn on that authority in order to pay O'Kane's hospital expenses. Mr. Ryder, an attorney at the bank, was consulted, and it was Ryder's opinion that the document presented was insufficient in form, and he suggested to Donovan that they go out to the hospital and see O'Kane. In the meantime Ryder prepared another document in the form of a general power of attorney running from O'Kane to Donovan. When Donovan and Ryder appeared at the hospital they were taken to the room or ward wherein O'Kane had been placed. Ryder introduced himself to O'Kane as representing the Hibernia Bank, and explained that he had a certain document which was a power of attorney running to John J. Donovan, wherein Donovan was given power to draw money for the purpose of paying expenses or for any other purpose necessary. O'Kane attempted once or twice to talk, but the pain he was suffering at the time affected his power of speech. Ryder tried to get him to talk about the power of attorney and finally O'Kane after a struggle turned slightly on the bed—Donovan standing at the bedside—and O'Kane said:

> "I don't want to sign anything. I have already given [pointing to Donovan] him everything I have got."

Ryder insisted that O'Kane should sign the paper, so after a time the paper was held up in front of him there, somebody got a book or something to hold it, and he attempted to sign it. The scrawl is visible on the document. Following O'Kane's attempt to sign Ryder asked him to sign by mark, explaining that it was necessary. O'Kane then made a mark, and Ryder signed the paper as a witness to the mark and left the room. The document thus signed was a general power of attorney to Donovan.

Ryder, thinking of the statement that O'Kane had made about his having given everything to Donovan, said to the latter after leaving O'Kane that apparently it was O'Kane's desire to make Donovan his beneficiary, and to that end it would be best to have a formal will prepared and executed. Then Donovan and Ryder returned to the sickroom. It might be here noted that the room in which O'Kane was in bed was a small ward in which two other patients also had beds. Both Donovan and Ryder spoke to O'Kane about making a will. Ryder said:

> "Mr. O'Kane, you apparently want to give this man everything you have got; and in order that it should be put into proper legal shape you ought to make a will."

O'Kane tried to mumble something, but was unable to talk. He did not move his head in assent or dissent. After two or three ineffectual attempts to get some expression from O'Kane, Ryder said to him:

> "Mr. O'Kane, I am judging from what you have said already that you would like to have a will made leaving what you have to Mr. Donovan. I will take it on myself to prepare a will, and I will bring it out to you some time to-morrow, and I will bring along one of the other men from the bank, and at that time if you feel so disposed you can execute the will."

Thereupon Donovan and Ryder left.

The next day Ryder and a notary took out a will for O'Kane to execute, but found him in such condition that nothing could be done. Nothing was said at that time by any one. Within 48 hours O'Kane died.

During all of this time Donovan had said nothing to Ryder about the bank book or about the belt having been given him.

After the death of O'Kane, to wit, on August 11, 1924, Donovan brought the package containing the bank book to Mr. Ryder's office, and placing the book and the belt upon the desk, stated, "These are the old man's things," Here the matter rests until later in the month, about August 29, 1924.

At that time a coroner's inquest into the facts surrounding the death of O'Kane was held. Donovan was called as a witness and gave testimony concerning the bank book and effects of O'Kane. Referring to said book the following questions were asked of Donovan by the coroner, and the answers given were as follows:

> "Q. What did he tell you to do with the package? A. He told me to keep it.
>
> "Q. Keep it for him? A. No, he says, 'You keep this.' He did not say for him. He said, 'You keep this.'
>
> "Q. In other words, it was left in your charge until he would come back from the hospital? A. Yes.
>
> "Q. And at that time he did not think he was badly injured? A. Yes.
>
> "Q. And he handed this to you as custodian? A. I suppose so. He threw out a request—
>
> "Q. Never mind about that just at this moment. When he handed you this package, your idea was you were to be custodian of it until he came back from the hospital? A. Yes.
>
> "Q. He did not give it to you at the time with the idea that he presented it to you? A. Well, I don't know. He gave it to me. He said, 'This is yours. Keep it.'"

The foregoing in detail fully sets forth the facts surrounding the alleged gift.

As before indicated, there was no evidence adduced by defendant.

It is appellant's contention that the case made out by plaintiff was so badly broken down on cross-examination as to render it inherently improbable and unworthy of belief. Further, that the admitted facts and circumstances in themselves negative the idea of a gift. Finally, appellant contends that if there ever was a gift the same had been revoked prior to the death of O'Kane.

[1] It is well recognized that courts must scrutinize carefully the facts adduced to support the claim of a gift causa mortis. It is appreciated that abundant opportunity for fraud and wrongdoing is afforded in this class of cases. In the case of Sullivan v. Shea, 32 Cal. App. 369, 371, 162 P. 925, 927, the rule is announced as follows:

> "Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded upon pretended gifts of his property asserted to have been made whilst he was living, it is but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation, whether it be a donation inter vivos or mortis causa. Even then fraudulent claims may prevail, but the rigid requirement of the clearest proof will at least diminish the number."

Adopting this as the law, nevertheless it does not follow that courts of review are to make an independent analysis of conflicting facts and retry the cause upon appeal. Appellant admits this to be true, and with this admission we feel the discussion is ended. An exacting cross-examination has developed inconsistencies and in some cases direct contradictions. However, the case in its entirety was submitted to a jury, and subsequently to the trial judge on motion for a new trial. The jury were painstakingly and fully instructed on all phases of the case, and this is most evident from the fact that not the slightest criticism is offered here on the action of the trial court in the matter of instructions. Every alleged inconsistency in plaintiff's case as it was developed was made the subject of an instruction, and all of the theories of appellant were presented carefully to the jury. The apparent contradictions in the testimony were argued and pointed out. In the face of it all the jury returned its verdict for plaintiff, and the trial court, with opportunity to note and weigh all of the facts and circumstances, and with further opportunity of observing the witnesses and their demeanor, refused to set aside the verdict rendered. The testimony of plaintiff was supported to some extent, and to a great extent, by that of a disinterested witness. It might further be noted that a great part of appellant's case was predicated upon conflicting and contradictory evidence given by plaintiff at the coroner's inquest. In this connection both plaintiff and the witness Ryder threw discredit upon the transcript of the testimony purporting to have been taken before the coroner, and the said transcript was not supported by any extrinsic evidence. It further appeared that at the coroner's proceeding some little feeling was developed between the plaintiff, Donovan, and the coroner, arising out of some previous matter entirely disconnected with the present case, and plaintiff testified in connection with the purported transcript of the coroner's inquest that his testimony was not "put down right." The statement of plaintiff was:

> "To do me justice on that thing, the coroner was prejudiced against me. He accused me of being in his court on a scandalous case. I challenged him to prove it, and he brought his secretary out with the books, and the secretary says, 'No, Mr. Donovan was not here, your honor,' and the coroner never apologized to me."

The witness Ryder testified:

> "I remember having a pretty acrimonious passage at arms with the coroner at that time. I don't know that the report is absolutely correct. He may not have got it all down, I don't know. He may have gotten it down properly. I don't like the way it reads. I remember there was something in that testimony some place that was not altogether in accordance with what I had testified to down there."

No evidence was offered to support the verity of the transcript read from as the official transcript of the proceedings at the coroner's inquest, and the force of the apparent contradictions was a matter exclusively for the jury. As to the inconsistencies developed elsewhere in the testimony at the trial in the court below, much the same situation exists, and these likewise left the truth to be determined by the jury with the supervisory control in the trial judge on motion for a new trial.

[2] In passing, it might also be noted that in explanation of some of his statements Donovan, the plaintiff, maintained all of the time that he did not consider the property actually his until such time as O'Kane had died. In other words, while contending that a gift had been made to him, he nevertheless felt that the same was revocable and contingent upon the death of the donor. This is a correct conception of the law governing, and is the very gist of the whole transaction. A gift causa mortis remains, as it were, ambulatory to some extent as would a testament. Plaintiff's alleged statements that he understood that he was the custodian until O'Kane's return from the hospital are easily and readily reconcilable with this view.

[3, 4] Appellant contends that the writing prepared by the doctor, being an informal power of attorney and appointment of guardian, controlled the alleged gift, and that the property was given to Donovan merely to enable him to secure funds to provide against the hospital and other expenses likely to arise. This necessarily goes to the question of intent, which was a question of fact for the jury. Mellor v. Bank of Willows, 173 Cal. 454, 160 P. 567. There was before the jury the fact that O'Kane was without relatives and apparently without intimates; that Donovan had befriended him in some instances, at one time to the extent of saving his life. And, further, it appears that practically the last words spoken by this dying man were words confirmatory of the gift. After carefully scrutinizing the testimony adduced, we are not inclined to disturb the judgment on the ground that the case of plaintiff is in itself unworthy of belief.

We come now to the question of law argued. The entire controversy naturally centers around the law governing gifts causa mortis.

Section 1149 of the Civil Code defines a gift in view of death to be a gift which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver. Section 1150 provides that a gift made during the last illness of the giver, or under circumstances which naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

At the outset appellant contends that there was not present the fear or contemplation of death necessary to render a gift effectual.

[5] The rule of law in the case of gifts causa mortis demands for their validity that the proof shall show the existence of a bodily disorder or of an illness which imperils the donor's life and which eventually terminates it. Zeller v. Jordan, 105 Cal. 147, 38 P. 640.

[6, 7] In the instant case O'Kane died within a few days after the gift, and his death resulted from the injury or ailment from which he was suffering at the time of the gift. He was an aged man whose expectancy of life was short, aside from any injury. He was told by the doctor that his condition was serious, and that possibly his skull was fractured. He was ordered forthwith to a hospital for examination and treatment. His own statement was, "I fear I may not come back." While there is an attempt to show that he made general statements to the effect that he was "feeling fine" or "fairly well," yet there seems little question but that his condition was known to him to be serious. One may realize himself to be in peril of death and yet not expect to die. It may often happen that a sick or an injured person may believe that he has a greater chance to live than to die, but, nevertheless, will take every step anticipatory of death. This fear of impending death is not an essential element of a causa mortis gift. The section specifically predicates the gift on either contemplation of death or peril of death. Section 1150

raises the presumption that a gift such as here, made during the last illness of the donor, under circumstances which naturally impress him with an expectation of speedy death, is a gift in view of death. There was no evidence to rebut the presumption, but, on the contrary, all of the evidence supports it. The whole evidence leaves no uncertainty on the question. Further, as hereinafter set forth, this, too, became a question of fact for the jury, and under appropriate instructions the fact was determined. We find sufficient to support it.

[8] It is next contended that there was no delivery sufficient to constitute a gift of the funds in the bank as represented by the bank book.

Section 1147 provides:

> "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

The passbook or bank book in question here contained in printed form a list of regulations classed as:

> "Conditions on which deposits may be made with and will be repaid by the Hibernia Savings & Loan Society, a corporation."

Among these conditions appears the following:

> "On withdrawing any money, if the depositor is not personally present, the passbook must be accompanied by a written order or assignment from the depositor."

Appellant, basing his contention upon this rule of the bank, argues that as there was no written order or assignment, the means of obtaining possession and control of the fund were not given, and therefore, conceding an attempt to make a gift, nevertheless the attempt was ineffectual and of no avail. Both sides here agree that the exact question has not yet been passed upon in this state. However, we feel that a solution is readily presented from the line of authorities on the general subject.

In the recent case of Dellepiane v. Hynes (Cal. App.) 257 P. 180, the court discusses gifts of this character. The opinion is exhaustive and reviews many of the authorities. In that case it is said:

> "The great weight of authority is, therefore, that the delivery of a passbook upon a savings account, with an intention of making a gift of the deposits represented by the book is sufficient to pass title to the deposits without a written assignment or order."

Indeed, appellant here concedes that to be the law of this state. The question as to whether or not the rule of the bank, requiring a written order for withdrawals, would have the effect of making a gift ineffectual without the order, was not before the court in the Dellepiane Case, and therefore it was not passed upon.

In the case of Ridden v. Thrall, 125 N. Y. 572, 578, 26 N. E. 627, 629, 11 L. R. A. 684, 21 Am. St. Rep. 758, the question was squarely presented and passed upon, and the reasoning of the court was as follows:

> "The by-law requires an order * * * when some one seeks to draw money for the depositor or the depositor's money. But the depositor can draw the money without making an order simply by the presentation of the deposit book, and so can any owner of the book. Suppose the plaintiff had purchased the book, and had thus become the absolute owner thereof; he could have drawn the money as owner on presentation of the book, and the bank could not have required as a condition of payment that he should procure a power of attorney or an order from one having no interest, legal or equitable, in the deposit. The owner in such a case should produce satisfactory evidence of his ownership of the book, and if the bank refused to pay he would be obliged to establish such ownership by any competent evidence and nothing more; and his rights as purchaser would be no greater than his rights as donee. He has the same right to enforce a payment that he would have had if he had been the donee of any nonnegotiable chose in action, or a certificate of deposit, or unindorsed note. He could establish his right to payment in such a case by any proof showing that he was the absolute legal or equitable owner."

In Dellepiane v. Hynes, supra, the court, in commenting on the New York case, Ridden v. Thrall, says:

> "The effect of the decision is that the passbook is in itself the evidence of the obligation of the bank and that the question as to the ownership of the book was one to be determined by competent evidence and that the donee of the passbook had the same right to enforce payment as the donee of any nonnegotiable chose in action, certificate of deposit, or unindorsed note. In such a case he may be called upon to prove his ownership, but this goes only to a question of evidence of title and not to the substantial right of the parties. Putting it in another way, if a party has come into possession of a passbook by purchase or gift a written order or assignment would merely be evidence of the right and not the means of enforcing the right."

That this is a correct interpretation of the decision is made manifest from a later New York case, Scheffer v. Erie County Savings Bank, 229 N. Y. 50, 127 N. E. 474. From these decisions it can be deduced that the holding is that the requirement of a written order or assignment is not a limitation on the exercise of the power of assignment. To the same effect is the case of In re Curran's Estate (N. J. Orph.) a New Jersey case reported in 129 A. at p. 820. In an ancient case, Tyrrell's Estate, 3 Pa. County Court, 228, we find this language:

> "In general, compliance with rules of this character is necessary only for the purpose of establishing the relation between the corpora-

tion and the assignee, and want of compliance does not affect the validity of the transaction as between the original parties or persons claiming as volunteers under them. * * * A gift causa mortis, in view of its conditional character, is one to which this doctrine would seem to be especially applicable. The delivery of a deposit book with the express intention of passing an ownership which is not to take effect indefeasibly until the death of the donor, manifests the purpose of the latter, inequivocally, and in the only manner consistent with the nature of the gift; and against such manifestation his personal representatives, where the estate is free from debt, ought not to be permitted to set up, as a reason for defeating the gift, a regulation of the bank which does not concern them in any manner."

In Van Wagenen v. Bonnot, 72 N. J. Eq. 154, 65 A. 244, it is said:

> "The point was suggested, rather than insisted on, by counsel that these savings bank books on their face required an assignment in writing by the depositor in order to transfer the money to another. This assignment relates to an absolute present assignment as between the bank and the depositor, and is only intended to regulate the legal rights of the bank with the depositor."

The doctrine of the New York decision is followed, likewise, in Goodson v. Liles, an Alabama case reported in 209 Ala. 335, 96 So. 262.

Appellant has cited cases holding to the contrary, or, rather, cases wherein a contrary conclusion has been reached. However, upon analysis most of these cases will be found to be from jurisdictions where delivery of a passbook is held insufficient to effectuate a gift of a savings account, and this irrespective of the question of the bank's requirements as to written order or assignment. These authorities therefore are of little aid here, inasmuch as it is conceded that the decisions of the state of California recognize as effectual to complete a gift causa mortis the delivery of a savings account passbook, all other essentials being present. Dellepiane v. Hynes, supra.

The case of Mellor v. Bank of Willows, 173 Cal. 454, 460, 160 P. 567, 569, is directly in point on the question here being discussed. In that case the subject of the gift causa mortis was a number of certificates of deposit. The court says:

> "The certificate of deposit was unindorsed. The appellants contend that this was a fatal defect to the validity of the gift. * * * Where there is no opportunity to make an indorsement or written assignment of an instrument, such as a certificate of deposit intended as a gift causa mortis, the absence of an indorsement does not raise a presumption against the validity of the transfer. The certificate was payable 'to self or order.' Its delivery constituted an equitable assignment of the money on deposit. * * * This clearly brings the case within the principle of the prevailing authorities, that a gift of a deposit in a bank is a proper subject of a gift causa mortis, and may be evidenced by the delivery of the certificate of deposit without indorsement. * * * *The conditions of transfer printed upon the certificate calling for an indorsement do not alter the rule.*"

And in support of this last statement the court cites the case of Ridden v. Thrall, supra.

Appellant here seeks comfort in the language of the Mellor Case as quoted, namely, "Where there is no opportunity to make an indorsement or written assignment," etc., and contends that this language is intended to provide only for exceptional cases. The whole opinion does not warrant this construction. Indeed, such a limitation would be unsound and would constitute an attempt to legislate rather than to construe. The clause was wholly gratuitous and has not the effect of a limitation. Many of the authorities are reviewed at length in an exhaustive annotation in 40 A. L. R. 1249, and the views hereinbefore expressed coincide with the almost unanimous holdings of other jurisdictions.

On principle, aside from authority, it seems manifest that no property right in money is lost by a deposit of the fund in a savings bank. The owner still retains all of his personal rights of transfer or assignment, and while the depositary bank may formulate and enforce certain rules relative to procedure and accounting, consistent with prudent management, yet the bank cannot in any sense restrict or take from the depositor any right of property. And it is elementary that the full right of property embraces the power of free disposition and control.

The appellant's claim here seems on its face to be unsupported. Appellant contends that by failure to give a written assignment the donor withheld the means of obtaining possession and control of the fund. The fact remains that the bank raises no question on this point. The bank does not contend that there was no written assignment and therefore no gift. It simply denies, on information and belief, that plaintiff is the owner of the deposit. It alleges the claims of the parties to this controversy and asserts that it has no interest in the fund in dispute other than to pay it to the person entitled thereto. In other words, it assumes the position of a mere stakeholder. And it is obvious that if it is held that a gift was made the bank will not refuse payment. And it is further obvious that if defendant Hynes, administrator, should dismiss the action, the bank would no longer defend but accede to the court's order. And throughout it all no question is presented by the depositary on the lack of a written assignment—showing conclusively that all that the bank requires is proof of ownership, and demonstrating the application of the New York holding to the effect that the written order or assignment is not an essential of the gift but only evidence thereof, and not indispensable evidence.

[9, 10] Appellant's next contention is stated as follows:

> "Even if there was a gift in view of death, it was revoked when the owner later reasserted dominion and control over his property by appointing the donee as his agent, under a power of attorney, to draw money from the Hibernia Bank."

It is a fundamental rule of law that a gift in view of death may be revoked by the giver at any time. Civ. Code, § 1151; Daniel v. Smith, 64 Cal. 346, 30 P. 575; Doran v. Doran, 99 Cal. 311, 33 P. 929. Without detailing the argument of appellant or attempting to distinguish the cases cited in support thereof, we are of the opinion that revocation is a matter of intent. The intent to revoke is what accomplishes the revocation. 13 Cal. Jur. 45, 46. Applying this doctrine to the facts of the instant case we may again note briefly the incident of the execution of the power of attorney. The witness Ryder testified:

> "O'Kane was very very sick; he did not do any talking outside of one single sentence that was intelligible. He tried to speak, but it was obvious that the pain he was suffering affected his power of speech. I tried to make him answer me two or three times about the power of attorney, and, finally, after a struggle, he turned slightly on the bed—Mr. Donovan was standing by me—and he said 'I don't want to sign anything. I have already given [pointing to Donovan] him everything I have got.' But I insisted that he should sign this paper, so after a bit the paper was held up in front of him there, somebody got a book or something to hold it, and he attempted to sign it. The scrawl is visible on the document. Following his attempt to sign I asked him to sign by mark, and explained to him what was necessary. He then made a mark, and I signed it as a witness and wrote his name on it."

The power of attorney thus signed was a general power of attorney, and had therein no specific reference to the deposit or to the bank book. There is nothing in the record to indicate any intention to revoke, but the facts and the statement of O'Kane tend strongly to negative any such intent. Issue was jointed on the question of revocation, and the verdict of the jury was against appellant's claim.

Throughout the entire presentation of this cause appellant insists upon what he classes as indicia of fraud, and points out many instances of equivocation. For instance, he emphasizes the silence of Donovan regarding the gift at times when it would be presumed he would have spoken. Yet Donovan makes reasonable and satisfactory explanation when he states that he understood the gift meant nothing if O'Kane recovered or chose to revoke, and he claimed no ownership in the fund until after O'Kane died. Appellant supports his argument by the repeated statement that gifts causa mortis are not favored by the law, and produces authority seemingly in support of this theory. But the statement is not exact. For many years, dating back perhaps centuries, the law has recognized gifts causa mortis and given effect to the manifest intent of the donor. It has appreciated the opportunities offered for fraud and injustice, and has tried to safeguard against the wrongdoer. One asserting a claim to property by virtue of such a gift has been put to the strictest proof, and from the outset looked upon perhaps with suspicion. But once the gift is proved the solicitude of the law in protecting the rights of each individual comes into play. And likewise, the intent of the donor being clearly shown, in accord with the requirements of the law the same regard for this intent is shown as in all other cases. In Freese v. Odd Fellows' Savings Bank, 136 Cal. 664, 69 P. 494, we find this language of Chief Justice Beatty:

> "And when the trial court has rejected his testimony, necessarily upon the ground that it is incredible, it would be a startling innovation for this court to practically make an affirmative finding of a gift by reversing the decision of the trial court and remanding the cause."

So, here, the facts were fully presented to a jury and to the trial judge, and a verdict returned in favor of plaintiff. The trial was without assigned error, and the law of the case and the various theories of each side fully presented to the jury and the learned trial judge. And it would be equally startling if this court were to make findings of fact upon the same evidence adverse to those of the court below.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

90 Cal. App. 225

BROOKS et al. v. OAKDALE IRR. DIST. et al. (Civ. 3457.)

District Court of Appeal, Third District, California. March 19, 1928.

Waters and water courses ⟹253—Transferees of irrigation system held required to continue irrigation by continuous flow, where such method had been used by their predecessors.

Where predecessors of irrigation districts acquired dam and ditch that had been used in conveying water to lands of plaintiffs' grantors, they assumed burden of continued service then necessary to beneficial use of land and premises owned by plaintiffs' grantors, and burden of continuing such service was immediately assumed by irrigation districts, and hence where lands of plaintiffs and their grantors were of such a nature that to irrigate it beneficially a continuous flow of a small stream was required and the flooding method of irrigation would materially injure it, and it had always been irrigated by continuous flow, the irrigation districts were under duty to continue such method of irrigation.

Appeal from Superior Court, Stanislaus County; E. N. Rector, Judge.

Action by C. P. Brooks and others against the Oakdale Irrigation District and another to establish preferential rights in certain waters of the Stanislaus river. Judgment for plaintiffs, and defendants appeal. Affirmed.

P. H. Griffin and Griffin, Boone & Boone, all of Modesto, and Nutter, Hancock & Rutherford, of Stockton, for appellants.

L. J. Maddux, of Modesto, for respondents.

PLUMMER, J. Plaintiffs had judgment in an action prosecuted to establish a preferential right to the use of certain waters of the Stanislaus river, from which judgment the defendants appeal.

The plaintiffs are the owners of certain tracts of land located within the vicinity of Knight's Ferry, in the county of Stanislaus, which lands have been irrigated for over 50 years from waters taken from the Stanislaus river and conveyed to said lands by means of a certain dam and ditch diverting the waters of said Stanislaus river thereto. None of the lands belonging to the plaintiffs lie within the exterior boundaries of either the Oakdale irrigation district or the South San Joaquin irrigation district. The two districts just mentioned were organized during the year 1909.

The transcript shows that some time during the year 1853 a dam was built in the Stanislaus river at a certain point known as and called "Six-Mile Bar," lying between the counties of Calaveras and Tuolumne, from which point water was diverted and conveyed through a certain ditch, which became known thereafter, at a period not mentioned, as the "Schell Ditch," to the vicinity of Knight's Ferry in the county of Stanislaus, and there and thereafter used for mining, domestic, and irrigation purposes. At just what period the use of such waters was begun to be made for irrigation, the record does not disclose, further than that such use was made of said waters at a period antedating the date of the trial at least 50 years. From the date of the inception of the use of said waters through the ditch herein referred to for domestic and irrigation purposes, such use was continued without any particular extension thereof, down to the year 1887. The record does not disclose just how many acres of land were irrigated at that date. During the trial of the action it was stipulated that the plaintiffs, at and prior to the acquisition of any rights in and to the waters of the Stanislaus river by the two irrigation districts, defendants in this action, were irrigating 255.55 acres of land.

For some period prior to the year 1887 it appears that twelve persons had been the owners of the dam and ditch herein referred to, and of the waters diverted from the Stanislaus river thereby and conveyed to the lands situate and lying within the vicinity of Knight's Ferry in Stanislaus county, and use thereof made by the predecessors in interest of the plaintiffs in this action. At just what period of time said persons became the owners of said waters and means of diversion the record does not clearly indicate, nor does such fact seem material in this action. During the year 1887 all of the twelve persons referred to, granted, bargained, sold, and conveyed all their rights in and to the waters of Stanislaus river and the dam and ditch referred to herein. Such rights were conveyed to three persons named M. F. Tarpey, L. U. Shippee, and James A. Morrissey. The record shows further that during the year 1887 and prior to the conveyance to M. F. Tarpey, L. U. Shippee, and James A. Morrissey of the rights of the twelve persons herein referred to, the said M. F. Tarpey, L. U. Shippee, James A. Morrissey, John Gambetti, and Abraham Schell filed notices of appropriation of water claiming the waters of Stanislaus river to the extent of several hundred thousand inches thereof measured under four-inch pressure; the notices of appropriation of such waters setting forth that it was proposed to divert the same by a dam or dams to be built in said Stanislaus river at a place indicated thereon other than the Six-Mile Bar dam herein referred to, and that it was proposed to divert the waters of said river by canals and ditches thereafter to be built, and to convey said waters to the counties of Stanislaus and San Joaquin for purposes of irrigation, etc., including the sale thereof for use for the various purposes named in said notices of appropriation. After the posting and filing of such notices of appropriation, three of the individuals named acquired all the right that had been owned in and to the waters of the Stanislaus river and the dam and ditch herein mentioned and referred to as having been erected, maintained and used for many years prior to the year 1887.

A number of the deeds of conveyance transferring to M. F. Tarpey, L. U. Shippee, and James A. Morrissey the rights of the twelve individuals herein referred to, in and to the waters of the Stanislaus river and the dam and ditch by means of which said waters were diverted to and used in the vicinity of Knight's Ferry, contained reservation clauses to the effect that a preferential right should always exist in favor of the users of said water living in and about Knight's Ferry where said water had been used for purposes of irrigation, mining, etc., prior to the date of the execution of the deeds of conveyance. The reservation was not contained in all of the deeds of conveyance, but in those in which it was contained, it appears in the following words, to wit:

> "This deed is made by the party of the first part and is accepted by the parties of the second part on this express condition and understanding that said parties of the second part and their assigns are to have the waters of said ditch used or sold for use in Stanislaus and San Joaquin counties, and that the people and persons residing in and about Knight's Ferry and vicinity and their heirs and assigns are to have all the waters that their needs may require for agricultural, horticultural, mining, vineyard, irrigating and domestic purposes, the same as they have had the same heretofore from the owners of said ditch; and the Knight's Ferry ditch which supplies the town of Knight's Ferry with water and which ditch takes its water from the San Joaquin county ditch, paying for the same, it is also to be supplied by the said parties of the second part and their assigns as it has been supplied heretofore; and the people and all persons as aforesaid and their heirs and assigns are to be preferred in the use of said water; and the charges for such use to the persons now using the same, and to those who may hereafter use the same and their heirs and assigns, in and about Knight's Ferry and vicinity shall not be greater than they are now, and in case the charges for the use of such water be reduced, all persons as aforesaid shall have the water at such reduced rates.
>
> "And the said parties of the second part for themselves and their assigns agree that upon taking possession and control of said ditch property, that they will furnish and supply the party of the first part and all persons now using the waters of said ditch with all water that their needs may require, the same as they have been heretofore furnished and supplied by the present owners of said ditch."

After acquiring the rights of the twelve individual owners of the Schell ditch and the waters diverted thereby, and after filing notices of appropriation of several hundred thousand inches of the waters of said Stanislaus river by Messrs. Tarpey, Shippee, and Morrissey, said last-named persons transferred all their interest in and to said waters and the dams and ditches diverting the same to the San Joaquin Land & Water Company, which company in the year 1894 transferred all its interest in and to said waters, dams, and ditches to one H. W. Cowell, who in the same year transferred all his interest in and to said water, water rights, dams, and ditches to the Stanislaus & San Joaquin Water Company; this deed reciting that it was made subject to the rights of the users of water through the Schell ditch and was made subject to the conditions and requirements of furnishing water to persons within the vicinity of Knight's Ferry, as set forth in the deeds hereinbefore referred to. The record shows that after this transfer a mortgage was executed upon said property and a foreclosure sale thereafter took place and the property referred to conveyed by a trustee to the Stanislaus Water Company in the year 1899. This company thereafter, and during the year 1907, conveyed all its interest in and to the waters of the Stanislaus river and dams and ditches hereinbefore referred to, to the Consolidated Stanislaus Land & Water Power Company, which latter company in the year 1910 conveyed all its interest in and to said waters, dams, ditches, etc., to the defendants in this action. Thereafter, and during the year 1913, it appears in the record that the two irrigation districts entered into an agreement by virtue of which the South San Joaquin irrigation district was to supply water to lands owned by the Frankenheimer Bros. situate outside of the exterior limits of the South San Joaquin irrigation district, and that the Oakdale irrigation district would supply water to the plaintiffs herein and residents of Stanislaus county, owning lands in the vicinity of Knight's Ferry lying outside of the Oakdale irrigation district, which lands had been theretofore furnished with water as hereinbefore stated.

The judgment of the trial court awarded the plaintiffs a continuous flow of waters of the Stanislaus river to the extent of four second feet of water to be conducted and conveyed to them along the same course and line of ditch by which the waters of the Stanislaus river had been conveyed to them, and to their predecessors, as stated herein.

No issue is raised as to the sufficiency of the findings, nor that the quantity of water awarded to the plaintiffs is not necessary or that beneficial use has not been made thereof by the plaintiffs, nor is there any issue presented or any question raised that such quantity of water has not been conveyed to the lands of the plaintiffs for a long period of time, nor that such quantity of water was not beneficially used by the plaintiffs and their predecessors upon the lands referred to in the complaint at the time when the predecessors of the plaintiffs filed their notices of appropriation of the large volume of water flowing in the Stanislaus river, as hereinbefore referred to. None of these questions being presented by the briefs of counsel, they are not inquired into by the court. The only issue tendered for our consideration is whether the plaintiffs, as the successors in interest of the lands and premises to which the waters of the Stanislaus river were diverted and conveyed before M. F. Tarpey, L. U. Shippee, James A. Morrissey, and John Gambetta filed their notices of appropriation of several hundred thousand inches of water of Stanislaus river and then acquired the rights of the prior appropriators in and to the waters diverted by the dam built at Six-Mile Bar and the ditch constructed therefor conveying water to the lands of the plaintiffs, have a prior right, or, as expressed in the briefs, a preferential right, to the use of the waters of the Stanislaus river to the extent of four second feet thereof in continuous flow. On the part of the appellants it is contended that a public service corporation can grant no preferential rights. On the part of the respondents it is contended that the deeds of conveyance, by which title to the waters in question has been transmitted to the appellants, reserve such right, and that the two irrigation districts, as successors in interest, are bound to furnish to those having lands lying within the vicinity of Knight's Ferry, the quantity of water referred to in the reservation contained in the various deeds of conveyance. It may be here stated that the reservations in the deeds of conveyance are so uncertain and indefinite in their application that no judgment could be based thereon, and in the consideration of this case the reservations in the deeds of conveyance are not considered as being material to a decision herein. As we have stated, no issue is raised and no argument presented in the briefs relative to the beneficial use of the waters, made by the plaintiffs and their predecessors in interest, and whatever we have to say is predicated upon the assumption that the plaintiffs and their predecessors in interest have made, and were at the time of the conveyances herein referred to making, beneficial use of the quantity of water held necessary by the trial court in its findings. As thus clarified we have only to determine whether irrigation districts acquiring water rights of prior appropriators to dams and ditches conveying said waters to lands situate outside of the district, and then proceeding by much larger appropriations to build its dams so as to obliterate the dam used in diverting water by the prior appropriators and conveying water included in the larger appropriations and using the same upon large tracts of land situate within the exterior boundaries of the irrigation districts, are relieved from furnishing water in the manner and to the extent that it was furnished and used by the owners of lands lying outside of the limits of the irrigation districts, which waters were so furnished in a certain manner and in a certain quantity prior to the time of the irrigation districts obtaining title thereto and making its larger appropriations and diversions. The question at issue is a trifle narrower than what we have just stated. On the part of the respondents it is contended, and apparently uncontradicted, that the lands owned and farmed by the plaintiffs are different in character and location from the lands lying within the exterior boundaries of either of the irrigation districts. It appears that the lands lying in and about Knight's Ferry are somewhat hilly, being more or less situate in the foothills between the level lands of San Joaquin valley to the westward and the more or less precipitous mountains to the eastward. The quality of the soil also is such that it washes away readily and cannot be beneficially irrigated by flooding. That a large percentage of the lands irrigated by the plaintiffs is set out to orchards and vines, to irrigate which beneficially requires a continuous flow of a small stream, and if furnished in that manner, highly beneficial uses can be made thereof, but if the flooding method is pursued, the lands on the hillsides would be washed away and instead of benefited would be materially injured. Thus, it is more a question of the method of furnishing water than the fact of furnishing water, the respondents claiming that the water should be furnished by the method pursued prior to the acquiring of any rights therein by the appellants and according to the method by which the plaintiffs have been enabled to plant, cultivate, and grow vines and orchards of much value. On the part of the appellants it is maintained that the plaintiffs have no rights different from those belonging to landowners within the respective irrigation districts, and if the irrigation districts furnished water to the land owners within its territorial limits in a certain manner and for use by the flooding method, that all obligations to furnish water to the plaintiffs have been discharged if water is furnished to them in the same manner.

We agreed with the appellants that all the waters of the Stanislaus river referred to in this action have for a long period of time been devoted to a public use, and that the owners of the water right instituted in 1853 and thereafter continued by the building of the dam at Six-Mile Bar and the ditch conveying the waters of said stream to the vicinity of Knight's Ferry were diverting and devoting such water to a public use.

This brings us to a consideration of the authorities cited by the respective counsel and the authorities collated by the court bearing upon the briefs involved and their application to the questions here to be decided. We will first examine the five cases upon which appellants base their contention that the judgment of the trial court should be reversed. In Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 P. 404, 29 L. R. A. (N. S.) 213, the plaintiff asserted his right to the prior use of water for a ranch belonging to him, based upon the following facts: The plaintiff by his own testimony showed that he had appropriated the waters of Susan river for the purposes of sale, rental, and distribution; that after the construction of the irrigation system for the diversion of the waters so appropriated by the plaintiff, he diverted a large quantity of the waters of the system to irrigate a ranch belonging to him. Subsequently, the plaintiff sold his water system, but, in selling, reserved to himself a prior and preferred right to take from said system a sufficient quantity of water to properly irrigate, during the irrigating season of each and every year, all the lands comprising his said ranch. The trial court found in accordance with such testimony, and, further, that the defendant bought with knowledge of such reservation, and judgment was correspondingly entered awarding to the plaintiff a preferred right in and to the waters furnished irrigators by said system. The Supreme Court, in discussing the claimed rights of the plaintiff in and to said waters and the possibility of a private right being established therein, used the following language:

> "Therefore, the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured as are the rights of every other private appropriator—not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land; but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water would also be measured according to these facts and limited to this quantity. Senior v. Anderson, 115 Cal. 496, 47 P. 454; Smith v. Hawkins, 120 Cal. 86, 52 P. 139; Strong v. Baldwin, 137 Cal. 440, 70 P. 288. The findings and judgment as above quoted establish that the court adopted the erroneous view that respondent, by his so-called reservation, had been able to secure for himself an undetermined quantity of water, without regard to the amount which he had been beneficially using. The findings and judgment are silent upon the question as to this latter amount, and the judgment upon this cause of action must, therefore, be reversed. This discussion has been upon the assumption that Leavitt did in fact make a private appropriation of water for use upon his Buggytown ranch in connection with his appropriation of the waters of Susan river for public use. If, however, the facts should be that he did not make such private appropriation, his attempted reservation of a private right out of a public trust, as above stated, would be futile and void."

The court then takes up the question as to the appropriation of water subsequent to the year 1879, the year of the adoption of our present Constitution, and states the law as follows:

> "The fundamental and all-important proposition then is this, that a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water. Even before the adoption of the Constitution of 1879 and its declaration therein contained (article XIV, sec. 1), it was said by this court in Price v. Riverside L. & I. Co., 56 Cal. 431: 'Every corporation deriving its being from the act above cited, has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created.'"

And further, quoting from McCrary v. Beaudry, 67 Cal. 120, 7 P. 264:

> "Whenever water is appropriated for distribution and sale, the public has a right to use it, that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner."

The court then goes on in its opinion to discuss the right of a public service corporation to make specific contracts for furnishing water, and distinguishes the Leavitt Case from that of Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359, which had to do with a contract for furnishing water by the Stanislaus Water Company and the right to change or readjust the charges therefor. The judgment of the lower court was reversed for the reason that no private appropriation was shown, and that a public service corporation could not grant any preferred rights. There is nothing, however, in the opinion in the case of Leavitt v. Lassen Irrigation Co., supra, which touches upon, or in any manner limits or extends or explains, the rights and duties of a public service corporation to furnish water to those who have previously obtained water from an irrigation system purchased by such public service corporation. The distinction between a reservation by a seller of a public service corporation of a preferential right to a use of the waters furnished by said stream and the rights of users of water furnished by a public service corporation by a grantee thereof are separate and distinct, and only one of these questions was involved and decided in the Leavitt Case. That is, the ruling of the court was to the effect that Leavitt could not, as against other consumers of water furnished by the same system, reserve a preferential right in himself. No question as to the duty of the grantee to continue the service to other users of water furnished by the stream as it had been furnished prior to the purchase of the stream, was involved. The cases of Byington v. Sacramento Valley Westside Canal Co., 170 Cal. 124, 148 P. 791, and Brewer v. Railroad Commission of the State of California, 190 Cal. 60, 210 P. 511, involved two questions, the Byington Case holding that a public service corporation could not grant preferential rights to any waters appropriated by it and dedicated to the public use; and the Brewer Case holding that a water company which had dedicated its waters to the public use cannot revoke such dedication and convert its waters to a private use, without the consent of all of the beneficiaries of such use. In the case of Butte County Water Users Association v. Railroad Commission, 185 Cal. 218, 196 P. 265, the question involved affected the right of users of water under a certain system, and not the taking away or limiting or changing the service, the right to which had been acquired under and by virtue of a certain appropriation and diversion of water. The petitioners who had been served with water under the established system owned and operated by the Sutter-Butte Canal Company petitioned the railroad commission to restrain or prohibit the company from extending their system so as to supply water to additional consumers. The court in that case, while upholding the order of the railroad commission, did state in substance as follows:

> That "a water company supplying water for irrigation has not the power to take on new customers after the demands of its consumers upon it have reached the limit of its supply."

The court upheld the order of the railroad commission in its finding that the taking on of the additional consumers would not be detrimental. The right to take away waters, or change the service of waters which had been initiated by use long prior to the acquisition of the dam and ditch by means of which the prior appropriation of waters had been affected and distribution made thereof to certain consumers, was not involved in determining the duty of the Sutter-Butte Canal Company. One system only was involved. The right to a continued service of water users to water furnished through a ditch outside of an irrigation district and which water right, as is shown in the case at bar, was acquired long prior to the creation of the irrigation districts and subsequently merged into a much more extensive appropriation and diversion of waters, presents a problem not presented or decided in any of the cases cited by appellants, as shown by the foregoing résumé thereof. Nor do we find anything in the case of Glenn-Colusa Irrigation Co. v. Paulson, 75 Cal. App. 57, 242 P. 494, decided by this court, which in any way trenches upon or limits the right to a continued service of water through what we have called the Schell ditch, to the plaintiffs owning lands in the vicinity of Knight's Ferry, just as those rights were acquired by the grantors of the plaintiffs long prior to the extensive appropriation of the waters of the Stanislaus river in 1887 by the grantors of the appellants herein, and who, during that year, became the grantees of the smaller system or dam and ditch diverting and furnishing water from the Stanislaus river to the plaintiffs' grantors. This court did hold in the Paulson Case, as set forth by appellants, that—

> "No private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a private freehold interest in the real estate of the distributing company; * * * his right is simply a right of service * * * so long as the public utility controls the instrumentality rendering the service, [and] the exercise and enjoyment of such right of service does not create an easement such as is contemplated by section 552 of the Civil Code, but is a service rendered by a public utility, subject to the regulation and control of the state in such manner as may be prescribed by law."

This court was there dealing with a question involving the rights of a water user who had been furnished water by a bankrupt public utility or company furnishing water to the public. Faced with the fact that the railroad commission could not compel the bankrupt company to continue the service, but had authority to permit the bankrupt company to make sale of its water rights, and also faced with the fact that the sale of the water rights belonging to the bankrupt company could not be made so as to deprive Paulson and others of the service which they had formerly received and had acquired the right to receive, the railroad commission under the Constitution being empowered to determine the conditions of the use, authorized the sale of the water rights of the bankrupt company to the Glenn-Colusa irrigation district subject to the condition of furnishing water to Paulson and others upon their lands being brought within the territorial limits of the irrigation district, made the sale conditional upon the district admitting the lands into the district that had formerly been served with water by the bankrupt company. A denial of such admission would have revoked the transfer of the water right of the bankrupt company to the irrigation district. Paulson and others, notwithstanding such recognition of their rights to continued service, declined to accept the conditions imposed by the railroad commission, and thus forfeited their rights to service. Applying the doctrine set forth in the case of Glenn-Colusa Irrigation Co. v. Paulson, had the transfers of the water rights and ditches involved in this case been a matter within the jurisdiction of the railroad commission, the affecting of the transfers would have been upon the condition of furnishing service to the water users in and about Knight's Ferry upon their paying the charges fixed and established as the compensation for such service. And the rights of service of the plaintiffs would have continued just so long as they continued to pay the charges.

As the rights to take water from the Stanislaus river and divert the same by means of a dam located at Six-Mile Bar and a ditch leading therefrom to the plaintiffs' land were initiated, and the rights to the use thereof were acquired long prior to the adoption of the Constitution of 1879, we are not considering in this case whether any of the rights of the parties hereto are subject to the provisions of section 1 of article 14 of the Constitution, but are dealing with the questions involved as waters devoted to a public use through the limited system which we have described, which latter passed into the ownership of corporations and then on down into the ownership of irrigation districts owning a much larger proportion of water and building or creating an extensive irrigation system or systems not including the lands owned by the plaintiffs and their grantors. In other words, the case presents not the duty of an irrigation system to its consumers, but the duty and liability of a transferee of the irrigation system or dam, ditch and waters to continue the service as theretofore furnished to the plaintiffs and their grantors. In 26 California Jurisprudence, p. 484, § 728, the law relating to the duty and liability of a transferee of a system is thus stated:

> "As elsewhere pointed out it is a general rule that a public utility including a water corporation cannot lawfully be transferred by the owner thereof without the sanction of the state or an agency thereof. Nor is the transfer valid unless the transferee has the power to accept the property and continue the use to which it has been devoted. The transferee of the system takes the franchise and property pertaining thereto subject to all the burdens, and is obliged to continue the performance of the public service to which the franchise and property had been dedicated. The transferee is also bound by the terms of valid contracts of the grantors of which it has notice, such, for example, as a contract to furnish water at a specified rate."

Thus, M. F. Tarpey, L. U. Shippee, and James A. Morrissey, the grantors through whom the irrigation districts base their extended claim to ownership of the waters of the Stanislaus river, could not, after acquiring the Six-Mile Bar dam and ditch leading therefrom to the plaintiffs' lands, from the owners thereof, limit the right to service of water furnished through the ditch heretofore called the Schell ditch, simply by filing notices of the large appropriations of the waters of the Stanislaus river which we have mentioned, and then proceed to build the irrigation system which has now ripened into miles of canals, ditches, reservoirs, and immense dams belonging to the appellants. As grantees of the twelve owners of the Schell ditch, Tarpey, Shippee, and Morrissey became, by virtue of the law, immediately charged with the duty and liability of furnishing service of water to the grantors of the plaintiffs just as their rights existed at the date of the transfer in the year 1887. The reservations in the deeds added nothing to the rights of the users of water furnished by the ditch referred to. The rights of the plaintiffs' grantors would have been exactly the same had the deeds been absolutely silent on the subject. The only effect that the deeds could have would be to give notice to the grantees of the fact that such rights existed and that they took the property burdened with the service that had been already established. The appellants being in the line of grantees of the persons just named are in no different situation.

The principles which we have just stated find expression in the opinion of Escondido Mutual Water Co. v. Escondido, 169 Cal. 772, 147 P. 1172, in an opinion written by Justice Henshaw, who also wrote the opinion in the case of Leavitt v. Lassen Irrigation District, supra. In dealing with the right to a continued use of water in the manner in which it had been formerly supplied and used, and also of the fact that such use cannot be changed to the injury of those entitled to rely upon its continuance, we find the following in the opinion:

> "It would be sufficient here to point out that a public use in waters may cease and determine, and that this may be accomplished by consent of all parties in interest, or by operation of law. It is to be borne in mind that it is only the use of water appropriated for sale, rental, or distribution which is a public use under the Constitution (art. 14, § 1), and while it is true that when any water has been so devoted to a public use, the public, and each individual member thereof as a part of the public, has a right to the continued use of that water, so that the use may not be changed to the injury of those entitled to rely upon its continuance, and, if abandoned by the purveyors of the use, may be taken over to the end that the use may be continued, it by no means follows, as said in Fellows v. City of Los Angeles, 151 Cal. 52 [90 P. 137], that the public use impressed upon any particular water supply may not be abandoned. A simple illustration will make clear our meaning. A man has developed water from wells and springs upon his own land and has devoted that water to the public service of a nearby town. He is using the water for rental, distribution, and sale. He has impressed it with this public use. Should he undertake to sell his supply the purchaser would buy it with the burden of this use attached. Should he sell his lands the purchaser of the lands, if he acquired the water by that purchase, would take them under the same burden."

The burden assumed by the grantees in the case at bar was the furnishing of the service in such manner that the lands, orchards, vines, and products of the lands owned by the plaintiffs should not be injured, and the burden was further that the service should be the same as that upon the faith of the continuance of which the plaintiffs and their grantors had devoted their lands to orchards, vineyards, and products requiring a particular service. The questions presented in the case at bar are very similar to those answered in East Bay Municipal Utility District v. Railroad Commission, 194 Cal. 603, 229 P. 949, where property was acquired outside of the utility district. The court there said, with reference to the duty imposed upon the city of Pasadena:

> " 'It will be obliged to put it to the same use as fully as that company is now compelled to do. Water which is in this manner dedicated to the use of an outside community cannot be at the same time surplus water subject to sale to others. * * * The city of Pasadena, with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested.' So in this case the petitioner would be acquiring the property outside the district as necessary or convenient to the full exercise of the granted powers and would be required to discharge its duties to the outside consumers as required by law. The petitioner has the power to acquire the works and system outside the district. If it should do so it would acquire such property subject to the burden or servitude of continuing the service and on no just principle could it continue to hold the property outside the district discharged thereof."

To the same effect is the case of Riverside Land Co. v. Jarvis, 174 Cal. 316, 163 P. 54, where it is also further said:

> "If the right was a public right pertaining to the land by reason of the fact that it was a part of the territory to which the public use for irrigation had attached, as must have been the case if the land was at that time lawfully receiving the water dedicated to public use, then it would be the duty of the water company [a grantee], to continue to supply to that land a reasonable proportion of the water so dedicated to the public use. Whether dedicated to public use upon a class of lands not all contiguous, or upon all lands within a defined territory, such water could not lawfully be diverted to other lands by the agent in charge of the use, but must be supplied to the land to which it is dedicated"—citing a number of cases.

As we have seen, the waters used by the plaintiffs and their grantors were dedicated to uses upon particular lands and that use cannot now be taken away to the detriment of the lands whereon it has been made beneficial use of by the appellants herein who are charged with the burdens of furnishing a service necessary to the proper use, cultivation, and irrigation of the lands whereon the waters were being used at the time that the owners of the Schell ditch executed the conveyances herein referred to.

To the same effect is the case of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490, where it is further held that—

> "In case of the establishment of a water system to supply water for public use, all persons to whose use the water is appropriated or dedicated are vested with the right to have the supply continued by whomsoever may be in control thereof, and may enforce such right by * * * mandamus," etc.

See, also, Hewitt v. San Jacinto Irrigation District, 124 Cal. 186, 56 P. 893; Stanislaus Water Co. v. Bachman, 152 Cal. 725, 93 P. 858, 15 L. R. A. (N. S.) 359. This latter case is somewhat different, the decision being based upon contracts. See, also, La Mesa, etc., Irrigation District v. Halley, 197 Cal. 50, and page 67 thereof, 239 P. 719, citing the cases hereinbefore referred to.

No issue being raised as to whether the lands belonging to the plaintiffs required the kind of service to which they were accustomed prior to 1887, and which was continued for long years thereafter, it necessarily follows from what we have stated that when Messrs. Tarpey, Shippee, and Morrissey acquired the system or dam and ditch that had been used in conveying water to the lands of the plaintiffs' grantors, they assumed the burden of a continued service then necessary to the beneficial use of the lands and premises owned by plaintiffs' grantors, and on the faith of the continuance of which plaintiffs' grantors had used their lands in a certain manner and devoted them to certain purposes, the burden of continuing such service was immediately assumed by the grantees above named, irrespective of the reservations contained in the deeds of conveyance, and that burden has been carried all the way down and placed upon successive grantees, and now rests upon the two irrigation districts, defendants in this action.

The judgment of the trial court is affirmed.

We concur: HART, Acting P. J.; BARTLETT, Justice pro tem.

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HOLMES et al. v. ANDERSON et al.
(Civ. 6177.)

District Court of Appeal, First District, Division 1, California. March 21, 1928.

1. Reformation of instruments ⚷36(3)—In action to reform contract for sale of patent rights, complaint alleging that, through mutual mistake, word "exclusive" was omitted, held to state cause of action (Civ. Code, § 3399).

In action to reform contract of purchase and sale of patent rights, complaint alleging that it was intent and purpose of plaintiffs and defendants by terms of agreement that plaintiff should have "exclusive" right to operate, manufacture, offer for sale, sell, distribute, and otherwise exploit letters of patent, and that by mutual mistake word "exclusive" was not included in contract, but that plaintiffs believed contract granted them exclusive right, *held* to state facts sufficiently to constitute cause of action by virtue of Civ. Code, § 3399, considered with sections 1576 and 1578.

2. Reformation of instruments ⚷33—One licensed to exercise rights granted in letters patent held proper party in action to reform contract for sale of such rights.

In action to reform contract of purchase and sale of patent rights, where license had been issued to another party to use patent, *held* that such party was proper party defendant.

3. Appeal and error ⚷878(1)—Appellate court must conclude that party not appealing from adverse judgment was satisfied therewith.

In action where party defendant did not appeal from judgment rendered against it, appellate court must conclude that it was satisfied with judgment entered.

4. Appeal and error ⚷878(1)—Appellate court will not consider rights of defendant not appealing.

Court, on appeal, will not consider rights of defendant not appealing.

5. Courts ⚷489(3)—State court held to have jurisdiction to grant injunctive relief in action to reform contract for sale of patent rights.

Where action was brought to reform contract for sale of patent rights in state court, contention that such court had no jurisdiction to grant injunctive relief, since it was question of infringement of patent and in exclusive jurisdiction of federal court, *held* without merit; both parties manufacturing under same letters patent under agreement from parties claiming rights under patent.

6. Reformation of instruments ⚷47—Court of equity granting injunctive relief in action to reform contract for sale of patent rights held in proper exercise of authority.

In action to reform contract for sale of patent rights, where court enjoined another party, licensed to manufacture under same patent rights, from manufacturing, *held* that injunctive relief was proper, since court of equity reforming instrument can retain control and enforce it as reformed, administering full relief.

7. Equity ⚷39(1)—Court of equity, having assumed jurisdiction, will give all relief necessary to final determination of issues.

Court of equity will give all relief necessary to final determination of issues for purpose of avoiding more than one suit and in order that full, complete, effectual, and final decree adjusting rights and equities of all parties interested may be entered and enforced.

8. Reformation of instruments ⚷1—In action to reform contract for sale of patent rights, court of equity, having determined parties' intention, was authorized to revise contract to express that intent.

In action to reform contract for sale of patent rights, trial court sitting as court of equity is interested in determining true intent of parties at time contract was executed, and, having determined that intention, court was authorized to revise written contract so that it truly expressed that intent.

9. Reformation of instruments ⚷16—In action to reform contract for sale of patent rights, written contract evidences parties' intent, unless testimony shows mistake.

In action to reform contract for sale of patent rights, written contract evidences intent of parties, unless testimony shows mistake.

10. Reformation of instruments ⚷18—"Mistake of law" must be mutual or made by one party with knowledge of its falsity by other, who fails to rectify it.

To constitute "mistake of law," such mistake must be mutual, or it must be made by one party with knowledge of falsity by another, and failure of such other party to rectify mistake.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistake of Law.]

11. Reformation of instruments ⚷45(15)—In action for reformation of contract for purchase of letters patent, evidence held to support finding parties intended plaintiff to have exclusive right to letters patent.

In action for reformation of contract of purchase and sale of patent rights, evidence *held* to support finding that it was intent and purpose of parties that by terms of agreement plaintiffs should have exclusive right to exploit letters patent.

12. Reformation of instruments ⚷46—In action to reform contract for sale of patent rights, specific finding of mutual mistake held unnecessary, where it was obvious from other findings.

In action to reform contract for sale of patent rights, where defendants complained that specific finding of mutual mistake was not made, but where findings were made that it was intent and purpose of parties that defendants by agreement have exclusive right to use of patent, and that plaintiffs believed they had such right, and defendants knew plaintiffs believed so, *held* that such specific finding was unnecessary; mutual mistake being obvious from other findings.

13. Judgment 🔑251(1)—In action to reform contract, equity held to have right to determine issues presented and necessary to make its judgment effective, though not in pleading.

In action to reform contract for sale of patent rights, where complaint was made that judgment must be vacated and set aside because it granted relief that was not alleged in complaint and was beyond issues, *held* that court of equity could determine all issues presented and necessary to make its judgment effective.

14. Costs 🔑203—Costs are waived by failure to serve cost bill within five days after notice of court's decision (Code Civ. Proc. § 1033).

Where cost bill was not served within five days after notice of decision of court, as required by Code Civ. Proc. § 1033, *held* that costs were conclusively deemed to have been waived.

15. Costs 🔑203—Knowledge of decision by party entitled to costs is sufficient to satisfy requirement of Code, though he received no written notice (Code Civ. Proc. § 1033).

Knowledge of the decision by the party entitled to costs is sufficient to satisfy requirements of Code Civ. Proc. § 1033, though he received no written notice.

16. Costs 🔑203—Notice of costs by mail could not benefit parties, where their attorneys had offices in same city (Code Civ. Proc. §§ 1011, 1033).

Under Code Civ. Proc. § 1011, providing how and when notices and papers are to be served, service of notice of costs by mail within time prescribed by section 1033 could not benefit party entitled to costs, where attorneys for parties had offices in same city.

17. Costs 🔑203—Under statute, it is incumbent upon one making service by mail to show that case is one in which such service is permitted and statutory mode has been followed (Code Civ. Proc. §§ 1011, 1012).

Under Code Civ. Proc. § 1011, providing how and when notices and papers are to be served, it was incumbent upon one making service by mail to show that case is one where such service is permitted, and that mode pointed out by section 1012 has been followed.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Verne L. Holmes and others, copartners doing business under the fictitious firm name and style of the Holmes Bed Manufacturing Company, against Robert H. Anderson and others, to reform a contract of purchase and sale of patent rights. Judgment for plaintiff, and defendants appeal, with the exception of defendant Los Angeles Wall Bed Company. Modified, and, as modified, affirmed.

Warren E. Libby, of Los Angeles, and A. B. Bowman, of San Diego, for appellants.

Francis D. Adams and Earl Curtis Peck, both of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This is an action brought to reform a contract of purchase and sale of certain letters patent. Injunctive relief also is asked. Judgment was entered for plaintiffs, and, from such judgment and from the order denying a new trial and a motion to retax costs, the defendants Robert H. Anderson, Ruth B. Anderson, Ruth B. Anderson as assignee of Robert H. Anderson, Ruth B. Anderson as assignee of W. C. James and Robert H. Anderson, has appealed.

The contract in question was entered into on April 15, 1921, between Ruth B. Anderson, Ruth B. Anderson as assignee of Robert H. Anderson and as assignee of W. C. James and Robert H. Anderson and Ruth B. Anderson as husband and wife, as first parties, and Holmes Bed Manufacturing Company, a copartnership, doing business under the fictitious firm name and style of Holmes Bed Manufacturing Company, consisting of Verne L. Holmes, Gene C. Holmes, and Bondorra Holmes, as second parties, and recites in part:

"That whereas the said Ruth B. Anderson is the assignee and holder of letters patent issued by the United States Patent Office, being serial No. 1074592, of date September 30, 1913, which said letters patent were originally issued to Robert H. Anderson, and which said letters patent cover a valuable improvement upon doors and recess for disappearing beds, and whereas the said Ruth B. Anderson is the assignee of certain letters patent of July 10, 1906, issued to W. C. James, covering certain valuable improvements consisting of a pair of doors, one with hinge and the other pivoted in the center with a gas stove secured to said door; and whereas the said parties of the second part are desirous of securing an assignment of all rights accruing to said patents or said assignees and to the said Robert H. Anderson and Ruth B. Anderson, either separately or jointly, and are desirous of securing said rights by purchase: Now, therefore, it is agreed between the parties hereto as follows, to wit: Said parties of the second part do hereby agree to purchase said patents and all rights thereunder, and the said parties of the first part agree to sell the same for the sum of twenty thousand and no/100 ($20,000.00) dollars, payable in gold coin of the United States of America" (then follows the manner of payment and the amounts to be paid on certain dates are set forth). "It is further provided, however, that during the life of the agreement, and pending any cancellation or sooner termination thereof, either by default or otherwise, the said parties of the first part shall have the right, and may operate, manufacture, sell, and distribute and otherwise exploit and distribute said patent and improvements made thereunder."

After the execution of the contract, a license was granted defendant Los Angeles Wall Bed Company by Robert H. Anderson, one of the defendants, to manufacture wall beds under the patent right, and, while Los Angeles Wall Bed Company was not a party to the contract in question, it was joined as a party defendant upon the theory that it had knowledge of the contract sought to be reformed and accepted the license granted with complete knowledge thereof, and which knowledge the court found in fact it had, and injunctive relief was therefore granted enjoining Los Angeles Wall Bed Company together with the other defendants from manufacturing, offering for sale, or selling any beds manufactured in accordance with the letters patent granted plaintiffs under the agreement so long as plaintiffs retain the right granted to them.

The complaint alleges:

> "That by mutual mistake of plaintiffs and said defendants the word 'exclusive' was not included in said contract; that the plaintiffs believed said contract granted to them the exclusive right to operate, manufacture, offer for sale, sell, distribute, and otherwise exploit said patent, said improvements, and the beds manufactured under and in accordance with the said letters patent of the U. S. A., No. 1074592; that the defendants knew that plaintiffs so believed."

Plaintiffs, therefore, sought to have the agreement reformed by inserting the word "exclusive" so that the agreement would read that the said parties of the second part shall have the *exclusive* right to manufacture, sell, and distribute, and otherwise exploit and distribute said patents and said improvements made thereunder.

The court found in accordance with the allegations of the complaint, and the defendants, with the exception of defendant Los Angeles Wall Bed Company, have appealed, and they urge the following objections: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) there is a misjoinder of parties defendant in permitting the joinder of the Los Angeles Wall Bed Company, a corporation, as a defendant; (3) the court has no jurisdiction over the subject-matter of the action in so far as it pertains to injunctive relief, because that is a question of the infringement of a United States patent, the sole and exclusive jurisdiction of which is in the federal District Court; (4) that plaintiffs are not entitled to any injunctive relief because they did not show any purpose or intent upon the part of any one or more of the defendants to violate the contract as sought to be reformed; (5) the judgment for reformation of the contract violates all rules pertaining to reformation of contract, and violates the spirit and intent of the contract itself, attempting to make a new contract between the parties which was never contemplated; (6) the evidence necessary to warrant a court in reforming a contract must be clear, specific, and unequivocal, and the evidence in this case does not conform to such requirements; (7) the findings of fact do not support a judgment for the reformation of the contract; (8) the judgment must be vacated and set aside because it grants relief that was neither alleged in the complaint, asked for in the prayer thereof, nor touched upon in the findings of fact, and is completely beyond the issues in the case; (9) the entire cost bill in this action should have been disallowed because not served and filed within five days after notice of the decision of the court; (10) the court erred in allowing the item of costs set forth in the memorandum of costs and disbursements as "copy of transcript paid to B. E. McConnell, $90.40."

[1] Answering point 1, we think the complaint states facts sufficient to constitute a cause of action. The complaint was intended to conform to section 3399 of the Civil Code, considered with sections 1576 and 1578 of the same Code. Section 3399 provides:

> "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

Section 1576 provides that a mistake may be either of fact or law. Section 1578 provides:

> "Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from:
>
> "1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
>
> "2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."

In support of their contention that the complaint does not state sufficient facts, appellants have cited Auerbach v. Healy, 174 Cal. 60, 161 P. 1157. That case sets out the facts required to be alleged in an action to reform an instrument as follows:

> "The complaint should allege 'what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement.'"

We think these requirements were complied with in the present case. Paragraph IV of the complaint contains the following allegations:

> "That it was the intent and purpose of plaintiffs that said defendants by the terms of said agreement that plaintiffs should have exclusive right to operate, manufacture, offer for sale, sell, distribute, and otherwise exploit said letters patent of the United States of America, No. 1074592, the improvements made thereunder and of the beds manufactured under and in accordance with the said letters patent; that by mutual mistake of plaintiffs and said defendants the word 'exclusive' was not included in said contract; that the plaintiffs believed said contract granted to them the exclusive right to

operate, manufacture, offer for sale, sell, distribute, and otherwise exploit said patents, said improvements, and the beds manufactured under and in accordance with the said letters patent of the United States of America, No. 1074592; that the said defendants knew that plaintiffs so believed."

This paragraph alleged the intent, the omission of the word "exclusive," the belief of plaintiffs and the knowledge of such belief by defendants, and, attached as Exhibit A and made a part of the complaint, is a copy of the agreement as executed, showing what the agreement as reduced to writing was.

[2-4] As to objection 2, that there is a misjoinder of parties defendant because Los Angeles Wall Bed Company is joined as a defendant, it may be said that Los Angeles Wall Bed Company in our opinion was a proper party defendant, but in any event, as that defendant is not an appellant herein, we must conclude that it is satisfied with the judgment entered. Furthermore, the court on appeal will not consider the rights of a defendant not appealing. Ambrose v. Drew, 139 Cal. 665, 669, 73 P. 543; McCreery v. Everding, 44 Cal. 284. In Shakespear v. Smith, 77 Cal. 638, 20 P. 294, 11 Am. St. Rep. 327, the court says:

> "There is no misjoinder of parties defendant. 'Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.' Code Civ. Proc. § 379. This section of the Code adopts substantially the former rule in equity, under which not only parties interested in the cause of action, but also in the relief to be obtained, or who would be affected by granting or withholding such relief, were proper parties."

See, also, Miller v. Highland Ditch Co., 87 Cal. 430, 25 P. 550, 22 Am. St. Rep. 254; Birch v. Cooper, 136 Cal. 637, 69 P. 420; Andrews v. Pratt, 44 Cal. 309.

In the present case there can be no question but that Los Angeles Wall Bed Company would be affected by the granting of the relief sought.

[5] The point urged under assignment 3—that the court has no jurisdiction because the injunctive relief is a question of the infringement of a patent and is therefore in the exclusive jurisdiction of the federal District Court—is without merit. There is no issue presented here on the question of an infringement of a patent right. Both respondents and Los Angeles Wall Bed Company were manufacturing beds under the same letters patent under agreements from parties claiming rights under the patent.

[6, 7] As to point 4, that plaintiffs are not entitled to injunctive relief because they did not show any purpose or intent upon the part of defendants to violate the contract sought to be reformed, it may be said that defendant Los Angeles Wall Bed Company in its answer admits that prior to the commencement of the action it manufactured beds under its agreement with Robert H. Anderson. The injunctive relief granted by the judgment, first, decrees against the defendants Anderson, prohibiting them "from transferring or granting to any person, firm, or corporation, other than plaintiffs, any right, title, or interest in and to letters patent No. 1074592, or any right to manufacture, offer for sale, or sell beds made under or in accordance with the said letters patent, so long as plaintiffs conform with the terms and conditions of said agreement of April 17, 1921"; and, second, against the Los Angeles Wall Bed Company, prohibiting them "from manufacturing, offering for sale, or selling any beds manufactured or sold under and in accordance with letters patent of the United States of America No. 1074592, or any improvements made thereunder so long as plaintiffs perform all the terms and conditions on their part to be performed. * * *" In so far as the injunctive relief against the defendants Anderson is concerned, it is incidental to the rights granted to plaintiffs by the reformation of the contract. It adds nothing to the force of the judgment. The determination that plaintiffs had the exclusive right to use the patent necessarily includes prohibition against the defendants Anderson from granting any such right to a third party. As far as defendant Los Angeles Wall Bed Company is concerned, it is not complaining of the judgment, and has not appealed. Furthermore, a court of equity will give all relief necessary to a final determination of the issues. "In equity a partial or incomplete decree will not be entered. Therefore, for the purpose of avoiding more than one suit, and in order that a full, complete, effectual, and final decree adjusting the rights and equities of all parties in interest may be entered and enforced, a court of equity once having assumed jurisdiction of a cause on any equitable ground will reach out and draw into its consideration and determination the entire subject-matter, bringing before it all the parties interested therein, and will retain such jurisdiction until all matters involved in the litigation between the parties or growing out of and connected with the subject-matter of the suit are finally disposed of. * * * Similarly, when a court of equity reforms an instrument, it can retain control and enforce it as reformed, administering full relief." 10 R. C. L. 370, and cases cited.

[8-10] We do not agree with appellants' contention under assignment 5 that the judgment for reformation of the contract violates all rules pertaining to reformation of contract and attempts to make a new contract between the parties. The trial court, sitting as a court of equity, is interested in determining the true intent of the parties at the time the contract was executed. Having determined that intention, the court was authorized to

revise the written contract so that it truly expressed that intent. The written contract evidences that intent unless the testimony shows a mistake. This mistake may be either a mistake of law or fact. To constitute a mistake of law, such mistake must be mutual, or it must be made by one party with the knowledge of its falsity by the other, and the failure of such other to rectify the mistake. The court determined the terms of the contract upon which the minds of the parties met, and, having so determined the intent of the parties, reformed the contract so as to render it true evidence of the actual contract upon which the minds of the parties met. Mr. Adams, the attorney who apparently represented all parties, testified:

> "Q. Now, you had dictated this paper to Miss Jones then, leaving out the clause that you referred to? A. Yes, sir; she went away. Then Gene spoke up and said, 'There is no question about our having the right to go ahead and manufacture this and having the exclusive use of it, is there?' He said, 'Don't you think we ought to have something in there about that?' and I said, 'Why, no; I don't see any use of that.' I said, 'Damn it,' just like that in front of Mrs. Anderson, 'damn it, you have got that anyhow, you have got the whole contract now,' and I said, 'I have already put in—' I said, 'I have already put in here that the Andersons are the owners of this patent and all the rights thereunder and that they are selling that to you. Now,' I said, 'you can't get any more than all, Gene.'"

Later on in Adams' testimony is the following:

> "Q. When Mr. Holmes suggested that you put something in regarding their having the exclusive right to sell and manufacture, did the Andersons say anything in the way of objection or otherwise? A. Oh, no, no, no; not any objection. When I said—the Andersons did not say a thing then, but when I said, 'Why, you don't need that, damn it, you have got it all now, anyhow, you can't have any more than all;' and I said, 'They have given you an assignment and all the rights and privileges;' and I said, 'You don't need it.' Mr. Anderson and Mrs. Anderson just kind of nodded and smiled at the way I had, either the advice I was giving to the Holmes, or the way I said it. And they just smiled and nodded and acquiesced in that way. Then I stuck it in."

On cross-examination, the following appears:

> "Q. (by Mr. Libby): You say that you did specifically advise Mr. and Mrs. Anderson as well as the Holmes that the word 'exclusive' did not need to be in the contract? A. I said at that time that they were all sitting around, I said, 'I don't see any necessity of putting that in there;' I said, 'Damn it, you have bought it all, and you can't have any more than all; he is assigning all his right, title, and interest and all the improvements he may make on it and all the foreign patents--I don't see any more need of it at all.'"

Mr. Gene Holmes, one of the respondents, testified that he asked Mr. Adams, in the presence of the Andersons, if the contract gave them the exclusive right, and Mr. Adams replied, "Absolutely"; that he would not have signed the contract and proceeded to manufacture beds had he not believed the contract gave him an exclusive right; that, when it was all finished, the Andersons wanted to pay half of Mr. Adams' fee, but he told them Mr. Adams was doing all their work, and he would make a special price to them.

[11] This testimony is sufficient to support the finding that it was the intent and purpose of the plaintiffs and defendants that by the terms of the agreement plaintiffs should have the exclusive right to operate, manufacture, offer for sale, sell, and otherwise exploit those certain letters patent of the United States of America No. 1074592. The evidence clearly shows that all the parties to the contract accepted Mr. Adams as their attorney in the preparation of the contract and accepted his advice as to the law, and that in the minds of all of the parties to the contract was the belief that by the agreement of sale the Andersons sold and transferred to the Holmes the exclusive right to use the patent. At any event, from the testimony quoted, it is apparent that appellants understood the law to be as stated by Mr. Adams, and that the Andersons, if they did not accept it as true, knew the misapprehension in the minds of respondents, and did not rectify the error.

In Benson v. Bunting, 127 Cal. 532, 537, 59 P. 991, 992 (78 Am. St. Rep. 81), the court says:

> "The mistake was one which related to rights which the redemptioners had in the property sold under the decree of foreclosure, and was solely in regard to the time within which an undisputed and well-understood legal right might be exercised. All understood the law alike, all making the same mistake; and where, as in this case, the mistake operates to deprive one of the parties of a valuable right, and to give the other a material advantage not contemplated by either, a court of equity will adjust their property rights as though the law relating thereto was, in fact, as the parties supposed it to be, if that becomes necessary to do justice between them. In Hunt v. Rousmanier, 8 Wheat. 174, 215 [5 L. Ed. 589], Chief Justice Marshall said: 'Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity.'"

And in Hannah v. Steinman, 159 Cal. 142, 146, 112 P. 1094, 1096, the court uses this language:

> "We deem it unimportant whether the alleged mistake in this case be held to be a mistake of fact or one of law. The mistake was the belief of both parties that the lot was not within the limits fixed by ordinance wherein it was unlawful under the ordinances of the city and county of San Francisco to construct a wooden building—ignorance of the fact that an ordinance had

just been adopted placing such lot within such limits. Unconscious ignorance of a fact material to the contract or belief in the present existence of a thing material to the contract constitutes a mistake of fact (Civ. Code, § 1577), and a misapprehension of the law by all parties, all supposing that they know and understand it, and all making substantially the same mistake as to the law, constitutes a mistake of law (Civ. Code, § 1578)."

See, also, Butte Creek Consolidated Dredging Co. v. Olney, 173 Cal. 697, 708, 161 P. 260.

Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547, cited by appellants, is not inconsistent with the views here expressed, and Burt v. Wilson, 28 Cal. 632, 638, 87 Am. Dec. 142, cited, was decided in 1865, prior to the adoption of the Code. In Kopp v. Gunther, 95 Cal. 63, 30 P. 301, the complaint failed to allege the mutuality of the mistake or knowledge on the part of the defendant of the mistake or his failure to rectify it.

From what has been said, and from the testimony quoted, it is apparent that there is no merit in appellants' assignment 6, that the evidence does not conform to the requirement that to reform a contract the evidence must be clear and specific.

[12] Appellants complain under point 7, that the findings of fact do not support a judgment for the reformation of the contract. The trial court found that on April 15, 1921, plaintiffs and defendants Anderson entered into an agreement in writing referred to in the complaint as Exhibit A, which agreement is set forth in hæc verba in the findings. The court also found that it was the intent and purpose of plaintiffs and defendants by the terms of the agreement that the plaintiffs should have the exclusive right to use the patent. The court further found that plaintiffs believed that they had such right, and that defendants knew that plaintiffs so believed. That a mutual mistake was made in the language used in the agreement is obvious from these findings, and a specific finding is therefore unnecessary. In Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 352, 123 P. 219, 220, the court says:

> "Undoubtedly it was the duty of the trial court to find upon all of the material issues raised by the pleadings, and the judgment in the present case could not be upheld if it were true, as defendant claims, that there was an utter failure to find the facts of a material issue upon which a finding, had one been made, would not necessarily have been adverse to the defendant. Ordinarily it is necessary to the validity and sufficiency of findings that the trial court find the ultimate fact in issue, or such probative facts as will enable the court to declare that the ultimate fact necessarily results therefrom; but where probative facts are found from which the existence of the ultimate fact must be conclusively inferred the finding is sufficient, and a judgment based thereon will be sustained. Coveny v. Hale, 49 Cal. 556; Smith v. Acker, 52 Cal. 219; Mott v. Ewing, 90 Cal. 231, 27 P. 194; Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 P. 379."

In Millard v. Legion of Honor, 81 Cal. 340, 342, 22 P. 864, 865, the court uses this language:

> "Of course there ought to be findings on the material issues raised by the pleadings and evidence, but if it appear that there are, in substance, such findings, it is not necessary that they should be in the exact language of the pleadings, or in any particular form."

See, also, Harlan v. Lambert, 19 Cal. App. 349, 354, 125 P. 1079; Haller v. Yolo Water & Power Co., 34 Cal. App. 317, 319, 167 P. 197; Millard v. Supreme Council, 81 Cal. 340, 342, 22 P. 864; Stoner v. Security Trust Co., 47 Cal. App. 216, 224, 190 P. 500; Tower v. Wilson, 45 Cal. App. 123, 132, 188 P. 87; Lawson v. Steinbeck, 44 Cal. App. 685, 688, 186 P. 842; Harris v. Mount Washington Co., 55 Cal. App. 144, 147, 202 P. 903.

[13] The conclusions of law and portion of the judgment complained of under assignment 8—that the judgment must be vacated and set aside because it grants relief that is not alleged in the complaint, asked for in the prayer, and is beyond the issues—is an exercise of the well-known right of a court of equity to determine all issues presented and to make its judgment effective.

[14-16] Appellants' objection 9, that the entire cost bill should have been disallowed because not served within five days after notice of the decision of the court, and their objection 10, that the court erred in allowing the item of costs set forth in the memorandum of costs and disbursements as "copy of transcript paid to B. E. McConnell, $90.40," may be considered together. The findings of fact and conclusions of law were signed by the court on March 10, 1925, and served on the attorneys for the respective parties defendant, as shown by admissions of service indorsed thereon, on March 3, 1925, before being presented to the court. The memorandum of costs and disbursements was filed March 21, 1925. The affidavit of Earl Curtis Peck, one of the attorneys for plaintiffs, shows that the memorandum of costs and disbursements was served on the attorneys for defendants by mail on March 20, 1925, and that all of the attorneys of record in the action maintain their offices in the city of Los Angeles. As the findings of fact and conclusions of law were served on the defendants' attorneys by the attorneys for the plaintiffs before they were presented to the trial court for signature or filed with the clerk, the attorneys for plaintiffs, in whose favor the decision ran, had knowledge of the decision on March 10, 1925, the date it was filed, and consequently the filing and service of the cost bill, even if properly served on March 21, 1925, was not filed and served within five days after notice of the decision of the court. Section 1033, Code Civ. Proc. "Originally said section contained no provision requiring the memorandum or a copy thereof to be served on the adverse party, but the Legislature of 1874 (St. 1873–74, p. 343) so amended it as to require such service, with the result that service of the memorandum is now one of the indispensable steps to be taken before the matter of costs may be considered by the court or judge. * * * It follows that if the one party fails, within the time prescribed, to file and serve his memorandum of costs, then he is to be conclusively deemed to have waived the costs, if any, accruing in his favor." Griffith v. Welbanks & Co., 26 Cal. App. 477, 480, 147 P. 986, 987. Knowledge of the decision by the party entitled to costs is sufficient to satisfy the requirement of the Code, though he receive no written notice. Dow v. Ross, 90 Cal. 562, 27 P. 409; O'Neil v. Donahue, 57 Cal. 226; Mullally v. Irish-American Benevolent Society, 69 Cal. 559, 11 P. 215. If, however, the attempted service by mail had been made within the time prescribed by the Code, it could not benefit plaintiffs, as under the facts here such service is not authorized.

[17] Section 1011 of the Code of Civil Procedure relates to how and when notices and papers are to be served. It clearly indicates that every reasonable effort be exhausted to make a direct service upon the attorney or upon some one in his behalf, in person, before service by mail may be resorted to. It is only after unsuccessful attempts to serve the attorney in person or by leaving the paper to be served with some one of mature years, either at his office or his residence, have failed that a notice or other paper to be served may be mailed to him at his office or residence. The only other circumstances under which service by mail may be made are those prescribed in section 1012 of the Code of Civil Procedure:

> "Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication."

It is incumbent upon one making service by mail to show that the case is one in which such service is permitted and that the mode pointed out by the statute has been followed. "A deposit in a post office in the county or place in which a party who may be served by mail has his residence or office would not constitute service on him by mail, because a service on him at his residence or office in his own county, to be effectual, must be made personally or constructively, in the manner prescribed by subdivisions 1 and 2 of section 1011, Code of Civil Procedure. It could not be made by mail, unless the residence of the attorney or party to be served was unknown." Reed v. Allison, 61 Cal. 461, 466. Service upon an attorney must be made in the manner provided by section 1011 of the Code of Civil Procedure. Thompson v. Brannan, 76 Cal. 618, 18 P. 783; Koyer v. Benedict, 4 Cal. App. 48, 87 P. 231; East Side Canal & Irr. Co. v. Superior Court, 30 Cal. App. 528, 158 P. 773.

It follows that defendants' motion that the cost bill be stricken from the records should have been granted. With this exception we find no prejudicial error.

The judgment is modified by striking therefrom the item of costs, and, as so modified, is affirmed. Respondents will recover their costs on appeal.

We concur: TYLER, P. J.; KNIGHT, J.

90 Cal. App. 512

WHITE v. RESKIN. (Civ. 4993.)

District Court of Appeal, Second District, Division 2, California. March 30, 1928.

1. Trial ⚿368—Broker's right to recover commission held not defeated for insufficient description of certain lots, in view of stipulation in agreed statement of facts.

Broker's right to recover commissions on sale of real estate *held* not defeated for insufficiency of description of property in agency contract, where agreed statement of facts stipulated that parties intended such contract to describe property described as "lots 70, 71, 72, 73, and the north half of lot 60 of La Tresa tract as per map recorded in Book 6, page 54 of Maps, Records of Los Angeles county," which was adequate description of property, and cured any deficiency or variance in original.

2. Brokers ⚿82(4)—Broker's right to commission held not defeated by failure to plead modification of contract, where escrow agreements merely explained and amplified intention of parties.

Broker's right to recover commission on sale of real estate *held* not defeated on ground that he must comply strictly with terms of agency, and must plead any modification of contract, where escrow agreements entered into by parties did not modify original contract, but merely explained and amplified intention of parties.

3. Brokers ⚿49(1)—Escrow instructions held to constitute contract for sale of real estate, in broker's action for commission.

In action by broker for commission on sale of real estate, escrow instructions of both parties deposited in escrow at the same time *held* to constitute agreement to purchase, though there was no other binding agreement in force on which to predicate them, and notwithstanding that escrow was subsequently canceled by consent of all parties, and sale not actually consummated.

4. Brokers 🔑39—Broker, consenting to cancellation of escrow, did not waive right to commission.

Broker's consent to cancellation of escrow and return of purchaser's deposit *held* not surrender of right to commission.

5. Brokers 🔑64(2)—Termination of escrow by consent of all parties was not "default" by prospective purchaser within provision of contract for broker's compensation.

Where escrow constituting contract for sale of real property was terminated by consent of all parties, there was no "default" within provision of broker's contract fixing compensation, in event of default on part of prospective purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Default.]

6. Principal and agent 🔑169(2)—Purchaser's reference to "my authorized agent, O. M. Tufts," held sufficient ratification to be equivalent to previous authorization of agent to sign escrow instructions.

In broker's action for commission on sale of real estate, statement in letter signed by prospective purchaser referring to "my authorized agent, O. M. Tufts," *held* sufficient ratification to be equivalent to previous authorization of agent to sign escrow instructions.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action for broker's commission on sale of real property brought by Mary E. White against Victor E. Reskin. Judgment for plaintiff, and defendant appeals. Affirmed.

E. O. Leake, of Los Angeles, for appellant.
Porter & Sutton, of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This was an action for broker's commission on sale of real estate. The case was tried upon a stipulated statement of facts, and no other evidence was introduced. Judgment was rendered for plaintiff, from which judgment the defendant appeals. Further facts are stated in the opinion.

[1] Appellant first contends that Evans, the agent (plaintiff's assignor), did not produce a purchaser ready and willing to purchase the property described in the agency contract, nor upon the terms therein set forth, because no location is given for the property, nor is the city and county mentioned in the agency contract. The agency contract describes the property as being "situate in the county of L. A., State of Calif., to wit—north half of lots 60, 70, 71, 72, 73 La Tresa Riverside Blvd."

Assuming that a deficiency or variance from the description and terms in the escrow may have existed in the agency contract as claimed by appellant, nevertheless the agreed statement of facts upon which the case was tried and decided contains this stipulation:

> "That both defendant and plaintiff's assignor intended, in said agent's contract to describe the same property described on page 1 of this stipulation,"

—which description is as follows:

> "Lots 70, 71, 72, 73 and the north half of lot 60 of La Tresa tract as per map recorded in Book 6, page 54 of Maps, Records of Los Angeles county,"

—which is an adequate description of the property in question, and cured any deficiency or variance in the original. Anderson v. Wilstrup, 34 Cal. App. 771, 168 P. 1150; Cowing v. Wofford, 68 Cal. App. 538, 544, 229 P. 883.

It also appears from the stipulated facts that prior to May 14, 1923, the date of the escrow instructions, the said agent, Evans, took the prospective purchaser, Mary R. Snyder, upon the said property, and exhibited the same to her on two occasions, and as to the terms it appears from the stipulated facts that said agent received from said Mrs. Snyder personally her check for $1,000 as a deposit on the purchase price, and then brought Mrs. Snyder's agent, a Mr. Tufts, and the appellant together at the office of the Title Insurance & Trust Company, where escrow instructions were signed by appellant as seller and by said Tufts as her agent for and on behalf of Mrs. Snyder as buyer, which instructions clearly stated the terms and the correct description. The $1,000 was deposited in escrow when the same was opened, with instructions to place the same to the account of Mary R. Snyder, to be used in accordance with her instructions when the title company could issue its guarantee in its usual form, and it was stipulated in said agreed statement of facts "that said prospective purchaser, Mary R. Snyder, was at all times financially able to purchase said property *upon the terms agreed,*" which meant, as appears later, that the terms mentioned in the escrow were agreed to.

[2] Appellant argues that respondent must show that he complied strictly with the terms of his agency, and found a purchaser ready, able, and willing to purchase the exact property described, and on the exact terms mentioned, and cites many authorities in support of what is, as an abstract proposition, a well-settled rule.

It appears from the foregoing that respondent had complied with those requirements. Appellant cites authorities on the proposition that, if respondent relies upon any modification of the contract or on a new contract, he must plead it. The contract was not modified in the sense intended, nor was there a new contract in the case at bar. The original contract was not modified by the escrow agreements. As shown by the stipulation, the intention of the parties was merely explained and amplified. There is no merit in this contention.

Appellant's second contention is that the agent did not produce a customer ready or willing to purchase the property described in the escrow instructions or upon the terms named therein, and again cites many authorities to sustain the well-settled rule that, in order to recover a commission, the agent must produce a purchaser ready, able, and willing to purchase the property. As stated above, the prospective purchaser's financial ability to purchase was stipulated, also her ability to purchase the property described in the escrow "upon the terms agreed," and, further, that she paid the agent the $1,000 by check to bind the bargain, which $1,000 was deposited to her credit in the escrow, and that she previously visited the property on two occasions. We think no further discussion of this contention is necessary at this point. The question of whether the escrow constituted an agreement between the purchaser and seller is considered later.

[3] Appellant next contends that there was no written agreement to purchase the property except the escrow instructions, and that they did not constitute an agreement, nor even a valid escrow, because there was no binding agreement in force upon which to predicate the same, and cites Pehl v. Fanton, 17 Cal. App. 247, 119 P. 400; Miller v. Sears, 91 Cal. 282, 27 P. 589, 25 Am. St. Rep. 176; Mott v. Minor, 11 Cal. App. 774, 106 P. 244, and other authorities, contending that they are to the effect that it must be shown that the purchaser must have actually entered into a binding contract to purchase or has offered to the vendor, and not merely to the broker, to enter into such a contract, and that instructions in an escrow separately signed do not necessarily constitute such a contract, but in such a situation the separately signed escrow instructions amount only to an offer or revocable order binding on neither until there has been an actual consummation of the sale or until they have entered into a mutual contract.

Assuming that, under the authorities cited, appellant felt justified in relying on this rule, later decisions of the Supreme Court have held that the separately executed instruments in an escrow are to be considered together as one contract, and the mutual stipulations of the parties, the actual conveyance in escrow by one and the promise by the other to pay the price, both being valid, constitute a sufficient consideration to create a valid contract. Tuso v. Green, 194 Cal. 574, 229 P. 327; Thoroman v. David, 199 Cal. 386, 249 P. 513.

In the case at bar, the escrow instructions of both parties were dated May 14, 1923, and deposited in the escrow at the same time. A deed was deposited in the escrow by the seller, and the $1,000 above mentioned deposited to the credit of the buyer to be applied on the purchase price, and this was sufficient to constitute a contract under the above decisions and to entitle the broker to his commission, notwithstanding that the escrow was subsequently canceled by consent of all the parties and the sale not actually consummated.

[4] Appellant contends that the agent, Evans, consented to the cancellation of the escrow and the entire transaction and to the return of the $1,000 to the purchaser, and thereby waived his commission. We do not deem it necessary to quote the various letters relating to the cancellation of the escrow. We find nothing therein to indicate other than that the parties, for reasons satisfactory to themselves, decided to cancel the escrow, and that all parties, including Evans, were requested to, and did, sign a consent that this might be done and the $1,000 returned to the purchaser, and the deed to the seller, but there is nothing stating that Evans consented to surrender his right to the commission.

Appellant's fifth contention that the agent's agreement was insufficient upon which to base an action because of an erroneous description has been disposed of previously, and his sixth contention that plaintiff seeks to recover on an oral agreement needs no discussion, as that question has now been eliminated by what has been previously said.

[5] Appellant's seventh and final contention is that the agent was bound by the provision in the contract fixing his compensation in the event of a default on the part of the prospective purchaser. Assuming that this might have required discussion had there been such a default, we think it is sufficiently answered by the fact that the escrow was terminated by the consent of all parties as contended above by appellant himself, and that there was no default.

[6] It perhaps is proper in conclusion to consider the question raised by appellant in his closing brief as to the agent, Tufts, never having been authorized in writing to sign the escrow instructions for his principal, Mrs. Ryan, the prospective purchaser, because, while this point is raised in appellant's closing brief, it is made in an effort to show that the case at bar does not come within the rule laid down in Tuso v. Green.

Admitting, for the sake of argument, that there is no direct stipulation in the agreed statement of facts that Tufts was authorized in writing in the beginning to act as her agent, the stipulation of facts may fairly be said to assume such agency, and in a letter to Mrs. Boyd of the Title Insurance & Trust Company, signed by Mary R. Snyder, she expressly refers to "my authorized agent, O. M.

Tufts." This is a sufficient ratification to be equivalent to a previous authorization.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

CALIFORNIA RENDERING CO. v. PACIFIC ELECTRIC RY. CO. (Civ. 5268.)★

District Court of Appeal, Second District, Division 1, California. March 28, 1928.

Hearing Granted by Supreme Court May 24, 1928.

1. Street railroads 🔑117(7)—Proof of high speed of electric car does not establish negligence per se.

Though proof of given high rate of speed of electric car in absence of statute or ordinance does not establish negligence per se, yet a car traveling at same high rate of speed is not necessarily operated in a manner free from negligence, and rate of speed which in some circumstances would be regarded as reckless might, in other circumstances, be held to be proper.

2. Street railroads 🔑114(9)—Evidence held to sustain finding of negligence in operation of electric car colliding with truck.

In action for damage in collision of truck with electric car, evidence *held* to sustain finding of negligence in operation of car.

3. Street railroads 🔑114(15)—Truck driver's evidence that he did not seasonably look in direction of approaching electric car held to establish contributory negligence as matter of law.

In action against electric railway for damages sustained when plaintiff's truck collided with electric car, evidence *held* to establish that driver of truck was guilty of contributory negligence as matter of law.

4. Negligence 🔑136(9)—Contributory negligence is question of law where only one reasonable conclusion can be drawn from evidence.

Though, generally, question of contributory negligence is one for the determination of the trial court, question becomes one of law rather than of fact where only one reasonable conclusion can be drawn from the evidence.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by the California Rendering Company against the Pacific Electric Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Karr, E. E. Morris, C. W. Cornell, and R. E. Wedekind, all of Los Angeles, for appellant.

Martin Forrest, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff recovered a judgment for damages sustained when its truck collided with a car of the defendant company. The accident occurred at about 11:30 o'clock in the morning at a point at which the rails of defendant company cross Cypress road on the interurban electric line between Los Angeles and Redondo Beach. The defendant was operating two sets of tracks and the car in question, traveling from Los Angeles to Redondo Beach, struck the right rear wheel of the truck as it crossed the westbound tracks. The driver of the truck, one Schultz, approached the intersection traveling on Cypress road in a northerly direction. At his right, the direction from which the car was coming, a number of cypress trees planted close to the road obstructed his view to such an extent that he could not see an approaching car from any point from which he would have to look through the trees. A line extended from the trees across Cypress road would be 32 feet from the nearest rail of the tracks on which the car was traveling. Except at the intersection defendant's cars were operated on its right of way. A wigwag was in operation, and the customary railroad sign had been erected. The territory about the intersection was described as "truck garden country," and the intersection itself was described by Schultz as a "regular country road crossing." He had frequently driven over it before the day of the accident.

[1, 2] Defendant contends that the evidence is insufficient to support the finding that it was negligent in the operation of the car, and cites Bilton v. Southern Pacific Co., 148 Cal. 443, 83 P. 440, and Larrabee v. Western Pacific Ry. Co., 173 Cal. 749, 161 P. 750, both holding that, in the absence of a statutory regulation on the subject, a given rate of speed is not negligence as a matter of law. These cases do not change the general rule that the question of negligence is for the trial court to determine in view of all the circumstances surrounding the collision. While it is well established that proof of a given high rate of speed, in the absence of a statute or ordinance, does not establish negligence per se, it is equally well established that a car traveling at the same high rate of speed is not necessarily operated in a manner free from negligence. Tousley v. Pacific Electric Co., 166 Cal. 457, 137 P. 31. A rate of speed which in some circumstances would be regarded as reckless might, in other circumstances, be held to be proper. Here there was evidence from which the court could reasonably infer that the car was traveling at a rate of speed 50 miles per hour at a crossing frequently used where the drivers of vehicles could not see approaching cars until they arrived at a point 32 feet from the point of danger; and that the whistle on the car

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★For opinion of Supreme Court adopting opinion of Court of Appeal, see 269 P. 922.

was not blown until the truck in question reached this point. In view of these circumstances, it cannot be said that the findings of the trial court on this subject were not supported by the evidence.

[3, 4] Defendant further contends that the evidence establishes that the driver of the truck was guilty of contributory negligence as a matter of law. This contention must be upheld. Schultz testified that he approached the intersection at the rate of about 5 miles per hour, and that he could stop his truck in about 2 or 3 feet. He further testified:

> "I stopped about where that 'X' is [referring to the map], and looked down to the east of me. I could see down to the east approximately 300 feet. I did not see any car approaching, and then I started up and looked to my right as I proceeded ahead. * * * When I stopped I was right on a line with those trees and I could see about 300 feet down the track. That is as far as I could see. I looked to the west between the time I started up and the time I drove onto the track. I looked to the east again after I hit the track. When I looked to the east again one wheel was on the track. *I did not look to the east between the time I started up and the time I hit the track.* * * * When I first saw the car, the front wheels of my truck were on the track. At that time the car was about 300 feet away. Had I looked to my right, or to the east, at any time between the point X and the point A [point of collision], I suppose I would have been able to see this car coming. There was nothing to obstruct my view."

While as a general rule the question of contributory negligence is one for the determination of the trial court, it has been frequently held that where the only reasonable conclusion that can be drawn from the evidence is that the driver was negligent the question becomes one of law rather than one of fact. In Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651, it is said:

> "But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined."

The rules applicable to the present case are the same as those governing collisions at crossings of steam roads. New York L. Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992. In Griffin v. L. A. & S. L. R. R. Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842, it was impossible for the driver of the automobile "to get a clear view of the railway track to the south until he passed a corner of the fence 17 feet from the track. * * * If, therefore, he had stopped at a point where his head would have been 16 feet from the track there would have been 5 feet between the front of his car and the zone of danger from a locomotive and he could have obtained from that point an unobstructed view of the rails for a distance of approximately 1200 feet. Instead of stopping to look when he reached this first available place for seeing, Mr. Griffin chose to bring his automobile to a standstill at a point about 35 feet east of the track where it would be impossible to see a train approaching from the south. At this point he stopped to listen and to look for smoke. Hearing no noise and perceiving no smoke he started to cross the track." In holding the plaintiff was guilty of contributory negligence as a matter of law, the court said:

> "From these facts it is clear that Mr. Griffin neglected the simplest and plainest precautions for the safety of himself and the others in the automobile. It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains."

In Jones v. Southern Pacific Co., 34 Cal. App. 629, 168 P. 586, the court said:

> "When the taxicab reached the property line of Webster street there was a space of 30 feet in which the plaintiff had opportunity to look for an approaching train. He testified that he looked for a train at this point, also when he passed the curb line, at which point he would have been 18 feet from the nearest rail of the track, with an unobstructed view for many blocks of the approaching train. * * * Plaintiff must look at a point where such looking would be effective. * * * If plaintiff had looked for a train where he said he looked, he must have seen it, for the uncontradicted testimony is that he had a clear view, and that the train was in sight with headlight burning. If he did see it, he was guilty of contributory negligence as a matter of law in attempting to cross. If he did not see it, it was because he did not look, and in that case he likewise was guilty of contributory negligence."

The facts in the case at bar establish contributory negligence on the part of the plaintiff as positively as in either of the two cases last referred to. By the testimony of the driver it was shown that he traveled a distance of 32 feet (making allowance for the distance between the driver's seat and the front of the truck) during which he had an unobstructed view of the approaching car. During this time he either failed to look to the right at all or if he did so he must have looked heedlessly. In either case his negligence is apparent. New York L. Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, supra. He cannot be cleared of the charge of negligence by a showing that he stopped the truck on a line with the trees and there looked to the right. It was his duty to look for approaching cars at such point and in such a manner as would enable him to determine if he could proceed in safety. No circumstances were shown in evidence which tended to excuse him from discharging this duty. His failure so to do, although ample opportunity was afforded, must inevitably lead to the conclusion that he was guilty of contributory negligence as a matter of law.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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90 Cal. App. 429

MARTIN v. STANDLEY et al. (Civ. 6173.)

District Court of Appeal, First District, Division 1, California. March 28, 1928.

1. Mechanics' liens ⚷281 (3, 4)—Evidence held to support finding of owner's lack of knowledge of erection of building and falsity of statement of material and labor furnished.

In action to enforce mechanic's lien, finding that owner of land, who was a nonresident, had no actual knowledge of erection of building, and that statement of material and labor furnished was made with intent to defraud, *held* supported by the evidence.

2. Trial ⚷105(2)—Finding of fraud in statement of mechanic's lien held not objectionable, where evidence thereof was introduced without objection.

Plaintiff in action to enforce mechanic's lien cannot complain of finding of fraud in statement of materials and labor furnished, on ground that issue of fraud was not tendered by answer, where allegations of complaint as to materials and labor furnished were denied, and facts showing intent to defraud appeared from examination of plaintiff and evidence introduced without objection.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Charles Martin against F. W. Standley and others to enforce a mechanic's lien. From portions of the judgment, plaintiff appeals. Affirmed.

L. C. Woods, of Los Angeles, for appellant.

Moote & Patterson, of Los Angeles, for respondent.

CASHIN, J. An appeal from those portions of a judgment wherein the plaintiff is denied a lien upon certain property owned by defendant David P. Evans, and the latter is given judgment for his costs.

Some time prior to November 2, 1921, F. W. Standley, one of the defendants, purchased a treasurer's certificate which purported to give him title to the premises. He thereafter entered into an agreement to sell the property to defendant Clarabelle Ulery, who commenced the erection thereon of a dwelling house. On November 2, 1921, defendant Evans commenced an action against defendants Standley and Ulery to quiet title to the property. A lis pendens was filed, and a decree quieting his title was entered on March 7, 1924. Some time after the commencement of the action to quiet title defendant Ulery abandoned work upon the house, certain portions of which, viz., the foundation, the sides and studding, and the roof, being three-fourths complete. The latter for a consideration of $300 then conveyed her interest in the land to Standley, who agreed to sell the partially completed house as it stood, treating it as labor and materials in place. Subsequently a bill of sale of the building was executed by defendant Ulery to the plaintiff, for which the former was paid the sum of $1,200. Following this transaction the plaintiff on August 7, 1923, entered into a written agreement with defendant Standley to erect a dwelling house upon the property, the contract price being $4,750.

According to the claim of lien which was filed by the plaintiff on November 16, 1923, the structure was completed on November 10, 1923, and, with the exception of the sum of $56.33, no part of the contract price had been paid.

It was alleged, and found by the court, that defendant Evans had no knowledge of the erection of the building upon the property until December 6, 1923, and that within 10 days thereafter, to wit, on December 14, 1923, he posted and filed a notice of nonliability as provided by statute. The court further found that plaintiff had knowledge of the pendency of the action to quiet title at the time of the execution of his agreement with defendant Standley, and further, that the consideration for the execution of the bill of sale of the unfinished dwelling by defendant Ulery to the plaintiff was paid by Standley. It was further found that the reasonable value of the labor and material furnished and installed by the plaintinff was the sum of $2,039; that the claim of lien filed did not set forth a true statement of the material and labor furnished by the plaintiff; and that the error in the statement of plaintiff's demand as set forth in the claim of lien was made with intent to defraud.

[1] The plaintiff contends that the finding that defendant Evans had no knowledge of the erection of the building before the date mentioned in the notice of nonliability, and the further findings that the claim of lien contained statements which were false and that these statements were made with intent to defraud, are unsupported.

The testimony of Evans, who resided in Portland, Or., sufficiently supports the finding of a want of actual knowledge; and, while it appears that he had communicated with a relative residing in Los Angeles, in which city the property is situated, to ascertain the steps necessary to quiet title, and also employed an attorney for that purpose, the evidence sufficiently shows that neither had knowledge of the erection of the structure, or of facts putting them upon inquiry, prior to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

December, 1923. It was claimed by the plaintiff that the consideration for the transfer of the unfinished structure by defendant Ulery was paid by him; but it sufficiently appears from the evidence that this amount was furnished by Standley for that purpose, and that the statement in the claim of lien that the labor and material which this sum represented was furnished by the claimant was knowingly false. The testimony of the plaintiff respecting this transaction was evasive; and this, with the facts shown, supported the inference of a collusive arrangement between him and Standley to endeavor to subject the property of Evans, a nonresident, to a lien not only for the benefit of Standley, but for a sum largely in excess of the reasonable value of the work and material furnished, and fully sustains the finding of fraud.

[2] As urged by the plaintiff, the issue of fraud was not tendered by the answer. The allegations of the complaint as to the materials and labor furnished were denied; and the facts from which the court concluded that the statements in the claim were made with intent to defraud appeared from the examination of the plaintiff and from evidence introduced without objection.

The findings were fully sustained by the evidence, and the portions of the judgment appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

CAVASSA v. OFF et al. (Civ. 5989.) ★

District Court of Appeal, First District, Division 2. California. March 30, 1928.

Rehearing Denied April 26, 1928. Hearing Granted by Supreme Court May 28, 1928.

Druggists ⇐3—Secretary of board of pharmacy in canceling registration of thrice convicted pharmacist held to perform ministerial and not judicial function (Pharmacy Act, § 12).

Secretary of board of pharmacy in receiving judgments of conviction of a pharmacist, ascertaining that each is a final judgment, adding them up, and ascertaining that there are three or more, and proceeding to cancel registration of such pharmacist pursuant to Pharmacy Act (Deering's Gen. Laws 1923, Act 5886), § 12, *held* not to exercise judicial functions, but to perform a ministerial act, and hence board did not act without and in excess of their jurisdiction in requiring pharmacist to appear and show cause why his certificate should not be canceled.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Application for writ of prohibition by H. A. Cavassa against E. T. Off and others, comprising and being the California State Board of Pharmacy, and another, to prevent revocation of petitioner's pharmacist's license. Judgment for defendants, and plaintiff appeals. Affirmed.

Pardini & Scampini, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for respondents.

STURTEVANT, J. The petitioner, herein called the plaintiff, commenced an action to obtain a writ of prohibition. The respondents, herein called the defendants, answered, and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the defendants, and the plaintiff has appealed, bringing up a judgment roll.

The findings of the trial court are very full and complete. From those findings the following facts appear: The plaintiff is a duly registered licentiate in pharmacy; the defendants include all the members of the board of pharmacy and the secretary of said board; on the 24th day of July, 1926, by order of the defendant board, the secretary served on the plaintiff a notice in writing which recited that the plaintiff had suffered three several convictions for violating the provisions of the Pharmacy Act (2 Deering's Gen. Laws 1923, Act 5886, p. 2390), and directing the plaintiff to appear before the board at the time and place designated to show cause why his certificate No. 4146 should not be canceled, and that, in truth and in fact, the plaintiff had suffered said convictions. Other findings were made which it is not necessary to recite.

In attacking the judgment, the plaintiff claims that the proceedings contemplated by the defendants in the notice above mentioned were without and in excess of the jurisdiction of the board. The plaintiff cites and relies on Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780; Robinson v. Board, 16 Cal. 208; Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315. Those authorities are not in point. If the defendants were adjudging, or about to adjudge, that the plaintiff was guilty of violating any statute, then such authorities might be in point. However, the guilt or innocence of the plaintiff had already been adjudged in the actions theretofore tried in the justice court of San Mateo county. In the governing statute, 2 Deering's General Laws, p. 2390, it is provided that no person shall dispense drugs unless he be a registered pharmacist or a registered assistant pharmacist (section 1); that such persons may be registered after having passed an examination (section 3); and that the defendant board shall appoint a secretary (section 5). Then it is provided in section 6:

"It shall be the duty of the secretary to keep a book of registration open at the city of San

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★Superseded by opinion of Supreme Court, 274 P. 523.

Francisco, in which shall be entered under the supervision of the board, the names, titles, qualifications, and places of business of all persons coming under the provisions of this act. * * * It shall be the duty of the secretary of the board to erase from the register the name of any registered pharmacist or assistant pharmacist who has died, or who in the opinion of the board has forfeited his right under the law to do business in this state. * * *"

In section 12 it is provided:

> "* * * Any person convicted of violating the provisions of this act a third time shall in addition to the penalties hereinabove mentioned have his or her registration as a pharmacist canceled."

A comparison of the passages just quoted shows clearly that the receipt by the secretary of the judgments of conviction ascertaining that each is a final judgment, adding them up, and ascertaining that there are three or more, is but a ministerial act. Whether those functions are performed by him acting of his own volition or acting under the supervision of the board of pharmacy, the functions performed are but a ministerial act. Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249; Lorbeer v. Hutchinson, 111 Cal. 272, 43 P. 896; People v. Board of Supervisors of Contra Costa County, 122 Cal. 421, 55 P. 131; Matter of Carter, 141 Cal. 316, 322, 74 P. 997; Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462.

We think it will hardly be contended that the secretary of the defendant board exercises judicial functions when, pursuant to the provisions of section 6, supra, he examines a death certificate and compares its contents with the provisions of the statute and the names on the registration book to ascertain whether a licentiate is dead, and, having determined the licentiate is dead, the secretary proceeds to cancel the registration of such deceased person. By the same reasoning it cannot be seen that he exercises judicial functions when, pursuant to the provisions of another section of the statute, he examines a certified copy of a judgment of conviction, or several of them, adds them up and compares the provisions thereof with the provisions of the statute and the names on the registration book, and proceeds to cancel the registration. If, in performing the functions last recited, part of the work is done by the defendant board, and part is done by the secretary, acting under the advice and direction of the defendant board, the same conclusion must be reached.

The statute provides that the secretary shall keep a registration book in which "shall be entered" the names, etc., of all persons who have qualified under the provisions of the statute. It is made the duty of the secretary to "erase" the names of registrants who have died. If a registrant defaults in the payment of his annual license fee the statute provides that his registration may be "revoked" by the board. Upon the payment of the fee and the penalty "the board must reinstate the delinquent's registration." It thus appears that "revoke" was used as synonymous with "suspend." It also appears that when the board "revokes," the secretary to keep his records clear will "erase," as that word was used above; and when he receives an order for reinstatement he will again enter a formal registration. Finally, the statute provides that when a registrant has suffered a third conviction, etc., he "shall have his registration as a pharmacist canceled." By whom? Nothing to the contrary appearing, it will be done by the secretary, the one who keeps the registration book. True it is that the statute authorizes the secretary of his own volition to erase the name of dead registrants and limits his power regarding other erasures to the names of those "who in the opinion of the board has forfeited his right under the law to do business in this state." But the word "forfeited" cannot, at all times, be given the broad meaning which this plaintiff contends for. It means "loss of right"—whether permanent or temporary. As to some instances it means permanent, and as to some instances it means temporary. That it means temporary in some instances is demonstrated by an examination of section 9. That section provides that the registration certificate must be renewed annually and a fee not to exceed two dollars must be paid. If it is not paid the board is authorized to revoke the registration of the defaulting licentiate. But upon the payment of the fee and penalty the board is directed to reinstate the delinquent's registration. However, the duties of the secretary under such facts rest solely upon that portion of section 6 which provides:

> "It shall be the duty of the secretary of the board to erase from the register the name of any registered pharmacist or assistant pharmacist who has died, or who in the opinion of the board has forfeited his right under the law to do business in this state."

Clearly the revocation for nonpayment of fees is not necessarily a permanent forfeiture. But permanent forfeitures are provided for. The state board of pharmacy has power (section 7, subd. 1, par. [i]) "to provide by proper rules and regulations for the revocation by said board of licenses issued under the provisions of this act, whenever the holder of such license shall be guilty of habitual intemperance or addicted to the use of narcotic drugs, or shall have been convicted of a felony." Again the duties of the secretary as to these revocations rest solely on the same passage, section 6, supra. That the forfeitures designated in section 7, supra, presuppose a judicial proceeding on the part of the board, may be conceded, but it is equally clear that the case under consideration does not fall within the provisions of the section last referred to. Because certain forfeitures may be determined judicially (section 7) does not argue that there are not, and cannot be, other forfeitures under the same statute. That death works a forfeiture is clear beyond dispute. That suffering a third conviction operates to the same effect we think is equally clear. That the Legislature has the power to so provide, and when it has done so the courts do not hesitate to follow the statute, has been decided several times. Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 649, 654, 103 P. 341.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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90 Cal. App. 525

ALLEC v. BRIGGS et al. (Civ. 5234.)

District Court of Appeal, Second District, Division 1, California. March 31, 1928.

1. Husband and wife 🔑232(3)—Evidence held not to establish partnership between husband and wife rendering wife liable for services performed by plaintiff.

In action for services performed, evidence *held* insufficient to establish a partnership between defendants, husband and wife, so as to render wife liable.

2. Husband and wife 🔑268(1)—Husband after separation and during pendency of divorce action cannot state account with creditor so as to give creditor right to personal judgment against wife.

After the separation of a husband from his wife and during the pendency of a divorce action, the husband may not state an account with a creditor, growing out of transactions concerning the community business and covering a period both before and after the separation, in such a manner as to give creditor a right to a personal judgment against wife.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Camille Allec, Jr., against R. H. Briggs, Stella Briggs, and others. From the judgment, defendant second named appeals. Reversed.

Henry Haves, of Los Angeles, for appellant.

Lee Utley, of Los Angeles, and Roland Thompson, of Santa Ana, for respondent.

WOOD, Justice pro tem. Plaintiff performed labor for a concern known as R. H. Briggs Trucking Service from November, 1922, to December, 1923. Although defendant R. H. Briggs filed an answer he did not appear at the trial to contest plaintiff's claim. Defendant Stella Briggs filed an answer in which she alleged that the trucking business was the separate property of R. H. Briggs. The complaint contains two counts, the first of which was abandoned by the plaintiff at the commencement of the trial. In the second count it is alleged that in January, 1924, "an account was stated between the plaintiff and the said defendant, and upon said statement a balance of $1,244.04 was found due to the plaintiff from the said defendants. That the defendants agreed to pay to plaintiff the said balance," etc. The trial court ordered that plaintiff "recover of and from the defendants R. H. Briggs Trucking Service, a fictitious name, R. H. Briggs and Stella Briggs, his wife, the sum of $1,244.04. * * *" The judgment provides:

> "It is further ordered, adjudged and decreed that the said judgment against Stella Briggs shall be satisfied only out of community property belonging to R. H. Briggs and Stella Briggs at the time said obligation was incurred."

From this judgment Stella Briggs appeals.

[1] Plaintiff now contends that the judgment against Stella Briggs can be upheld on the theory that a partnership existed between her and defendant R. H. Briggs. Plaintiff did not allege in his complaint, and the trial court did not find, that a partnership existed between these two parties; nor did the evidence establish such a relationship. Plaintiff testified that his services were engaged by R. H. Briggs, who signed his pay check; that the name of Stella Briggs did not appear on any cards, letterheads, or signs about the place of business. He said:

> "My employer there was R. H. Briggs and Mrs. R. H. Briggs, Stella Briggs. They were acting under the name, 'R. H. Briggs Trucking Service.' It was a community name—partnership name—and not a corporation. * * * Mrs. Briggs was in the office; she kept books and took the orders, and she sent us out to different places, and she got after us in case we did not do things right. * * * Mr. Briggs told me that Mr. and Mrs. Briggs were partners. That happened during this time. Both told me that, because whenever they wanted to do something they would consult one another. They were married."

Defendant Stella Briggs testified that she and R. H. Briggs were (at the time of the trial) divorced; that the divorce action was commenced in September or October, 1923. She further testified:

> "My husband and I separated September 22, 1923; I had not been aiding him at his place of business for some time. Before I and my husband separated I would help him in his business. I was in the office up until the last 30 days before we separated. I and my husband have no partnership agreement. I got a salary and a certain allowance from the business to run the house. This business was not incorporated. I had no interest in the business other than the interest Mr. Briggs had in it."

The record discloses that in the pleadings in the divorce action both Mr. and Mrs. Briggs alleged that the trucking business was community property. Clearly the foregoing evidence is insufficient to establish a partnership between R. H. Briggs and Stella Briggs. The trial judge must have so held, else he would not have qualified the judgment rendered against the wife.

[2] Although the trial court found that an account was stated between defendant and R. H. Briggs, there is no finding of an account stated between plaintiff and defendant Stella Briggs. On January 10, 1924, when the account was stated with R. H. Briggs, a divorce action was pending between Mr. and Mrs. Briggs, and Stella Briggs had nothing whatever to do with the management of the affairs of the trucking concern. Since she was not a partner in the business she was not personally bound by the action of her husband in stating an account with his creditor. 1 Cor. Jur. 702. After the separation of a husband from his wife and during the pendency of a divorce action the husband may not state an account with a creditor, growing out of transactions concerning the community business and covering a period both before and after the separation, in such manner as to give the creditor a right to a personal judgment against the wife. Whatever rights the plaintiff may have had in the premises were fully protected by his judgment against R. H. Briggs and R. H. Briggs Trucking Service.

The judgment rendered against defendant Stella Briggs is reversed.

We concur: CONREY, P. J.; YORK, J.

90 Cal. App. 601

POTTER v. CAMP et al. (Civ. 4781.)

District Court of Appeal, Second District, Division 2, California. April 3, 1928.

Trial 🔑393(1)—Appellate court cannot consider court's statement directing judgment at conclusion of testimony as findings of fact.

Appellate court cannot consider statement of court made at conclusion of testimony and directing judgment as findings of fact.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Clyde H. Potter against Burdette C. Camp and husband. Judgment for plaintiff, and defendants appeal. Affirmed.

Kelby & Lawson and Samuel M. Garroway, all of Los Angeles, for appellants.

Adams, Adams & Binford, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. The plaintiff brought suit for the sum of $1,137.76, alleged to be due him on an oral contract to build a house for defendants, and for the foreclosure of a mechanic's lien for such sum. Judgment was entered against defendants for the sum of $587.96, and findings of fact and conclusions of law were waived.

Both parties to the appeal represent in their briefs that the trial court held the claim of lien invalid, and no complaint as to such ruling is made here. Appellants' sole point is that a statement of the court at the conclusion of the testimony, and directing judgment, shows the judgment to be erroneous. But this court cannot consider this statement as findings of fact. There is nothing further before us.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

90 Cal. App. 453

ANHEUSER-BUSCH BREWING ASS'N v. GREEN et al. (Civ. 6248.)★

District Court of Appeal, First District, Division 1, California. March 29, 1928.

Hearing Denied by Supreme Court May 28, 1928.

1. Evidence 🔑588—Testimony that World War armistice was signed in August held evidence of bad faith of witness sued as officer of corporation organized to carry out wartime government contract.

Though knowledge of history or current events is not always standard by which credibility of witness may be measured, testimony that World War armistice was signed in August supports conclusion that witness was not in good faith, where witness was sued as officer of corporation organized to carry out war-time government contract.

2. Corporations 🔑306—Evidence held to show corporation officers willfully and fraudulently destroyed stock and transfer book, preventing plaintiff from enforcing stockholders' liability on judgment claim (Civ. Code, § 378).

In action against officers and directors of corporation for failure to keep record showing names of stockholders as required by Civ. Code, § 378, so that plaintiff had been unable to enforce stockholders' liability on judgment claim, evidence *held* to support finding that defendants willfully and fraudulently destroyed stock and transfer book, notwithstanding that there was no witness to physical act of destruction, since law requires only that sufficient facts be shown from which fair inference follows of existence of fact.

3. Corporations 🔑253—Judgment against corporation held prima facie evidence of original obligation in suit on such obligation against stockholders when judgment remained unsatisfied.

In action against stockholders of corporation on debt due from corporation after plain-

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★Hearing denied by Supreme Court.

tiff's judgment against corporation had remained unsatisfied after execution issued and corporation was without assets, judgment obtained against corporation was prima facie evidence of indebtedness sued on.

4. Corporations ⚷306—Measure of damages for destruction of corporation's records preventing plaintiff from enforcing stockholders' liability on judgment claim is amount of judgment.

Where plaintiff, having obtained judgment against corporation which remained unsatisfied after execution issued, corporation being without assets, was deprived of remedy against stockholders by destruction of books and records of corporation showing number of shares issued and to whom, measure of its damage as against officers destroying books is amount of judgment.

5. Limitation of actions ⚷55(5)—Action for destruction of corporation's records commenced within two years after destruction held not barred (Code Civ. Proc. §§ 338, 343).

Action against officers and directors of corporation for destroying record books, which was commenced less than two years after date of destruction, *held* not barred by limitation, whether deemed one for fraud under Code Civ. Proc. § 338, or under section 343, since such action is not based on corporate contract or statutory liability, and fact that defendants might have personal interest in destroying books does not alter case except to add motive for destruction.

6. Corporations ⚷306—That corporation treasurer failed to keep records or benefited by their destruction held not basis for liability for destruction by others.

Liability of treasurer of corporation for destruction of corporate records actually destroyed by other officers cannot be predicated on his failure to keep proper corporate records, since destruction presupposes existence of records, nor can liability be predicated on fact that treasurer might have benefited by destruction.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Anheuser-Busch Brewing Association against Fred H. Green and others. Judgment for plaintiff, and defendants appeal. Affirmed as to named defendant and another. Reversed as to defendant R. B. Guernsey.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellants.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

PARKER, Justice pro tem. This is an appeal from a joint and several judgment rendered against defendants in an action brought to recover damages alleged to have been sustained by plaintiff as the result of certain acts and omissions on the part of defendants as officers and directors of a corporation, as will more fully appear hereinafter.

The American Products Company was organized as a corporation under the laws of the state of California in 1918, the appellant Green being president thereof, the appellant Tuck being secretary, and the appellant Guernsey treasurer. On December 31, 1920, a judgment was obtained by Anheuser-Busch Brewing Association (plaintiff herein) against American Products Company in the sum of $2,728.50, together with costs and interest. An appeal from such judgment was taken resulting in its affirmance. Execution was issued, and no assets of the defendant corporation could be found, and the judgment remained and now remains wholly unsatisfied.

On September 27, 1921, Anheuser-Busch Brewing Association commenced an action to enforce the liability of the stockholders of American Products Company upon the judgment claim. Green, Tuck, and Guernsey were made defendants jointly with various unknown parties, sued under fictitious names, the plaintiff alleging on information and belief that the greater portion of the stock of American Products Company was owned by the defendants named. The plaintiff then sought by process and subpœna to locate the books and records of said company, but without success. Thereafter, on July 31, 1923, the present action was commenced.

The complaint in the present action, after setting up the facts as hereinbefore detailed, alleges in substance as follows: That at all times the defendants named were and are the only officers and directors of American Products Company; that prior to the commencement of the action plaintiff demanded of said defendants that plaintiff be allowed to inspect the stock and transfer book of American Products Company in order that the names of the stockholders and number of shares owned and issued might be ascertained but that the demand was refused; that plaintiff has no other means of securing such information; that defendants have at all times failed to keep and now fail to keep, in accordance with the provisions of section 378 of the Civil Code, the stock or transfer book, or any other book or record showing the names of the stockholders and the number of shares held by each, and have at all times failed and do now fail to keep said book or any such book open to inspection of stockholders, members or creditors of said American Products Company; that solely as the result of the said failure of said defendants to keep such stock and transfer book, or any other book or record showing the names of stockholders of said American Products Company, the plaintiff has been prevented from learning the names and shares owned by the stockholders, and thus damaged in the amount of the judgment.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Following these allegations the plaintiff, after pleading the same general facts, set up two additional counts, the first of which charges a willful and fraudulent destruction of the books and records of said corporation for the purpose of depriving plaintiff of its remedy against the stockholders, and the last count alleging that defendants negligently and carelessly destroyed and lost the books and records, as a result of which loss plaintiff was damaged, etc. Defendants denied specifically all the allegations of the complaint as to the destruction of the books and records, or the alleged failure to keep the same open for inspection. Defendants allege that the American Products Company forfeited its charter on March 3, 1923, at a date prior to the commencement of the action. Further, defendants pleaded that the several causes of action are barred by the statutes limiting the time within which said actions may be commenced. Sections 336 to 343, inclusive, Code Civ. Proc.

The case was tried before the court sitting without a jury, and judgment was entered in favor of plaintiff following findings of fact in support of all of the material allegations of the complaint, and the further finding that the causes of action were not barred by the statutes of limitations.

Appellants contend for a reversal of the judgment on many grounds. Without cataloguing these contentions we will take up each one as presented.

1. It is claimed that the record is absolutely devoid of any evidence proving or tending to prove that the appellants, or either of them, ever at any time either willfully, fraudulently, or otherwise or at all destroyed any books or records of the American Products Company, and that the finding that they did so is totally unsupported by the evidence. Respondent answers this contention by asserting that while there may be no eyewitnesses to the actual physical destruction of the stock record or other books of the American Products Company, yet there is an abundance of evidence from which the inference can be logically drawn, and that the case as a whole supports the finding made that these defendants willfully and fraudulently destroyed the stock and transfer book of the said corporation.

To pass upon this phase of the case it is necessary to briefly summarize the evidence adduced. To obviate the necessity of repetition we will give such a statement of the evidence as will suffice for the consideration of all of the remaining points urged.

It appears that American Products Company was organized in 1918, and was what might be termed one of the war-time corporations formed for the purpose of producing goods and supplies for which there was an emergency war-time demand. The articles of incorporation provide that the number of directors shall be three, and the names of those set out in the articles are the names of the defendants herein. These three defendants subscribed the articles of incorporation, which set forth that each of those whose names so appear has subscribed one share of the amount of $100. At a directors' meeting held on November 20, 1918, an application directed to the corporation commissioner of the state of California was prepared, and afterward in due course presented. The application sought permission to issue and sell the capital stock of the American Products Company. In this application appeared the following statement:

> "The aforesaid F. H. Green, R. B. Guernsey and G. A. Tuck have agreed to invest in said business the sum of $25,000 each, and have already invested the following amounts respectively: Cash paid in by F. H. Green, R. B. Guernsey and G. A. Tuck $9,000; installation of new machinery and equipment bought and paid for, $40,000; value of government contract marked 'Exhibit C' $75,000; total $129,000."

This application was signed and verified by F. H. Green as president of said corporation. The application further contained this statement:

> "The authorized capital stock of said corporation is 1,000 shares of a par value of $100 each. There has been issued of said capital stock three shares of stock, one share to F. H. Green, one share to R. B. Guernsey and one share to G. A. Tuck, and permission is hereby asked to distribute 750 shares of this capital stock as follows: to F. H. Green 250 shares, to R. B. Guernsey 250 shares, to G. A. Tuck 250 shares."

Permission was asked to sell the remaining 247 shares at par value, to wit, $100 each. The permit was granted in accordance with the application.

Nothing appears from the record to indicate any action taken pursuant to the permit. There is no evidence that any stock was issued to any person under the said permission of the corporation commissioner.

In November, 1918, the American Products Company was operating as a going concern, working upon a government contract for the furnishing of dehydrated vegetables. The corporation through its directors entered into a contract of lease of certain premises with the plaintiff Anheuser-Busch Brewing Association, and entered into possession of the premises leased. In the spring of 1919, about February or March, the government canceled the contract with the American Products Company, and as that corporation had been in no other business it appears that corporate activity thereafter ceased; in other words, its occupation was gone. Late in 1919 or in the early part of 1920 the Anheuser-Busch Brewing Association brought suit against the American Products Company to recover rent due upon the leased premises. The facts as developed in that case appear in the reported case on appeal. Anheuser-Busch Brewing Ass'n v. American Products Co., 59 Cal. App.

718, 211 P. 817. The only fact therein deserving passing comment is that in June, 1919, after the cancellation of the government contract the Products Company abandoned the leased premises. In the suit the Anheuser-Busch Association recovered judgment against the Products Company for $2,728.50, together with costs and interest. Execution was issued on the said judgment, and the same was returned wholly unsatisfied. Thereafter action was instituted to enforce stockholders' liability as hereinbefore set forth.

When this last action was instituted plaintiff was put upon inquiry to ascertain the names of the stockholders and the holdings of each. Thereafter plaintiff noticed the taking of the depositions of defendants Green, Tuck and Guernsey, and subpœna was issued directing the appearance of each of these together with a duces tecum ordering the production of the stock ledger and stock transfer book of the American Products Company. In answer to the subpœna Green and Tuck appeared, and upon examination each stated that he did not have the books and did not remember ever having had any books; in fact neither of these persons knew anything about the stock ledger or stock transfer book, nor did either know if any stock had ever been issued. In the depositions given by these witnesses they seemed to have a hazy idea that there might have been at one time a corporation called American Products Company with which they had been connected, but that was practically the extent of their knowledge concerning any stock records. The subpœna duces tecum was served upon Green and Tuck in the fall of the year 1921. The process server found Green and Tuck together. After he handed the subpœna to each of them Green called Tuck and asked him about these books and where they were, and Tuck said, "They are around the office somewhere; I will look them up." As hereinbefore stated, the books were not found and were not produced. No further proceedings were taken in the action to enforce the stockholders' liability. The present action was thereafter commenced.

[1] On the trial of this action little further appeared. The plaintiff perforce was obliged to rely to a great extent upon what facts he could elicit from the defendants. The only one of the defendants called or who appeared in person at the trial was Green. The testimony of this witness was characterized by the court below as unreasonable and absurd, and it well deserved this description. The stock answer to all questions was, "I don't know;" or "I don't remember." Only in one instance did the witness indicate any positive knowledge, and that was when he stated that the Armistice was signed in August! A knowledge of history or of current events is not always a standard by which the credibility of a witness may be measured; but in a case of this nature, where the organization of a corporation was for the sole purpose of carrying out a war-time government contract, and the business of the corporation devoted exclusively to that end, then evidence such as this supports the conclusion that the witness is not in good faith, and that little heed should be given his testimony.

It was shown further that the three shares of stock originally subscribed were in fact issued. A form of stock certificate, identified by Green, president, as being a blank certificate of stock of American Products Company, was produced in evidence. When asked if he, Green, had any connection with the issuance of stock of the corporation, he made this answer: "I did not write the certificates out. We had a bookkeeper down there. I judge he did that." It further appears that many shares of stock were issued, several hundred according to the testimony of defendants. Further, in appellants' reply brief appears a purported excerpt from a permit of the corporation commissioner authorizing the sale and issuance to one Carl Leonardt, for cash at par, of 100 shares; and the record also shows that the affairs incident to the organization of the corporation and its application to the corporation commissioner were under the direction of competent and able counsel, whose briefs here indicate a keen knowledge of corporate business and corporation laws.

[2] From the facts as thus narrated the trial court found that defendants Green, Tuck, and Guernsey had willfully and fraudulently destroyed the stock and transfer book of the American Products Company.

We conclude that the evidence supports the finding. While it is true that there is no witness to the physical act of destruction, yet there need be no such witness. The law does not require demonstration. If there are sufficient facts shown from which a fair and reasonable inference follows of the existence of the fact in question the demand of the law is satisfied. We have here admitted facts sufficient to support the conclusion reached. That there was a corporation organized is not disputed. This corporation had prepared forms of stock certificates and did issue stock. A fair inference from this is that a stock book was kept. In support of this inference is the positive mandate of the law that such a book be kept. Section 378, Civil Code, provides: Corporations for profit must keep a book in which must be kept a record of all stock, the names of the stockholders or members, alphabetically arranged, etc. There are then the general provisions of section 1963 of the Code of Civil Procedure setting forth the presumptions of law. Subdivision 15 of that section specifies as a presumption that official duty has been regularly performed, and subdivision 33 establishes it as a presumption that the law has been obeyed. Section 1960, Code of Civil Procedure, provides that a presumption must be founded on a fact legally proved and on such deduction from that fact as is warranted by a consideration of the usual course of business. Where stock is issued the law provides that a book be kept showing such issuance; and where a corporation such as this in question follows organization with a verified statement to the commissioner of corporations, showing an investment in excess of $100,000, surely the usual course of business warrants the inference of systematic record in compliance with statute.

The defendant Green was at all times the president of the American Products Company, and defendant Tuck the secretary, and Guernsey the treasurer, the three being also the sole directors of the corporation. Section 305 of the Civil Code provides that the corporate powers, business and property of all corporations such as this must be exercised, conducted and controlled by a board of not less than three directors. These defendant directors were therefore in control of and entitled to the possession of all of the corporate property, including the books and records of the corporation. There is, then, the significant fact that when defendants Green and Tuck were served with process requiring the production of the stock and transfer book Green called Tuck and asked him where the books were, and Tuck replied, "They are around the office somewhere." Thereafter when appearing in response to the subpœna duces tecum both Green and Tuck state that they have not got the books and do not know where they are and cannot produce them.

We repeat it is our conclusion that the facts shown, the inferences logically following therefrom and the admissions of defendants support the finding of willful destruction. It might be inferred that the books had been hidden or concealed. This inference is destroyed by the fact that one who conceals a thing usually knows where it is. In any event, such a nicety of differentiation should not avail a wrongdoer. The finding being thus supported, the conclusion of law-fixing liability follows.

[3, 4] Plaintiff had recovered a judgment against the American Products Company, which judgment remained unsatisfied after execution issued and the corporation was without assets. Action was commenced against the stockholders within the statutory period on the original obligation. The judgment obtained against the corporation was prima facie evidence of the indebtedness sued upon. Ellsworth v. Bradford, 186 Cal. 325, 199 P. 335. The remedy of plaintiff was absolutely conditioned upon its ability to prove the number of shares issued and to whom, and without the books and records sought this could not be done, and by the destruction of the said record plaintiff was deprived of its remedy at law and was prevented from enforcing a claim prima facie valid. The measure of its damage would therefore be the amount of the judgment.

[5] Appellants have urged the statute of limitations as a bar to the action. No specific section of the Code of Civil Procedure is pleaded, but appellants have pleaded all of the sections separately, without indicating upon which they rely.

The cause of action would arise upon the date of destruction, and we could assume that the books were destroyed the very instant after the admission that they were there in the office. This was October, 1921. The action was commenced on July 31, 1923, less than two years thereafter. If the action were deemed one for fraud then section 338, Code of Civil Procedure, fixes the time of commencement within three years from discovery of facts constituting the fraud. If the action could not be classed among the causes of action enumerated in section 338, Code of Civil Procedure, it must necessarily come within the purview of section 343, Code of Civil Procedure, which provides a four-year limitation. The present action is not based upon any corporate contract or statutory liability in as far as this question of destroying the books may be concerned. The same cause of action would have been in plaintiff if some stranger had caused the damage to it. The fact that these defendants might have had a personal interest in depriving plaintiff of the means of pursuing his remedy against them, while adding a motive for the destruction, in no way otherwise alters the case.

We find no prejudicial error in the rulings of the trial court in the admission of evidence.

[6] It must be noted, however, that what has been said applies only to defendants Green and Tuck. Defendant Guernsey in no wise was shown to be connected with the loss of the books. Nor could his liability be predicated upon his failure to keep proper corporate records for the reason that the willful destruction presupposes the existence of the records. Absolutely nothing appears in the transcript before us indicating the connection of Guernsey other than that possibly he might have benefited by the failure or inability of plaintiff to carry on its suit against the stockholders. This is not sufficient to sustain any judgment against him in this action.

It might be added that the entire record here discloses an attitude on the part of defendants not to be commended. It evidences a studied attempt to prevent plaintiff from pursuing the remedies afforded it by law, and the testimony of defendants is evasive and sham almost to the point of contempt. Defendants obviously appreciated the difficulties confronting plaintiff in its efforts to prove any fact concerning the corporate records, and mistakenly relied upon the supposed weakness of the law to bar plaintiff from any relief. There can be no wrong without a remedy; and we feel the law retains sufficient of its vigor to satisfy the demand of justice in the instant case.

As to defendant R. P. Guernsey, the judgment is reversed. As to defendants Fred H. Green and George A. Tuck, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

90 Cal. App. 547

HAISH v. HALL. (Civ. 5143.)★

District Court of Appeal, Second District, Division 1, California. April 2, 1928.

Rehearing Denied April 23, 1928. Hearing Denied by Supreme Court May 31, 1928.

1. **Execution 🔑253(1)—Execution sale of corporate stock could be set aside in proceeding by motion rather than by action in equity, where no equities of third parties had intervened.**

Sale of corporate stock under execution could be set aside in a proceeding by motion rather than by action in equity, where no equities of third parties had intervened.

2. **Execution 🔑250—Gross inadequacy of consideration held sufficient to justify setting aside sale of corporate stock under execution.**

Where corporate stock having market value of approximately $1,290 was sold under execution for amount of plaintiff's judgment, plus sheriff's costs amounting to $23.60, and defendant had no information that execution was to be or had been issued and levied, or that sale had been made, until several days after sale, sale could be set aside on motion where only ground urged was gross inadequacy of consideration, since there is difference between "mere inadequacy of consideration" and "gross inadequacy of consideration."

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Jennie L. Haish against Sara D. Hall to quiet title. Judgment for plaintiff, and defendant's corporate stock was sold under execution. From an order granting a motion to set aside the sale under execution, plaintiff appeals. Affirmed.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for appellant.

Neil S. McCarthy and Earl L. Banta, both of Los Angeles, for respondent.

HAHN, Justice pro tem. Upon this appeal we are asked to review an order of the superior court granting respondent's motion to set aside and annul a sale of 30 shares of the capital stock of the United Oil Company made by the sheriff upon execution issued to satisfy a judgment for $15.60, rendered in favor of the plaintiff and appellant, and against defendant and respondent.

It appears from the record that, upon the trial of the action, plaintiff recovered a judgment quieting her title to certain described real property which had been sold under execution to satisfy a judgment obtained in another action by the defendant and respondent herein. With plaintiff's judgment quieting title, she also recovered judgment for costs in the sum of $15.60. Execution was in due course issued and levy made upon the oil stock in question, standing in the name of defendant, which according to the affidavits in the case had a market value of at least $1,290. There is no contention that there is any irregularity in the proceedings leading up to and including the sale. At the time of the sale no one appeared to bid except the plaintiff and her attorney, and the plaintiff's bid of $23.60, which is the amount of the judgment, plus the sheriff's cost in the sale proceedings, was accepted. Neither the defendant nor her attorney had any information that execution was to be or had been issued and levied, or that a sale had been made, until several days after the sale. It does appear that, subsequent to the rendition of judgment in the instant case and the sale under execution, the attorney for the defendant had been conducting negotiations with the attorney for the plaintiff with a view to securing a settlement of a judgment which had been obtained by the defendant in another action against the husband of the plaintiff, and to satisfy which judgment an execution had been levied upon plaintiff's property, which caused the present action to quiet title. There was a controversy over the question as to whether the property standing in the name of plaintiff and upon which the levy had been made was the community property of plaintiff and her husband. Apparently, the attorney for the defendant carried on the negotiations referred to with plaintiff's attorney with the idea that in the settlement, if one was accomplished, there would be a set-off of the judgment for costs obtained by the plaintiff in the instant action, against the judgment obtained by the defendant in the other action.

Upon learning of the sale of the stock, respondent herein promptly gave notice of motion to set aside the sale, accompanying said notice, with affidavits. Upon the hearing, counter affidavits were filed by the plaintiff, and in due course the court made its order setting aside and annulling said sale. From this order the plaintiff appeals, urging two grounds for reversal:

First. That the trial court did not have the power to set aside the sale upon motion. That such relief could only be granted in a suit in equity.

Second. If it is held that such relief can be granted on motion, that the only ground urged was the inadequacy of the consideration paid for the stock, and this has been held not sufficient to justify the setting aside of a sale otherwise properly conducted.

[1] The rule for determining when relief from a sale of property under execution may

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★Rehearing denied. Hearing denied by Supreme Court.

be had by motion to set aside the sale, and when such relief may be had only by a suit in equity, is not clearly established. It has been held that there is a concurrent jurisdiction that may be exercised in law by the making of the motion, or in equity by a separate suit. Ford v. California Pac. Inv. Co., 180 Cal. 616, 182 P. 274. There are also cases which hold that under a certain state of facts an action in equity is the only way in which relief may be had. This is the conclusion arrived at in the case of Craig v. Stansbury, 37 Cal. App. 668, 174 P. 404. The principal ground in that case, urged upon a motion to set aside an execution sale, was that a conspiracy had been formed between the judgment creditor, the deputy sheriff conducting the sale, the deputy county clerk, and the purchaser to defraud the owner of the property sold. It was there held that, under the facts as they appeared in the case, an action in equity was the proper method for securing relief. The court, in discussing the question, however, recognizes that under a different state of facts a motion to set aside the sale would be a proper proceeding. The proceeding by motion seems to have had general approval where the facts show that no equities of third parties have intervened, and a deed or bill of sale for the article or property sold has not been executed and delivered to the purchaser.

The facts in the instant case clearly bring it within that class where the proceeding by motion for relief has been approved.

[2] In support of the second point, appellant urges that the court erred in setting aside the sale, for the reason that the motion was granted on the ground of inadequacy of the consideration.

It is well settled as an abstract proposition of law in this state that "mere inadequacy of consideration" will not justify the court in setting aside a sale made under execution, where the sale has been regularly noticed and held. Our courts, however, have held that there is a difference between "mere inadequacy of consideration" and "gross inadequacy of consideration." The court, in Odell v. Cox, 151 Cal. 70, 90 P. 194, said:

> "In fact, according to very respectable authority, inadequacy of price may be so gross as in itself to furnish satisfactory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the vacating of the sale."

Mr. Freeman in his work on executions, in section 309, discussing this same question, said:

> "Where the inadequacy is palpable, the purchaser can retain his advantage only by showing that the proceedings are free from fault or irregularity. If the inadequacy can be connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be vacated, unless the complainant was himself in fault, or the rights of innocent third parties have become dependent on the sale."

These views find support in the case of Graffam v. Burgess, 117 U. S. 180, 6 S. Ct. 686, 29 L. Ed. 839, and Schroeder v. Young, 161 U. S. 334, 16 S. Ct. 512, 40 L. Ed. 721.

Appellant urges the cases of Baldwin v. Brown, 193 Cal. 345, 224 P. 462, and Sargent v. Shumaker, 193 Cal. 122, 223 P. 464, and Rauer v. Hertweck, 175 Cal. 278, 165 P. 946, as supporting his position. An examination of these cases discloses that they differ very markedly in the facts from those of the instant case, and, moreover, each opinion distinguishes the facts in the case of Odell v. Cox, supra, from those in the case in which the opinion is written. In neither of these cases cited is there any attempt to disapprove of the considerations emphasized, or the conclusion arrived at in the Odell v. Cox Case.

While the line of reasoning in Odell v. Cox which leads to the conclusion therein arrived at may be attacked as having some exceedingly weak points, the approval of the court in setting aside a sale under the circumstances therein shown is surely more consonant with equitable considerations than are some of the decisions that reach a contrary conclusion.

We readily give our approval to the line of reasoning and the conclusions arrived at in Odell v. Cox by affirming the order here appealed from.

The order is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 510

SISSON v. GUARANTY MORTGAGE CO. OF CALIFORNIA et al. (Civ. 5946.)

District Court of Appeal, Second District, Division 1, California. March 30, 1928.

Mandamus 🔑187(6)—Supersedeas to stay mandate compelling permission to stockholder to examine records should be granted pending corporation's appeal, on adequate bond (Code Civ. Proc. § 949).

Where defendants, who had appealed from an order for issuance of writ of mandate to compel them to permit stockholder of defendant corporation to examine corporation's books and records, applied for writ of supersedeas pending appeal, *held*, that since, under Code Civ. Proc. § 949, an appeal of such nature would not stay proceedings in the court below unless supersedeas were granted, and since, unless stayed pending appeal, appeal would be useless, writ should be granted on corporation's furnishing bond for adequate protection of stockholder because of delay.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Application by Guy D. Sisson, for himself and for and in behalf of all other stockholders who wished to join in the action, for writ of mandate to compel the Guaranty Mortgage Company of California and others to permit examination of the corporation's books and records. Writ ordered to issue, whereupon defendants appealed from such order, and, pending appeal, they apply for writ of supersedeas. Writ granted.

Alden Ames, of San Francisco, for petitioners.

Roland Rich Woolley, of Los Angeles, for respondent.

HOUSER, J. The dependent facts appear to be that the respondent is the holder and owner of 500 shares of stock in the defendant corporation; that some time prior to the filing of the petition herein respondent herein filed in the superior court in and for the county of Los Angeles an application for a writ of mandate for the purpose of compelling the defendants therein (appellants and petitioners herein) to permit him to examine the books and records of the defendant corporation; that on the hearing of said application, at which both oral and documentary evidence was introduced, a peremptory writ of mandate was ordered to issue out of the superior court, directed to defendants, commanding them to permit plaintiff to have access to and inspection of all the books and records of the defendant corporation as prayed; that within the time allowed by statute defendants filed their notice of appeal from said order; and that said appeal is now pending and undetermined. Thereafter petitioners presented to this court their application for a writ of supersedeas for the purpose of staying proceedings under the order for the issuance of said writ of mandate until the determination by this court of the appeal from said order.

Among other things, section 949 of the Code of Civil Procedure provides in effect that without the issuance of a writ of supersedeas an appeal of the nature of that here involved does not stay proceedings "in the court below." That the appellants have a legal right of appeal from the order of the lower court directing the issuance of the writ of mandate is not disputed, and yet the obvious effect of a refusal on the part of this court to order a supersedeas would be to deny to petitioners the right accorded to them by law generally and which is at least inferable from the language of section 949, Code of Civil Procedure, to which reference has been had. In view of the delay which necessarily will ensue before the appeal herein may be determined, it is evident that in the absence of a stay of proceedings the plaintiff will at once proceed to an inspection of the records of the appellant corporation, with the practical result that the order of the lower court will become final and the question involved in the appeal will become moot. On the other hand, it is possible that, unless within a reasonable time and before the appeal may be determined the plaintiff may have access to the records of the corporation, he may suffer a considerable damage. At the hearing in this court of the instant matter it was stipulated by respective counsel that a bond to be furnished by petitioner in the sum of $2,000 would adequately protect respondent from damage pending the determination by this court of the application for the writ.

In the circumstances herein presented, this court is of the opinion that, for the protection of each of the parties to this proceeding, the writ of supersedeas should issue staying proceedings in the lower court until the determination or disposition of the appeal, and that as a condition for the issuance of such writ petitioners should furnish a good and sufficient bond in the sum of $4,000 indemnifying respondent from all loss and damage which he may sustain in the event of the affirmance of the order from which the appeal is taken.

It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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90 Cal. App. 519

SHASTA COUNTY v. MOODY. (Civ. 3468.)

District Court of Appeal, Third District, California. March 30, 1928.

1. Counties ⟾112—Laws forbidding public officers to be interested in contracts made in official capacity are valid (Pol. Code, §§ 920, 4322).

Pol. Code, § 920, forbidding state, county, city, and township officers from being interested in any contract made in official capacity, and section 4322, forbidding supervisors to be interested in purchase or contract, are merely express legislative declarations of common-law rule upon subject and are valid.

2. Counties ⟾122(2)—Contracts by county supervisor, as owner of printing plant, with county officials for printing and supplies held void (Pol. Code, § 4322).

Contracts by county supervisor, as owner and publisher of newspaper and printing plant, for printing, advertising, job work, and supplies to various county officials while holding such office of supervisor *held* void as in violation of express provisions of Pol. Code, § 4322, and contrary to public policy.

3. Contracts ⟾107—Contract founded on act for which law provides penalty is void, though not expressly prohibited.

Where a statute provides a penalty for an act, a contract founded on such act is void although the statute does not pronounce it void nor expressly prohibit it.

4. Estoppel ⚷62(3)**—County is not estopped to sue county supervisor for sums paid him under void contract for printing and supplies without restoring benefits received (Pol. Code, § 4322).**

Contracts by county supervisor as owner of printing plant with county officials for printing and supplies being void under express provisions of Pol. Code, § 4322, and against public policy, county is not estopped from maintaining action to recover sums paid thereon without first restoring or offering to restore benefits received.

Appeal from Superior Court, Shasta County; J. J. Trabucco, Judge.

Action by the County of Shasta against H. L. Moody, also known as Herbert Lyle Moody. Judgment for plaintiff, and defendant appeals. Affirmed.

Chenoweth & Leininger, of Redding, and Dozier, Kimball & Dozier, of San Francisco, for appellant.

Jesse W. Carter, of Redding, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant, H. L. Moody, from a judgment entered against him in the sum of $6,907.15, in favor of the county of Shasta.

The facts are not in dispute and can be thus briefly stated: On September 19, 1923, the appellant, H. L. Moody, became supervisor of the first supervisoral district of the county of Shasta, state of California, and immediately qualified and entered upon the discharge of his duties as such supervisor. He was, at the time of his appointment and qualification as supervisor, and had been for some time prior thereto, the owner and publisher of a newspaper in Redding, Shasta county, Cal., known as "the Searchlight." In connection with the publication of said paper, appellant owned a general printing plant and conducted a printing and jobbing business. After appellant became supervisor, and while holding that office, he did printing, advertising, job work, and sold supplies to the various county officials of the county of Shasta, including the board of supervisors, and claims for the same were presented to the board of supervisors, approved by them, audited by the county auditor, and paid by the treasurer. He collected from the county of Shasta while he was supervisor, for printing, advertising, job work, and supplies, on these various claims, the sum of $5,755.96. After said claims had been paid, and on or about the 23d of July, 1925, the district attorney of the county of Shasta made demand, in writing, upon defendant to forthwith return said sum of $5,755.96 to the county of Shasta. Appellant ignored said demand and thereafter and on the 26th day of August, 1925, the district attorney brought this action in the superior court of the county of Shasta, in the name of the county of Shasta, to recover from appellant the money he had collected from the county for printing, advertising, job work, and supplies while he was supervisor.

The case was tried by the court sitting without a jury, and the court found, among other things, that at the time all the claims and demands were presented, allowed, and paid by the county of Shasta, appellant was interested in the same, and the filing, presentation, approval, and payment of each and all of said claims was in violation of law and, therefore, illegal, and that said sum of $5,755.96 was paid to and received by appellant without authority of law, and rendered judgment against appellant for the sum of $5,755.96, and in addition thereto, 20 per cent. penalty, as provided in section 4005b of the Political Code, making a total judgment of $6,907.15, as above stated.

This appeal is upon the judgment roll alone.

Appellant contends that said claims were not illegal and void because of his interest therein.

[1] Section 920 of the Political Code provides that:

> "Members of the Legislature, state, county, city, and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members. * * *"

Section 4322 of the same Code also provides as follows:

> "*Supervisors Must Not Be Interested in Purchases or Contracts.*—No member of the board must be interested, directly or indirectly, in any property purchased for the use of the county, nor in any purchase or sale of property belonging to the county, nor in any contract made by the board, or other person, on behalf of the county, for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for any purpose or act as a member of a committee or board of reviewers."

Section 71 of the Penal Code provides a penalty by fine or imprisonment in the state prison for a violation of the above provisions of the Political Code, or for the doing of certain other acts prohibited by public officers acting in their official capacity.

These provisions of the Political Code are merely express legislative declarations of the common-law rule upon the subject and have been repeatedly upheld by the courts of this state. Berka v. Woodward, 125 Cal. 128, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Meyer v. City of San Diego, 121 Cal. 102, 53 P. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020; Nielsen v. Richards, 75 Cal. App. 680, 243 P. 697; Moody,

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etc., v. Shuffleton, Jr., etc. (Cal. Sup.) 262 P. 1095.

In Berka v. Woodward, supra, the court said:

> "Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this where the contractor is a member of the common council whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any situation where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation."

In the case of Stockton Plumbing & Supply Co. v. Wheeler, supra, Mr. Justice Hart said:

> "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed. The principle has always been one of the essential attributes of every rational system of positive law, even reaching to private contractual transactions, whereby there are created between individuals trust or fiduciary relations. The voice of divinity, speaking from within the sublimest incarnation known to all history, proclaimed and emphasized the maxim nearly two thousand years ago on occasions of infinite sacredness."

[2] Furthermore, the Supreme Court in the recent case of Moody v. Shuffleton, above cited, seems to us to have definitely decided this precise question adversely to the contention here made by appellant. In that case the court held that contracts made with the various county officials of the county of Shasta by H. G. Moody, son of this appellant, for supplies, printing, job work, and advertising were in violation of section 4322 of the Political Code and void, because such contracts were made, and said supplies, etc., were furnished to the county officials and charged to the county while appellant was supervisor, and while he was the owner and holder of a chattel mortgage on the printing plant from which the supplies, etc., were furnished. If such an indirect interest in, or lien upon, said printing plant would render contracts for supplies, etc., furnished the county from such plant, while appellant was supervisor, illegal and void, certainly it cannot be successfully contended that contracts *made by appellant himself with the various county officials for printing, advertising, etc., and paid for by the county while he was supervisor and at the same time the owner of the printing plant, would be legal.*

[3] Furthermore, the law is well settled that, where a statute provides a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it. Stockton Plumbing & Supply Co. v. Wheeler, supra; Berka v. Woodward, supra; Swanger v. Mayberry, 59 Cal. 91; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 P. 391, 9 Am. St. Rep. 211; Gardner v. Tatum, 81 Cal. 370, 22 P. 880; Morrill v. Nightingale, 93 Cal. 452, 28 P. 1068, 27 Am. St. Rep. 207; Wyman v. Moore, 103 Cal. 213, 37 P. 230; Visalia Gas & E. L. Co. v. Sims, 104 Cal. 326, 37 P. 1042, 43 Am. St. Rep. 105; Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699; Brooks v. Cooper, 50 N. J. Eq. 761, 26 A. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793.

We see no escape from the conclusion that under the admitted facts the contracts for supplies, job printing, advertising, etc., were not only made in violation of the express provisions of section 4322 of the Political Code, but were contrary to public policy, and for these reasons void.

[4] Appellant strenuously contends that the county is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. The contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels. Berka v. Woodward, supra; Stockton Plumbing & Supply Co. v. Wheeler, supra; Nielsen v. Richards, supra; 21 Cal. Jur. 888. The appellant relies upon such cases as Riverside Co. v. Yawman & Erbe Mfg. Co., 3 Cal. App. 691, 86 P. 900, and County of Sacramento v. Southern Pac. Co., 127 Cal. 217, 59 P. 568, 825, as supporting his contention that the respondent is estopped to maintain this action. The facts in those cases are decidedly different from the facts in the case at bar and are not in point. The contracts in the case at bar, as we have seen, *are against the express prohibition of the law, and courts will not entertain any rights growing out of such a contract, or permit a recovery upon a quantum meruit or quantum valebat.* Berka v. Woodward, supra.

We might add also that the record reveals that before any supplies, printing, etc., were furnished to the county by the appellant, he was warned by the district attorney and also by the Attorney General that he could not legally receive payment for any printing, advertising, supplies furnished, or other work done for or on behalf of the county of Shasta in his printing establishment, whether such printing was done by order of the board of supervisors or any county official, while he was holding the office of supervisor, and it appears that the appellant did not heed such warnings, but in apparent defiance thereof proceeded to, and did, furnish supplies to and do printing, advertising, job work, etc., for the county and collect money for the same.

Appellant also contends that the facts in this case do not bring it within the operation of section 920 of the Political Code, because it does not appear that the board of supervisors made any contracts for the county with the appellant; that the supplies were furnished direct to the various county officials. If it be conceded that section 920 of the Political Code is not applicable under the facts in the case at bar, still, there is no escape from the conclusion that the various contracts were void by the express provisions of section 4322 of the Political Code, above quoted, and also void as being in contravention of public policy.

From the conclusions that we have reached, we deem it unnecessary to discuss the other questions presented. We are fully convinced that the trial court's judgment was correct and should be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

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90 Cal. App. 463

CHAPMAN v. CITY OF FULLERTON et al. (WARD, Intervener). (Civ. 6172.)★

District Court of Appeal, First District, Division 1, California. March 29, 1928.

Hearing Denied by Supreme Court May 28, 1928.

1. Appeal and error 🔑907(3)—Findings of fact are controlling, where appeal is taken on judgment roll alone.

Where appeal is taken on judgment roll alone, findings of fact are controlling.

2. Municipal corporations 🔑995(2)—Allowing warrant based on claim for detective services which wholly failed to comply with municipal requirements would be void.

In action by taxpayer to enjoin payment of warrant issued by city to one rendering service in detecting liquor law violators, where claim presented wholly failed to comply with plain requirements of municipal law, *held* that allowance thereof would be void, and, if paid, would constitute an illegal expenditure of city's funds.

3. Municipal corporations 🔑860—City held not liable for services in detecting liquor violations for benefit of other portions of county (Const. art. 4, § 31).

Where one operating detective bureau who had, at instigation of marshal, investigated liquor law violations, presented demand for services against city, which was not based on actual service rendered or money expended for or on behalf of city, but included services performed and money expended extraterritorially for benefit of other portions of county including three other municipalities, *held* that, irrespective of whether marshal agreed on compensation and trustees ratified account, such expenditure would be void as a violation of trust imposed on those having control of city's funds under Const. art. 4, § 31.

4. Municipal corporations 🔑1006—City held not liable for services in detecting liquor violations, where claim was not itemized as required by ordinance.

In taxpayer's action to enjoin payment of warrant issued to detective for alleged aid in detecting liquor law violators, where detective's claim, if considered as a claim for services on a per diem basis, was not itemized in manner required by city ordinance, *held* that board of trustees could not disregard ordinance and pay warrant.

5. Municipal corporations 🔑1015—That board of trustees attempted to act favorably on defective claim did not legalize it even though city received value from claimants.

Fact that board of trustees may have attempted to act favorably on claim defective in form did not legalize same, even though city may have received value from claimant.

6. Municipal corporations 🔑183(1)—Appointment of private detectives to investigate liquor violations held illegal, where appointments as deputies were not filed with city clerk or approved by trustees.

Appointment of private detectives for alleged investigation of liquor law violations as deputy marshals *held* illegal, where appointments and oaths attached thereto were not filed with city clerk nor appointments presented for approval and confirmation by board of trustees.

7. Municipal corporations 🔑995(2)—Action to enjoin payment of void warrant for services in detection of liquor law violators held properly maintained by taxpayer and resident within city (Code Civ. Proc. § 526a).

Action to enjoin payment of void warrant issued for services in detection of liquor law violators *held* one which could be properly maintained by taxpayer and resident within city under Code Civ. Proc. § 526a.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by C. S. Chapman against the City of Fullerton and others to enjoin payment of a warrant for services in detection of liquor law violators. E. S. Ward intervenes. From judgment granting relief prayed, intervener appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Launer & Collins, of Fullerton, for respondents.

KNIGHT, J. [1] Plaintiff brought this action as a taxpayer of the city of Fullerton, a municipality of the sixth class organized and existing under the "Municipal Corporations Act" of 1883 (St. 1883, p. 93), to enjoin said

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★Hearing denied by Supreme Court.

city and certain of its officers from paying a warrant for the sum of $2,800 drawn in favor of Edward S. Ward, upon the ground that the payment thereof would constitute an unauthorized and illegal expenditure of city funds. Ward intervened, was joined as party defendant, and, besides answering plaintiff's complaint, filed a cross-complaint wherein he prayed for the issuance of a writ of mandate to compel said city and its treasurer to pay said warrant. The city and its officers defaulted as to plaintiff's complaint, and refused, after demand by plaintiff, to answer the cross-complaint. Thereupon plaintiff, for himself and on behalf of said city and its officers, answered the cross-complaint, and the controverted issues were tried between plaintiff and Ward. The trial court found in plaintiff's favor on all essential issues, granted the relief prayed for in the complaint, and denied Ward's application for a writ of mandate. Judgment was entered accordingly, and Ward appealed. The appeal is taken upon the judgment roll alone, and, consequently, so far as the facts of the case are concerned, the findings are controlling.

It appears therefrom that in June, 1924, the board of trustees set apart $500 of the city's money to be used by the marshal of said city as a detective fund, $100 of which was subsequently spent. Thereafter the marshal, without the knowledge, consent, or authority of the board of trustees, arranged with Ward, who operated a private detective agency, to perform certain services toward cleaning up liquor violations within said city; and on December 2, 1924, Ward presented to the trustees a letter, dated November 30, 1924, addressed to the board, and reading as follows:

> "I, Edward S. Ward, do hereby submit to your honorable body my bill for services rendered in your city while making an investigation over the entire county of Orange, the purpose of this investigation being the detection of the liquor law violators. The total cost of this investigation being divided equally among four cities in the county, is $11,200.00. The amount due from the city of Fullerton covering salaries and expenses for a period of sixty-eight (68) days will be: Salaries and exp. for 68 days, $2,800. Respectively submitted by Edward S. Ward, Chief of Investigation."

Attached to said letter was a document in the words and figures as follows:

"City of Fullerton, California, To Edward S. Ward, Dr.
"Address-Fullerton, Calif.

Date 1924	Description Item	Amount
December 2	Salaries and expenses in apprehension of 'liquor law violators' 68 days............	$2,800 00
	Total	2,800 00"

—and appended thereto was the printed form of an oath which the law of the municipality required to be taken and attached to all claims presented against the city; but the oath was not subscribed or sworn to by Ward or any other person. On the reverse side of the document was indorsed:

> "I do hereby certify that I have examined the items of this demand, that the service and articles mentioned were ordered in accordance with requirements and have been actually rendered and received for the use and benefit of the city of Fullerton, and that the demand is, in all respects, just and correct. A. L. Eells, Head of Department. Approved by auditing committee, O. M. T. W. J. C.? Date approved for payment by trustee —— Recorded: Date ——. Remarks ——."

The presentation of the foregoing demand on December 2, 1924, was the first information any of the members of the board of trustees had of the purported employment of Ward and his assistants; nevertheless, on the day of the presentation thereof, the board allowed the same in full, and ordered a warrant drawn upon the general fund in favor of Ward for the payment thereof; but, before the warrant was cashed at the bank, the city treasurer stopped the payment thereon, and these legal proceedings were thereupon instituted.

[2] Much argument has been presented by the respective parties as to whether a contract of employment was in fact entered into between the marshal and Ward, and, if so, whether the marshal had legal authority so to do without the permission of the board of trustees; also, assuming that he did enter into the contract in the absence of such authority, whether thereafter the trustees had power to ratify said contract, and did in fact do so. After reviewing the record on appeal and analyzing the points presented, we do not deem a discussion of or ruling upon any of the foregoing questions necessary to the determination of the merits of the appeal, for, assuming that in the last analysis it be held, as appellant contends, that the marshal was empowered, in the absence of permission from the board of trustees, to employ said private detectives, or that, having no such power, he nevertheless presumed to do so, and that thereafter the board of trustees had the power to, and did in fact, ratify his action, we are of the opinion that the judgment must in any event be affirmed, for the reason that, in view of the trial court's findings, appellant's demand called for payment of services performed and expenses incurred extraterritorially, for which the city of Fullerton was not obliged nor allowed to pay; and, moreover, that, even though the entire amount claimed to be due did constitute a legal demand against the city, the form of the claim presented wholly failed to comply with the plain requirements of the municipal law, and consequently the allowance thereof was void, and, if paid, would constitute an illegal expenditure of the city's funds.

[3] As to the legality of the demand, it

may be conceded that the city has the inherent right through the proper exercise of its agencies to employ a sufficient number of deputy marshals or private detectives to detect and suppress crime committed within its boundaries; and that the investigations to be made in this regard may extend beyond the municipal limits. It will be observed, however, that appellant's contract did not purport to be one for the employment of any particular number of investigators at specified wages, whose operations were to be devoted to the detection and suppression of crime committed within the city of Fullerton, but consisted of a quadripartite arrangement made with the marshal whereby appellant undertook to cover the entire county of Orange with his investigations and to charge the city of Fullerton with an equal one-fourth of the expense attached thereto, regardless of the actual amount of services performed or expenditures made within or for and on behalf of said city. With respect thereto the trial court found:

> "That part of the services of Edward S. Ward (set forth in said demand) in the investigation and apprehension of persons accused of possessing, selling and transporting intoxicating liquor, containing more than one-half of 1 per cent. of alcohol, were performed outside of the city limits of the city of Fullerton, and that part of the 68 days claimed to have been spent by the said Edward S. Ward in said investigation, and part of the expenses incurred by him and his employees in said investigation, were spent and expended by him and his employees outside of the city limits of the city of Fullerton, and that said services were not performed for or on behalf of the city of Fullerton";

—and in connection therewith the court further found:

> "That it is not true that all of the services of said Edward S. Ward and his operatives and employees set forth in his request for payment from the city of Fullerton, were performed particularly with the city of Fullerton, in the apprehension of the violators of the laws of the state of California, or of the city of Fullerton, relating to intoxicating liquors, but that it is true that part of said services were performed outside of the city limits of Fullerton."

It thus appears that appellant's demand against the city of Fullerton for the payment of $2,800 was not based upon the amount of actual services rendered or money expended for or on behalf of said city, but included services performed and money expended extraterritorially for the benefit of other portions of Orange county, including three other municipalities therein; and therefore it is manifest that, irrespective of whether the allocation of the portions of the expense attached to said investigation was arbitrarily fixed by appellant, or was agreed to in advance by the marshal, and ratified by the trustees, the payment of appellant's demand by the city of Fullerton would result in the expenditure of an undetermined amount of the funds of the city for the extraterritorial purpose of helping to police and pay the debts of other municipalities, which, of course, would be clearly contrary to law, and in violation of the trust imposed upon those having control of the city's funds. Section 31, art. 4, Constitution of California; Johnston v. County of Sacramento, 137 Cal. 204, 69 P. 962; South Pasadena v. Terminal Ry. Co., 109 Cal. 315, 41 P. 1093; City of Arcata v. Green, 156 Cal. 759, 106 P. 86; City of Fort Bragg v. Brandon, 41 Cal. App. 227, 182 P. 454.

[4] If, however, on the other hand, in the face of the wording of said demand and the findings of the trial court above set forth, the documents filed by appellant constituting his demand against the city can be construed, under any process of reasoning, as a claim for the rendition of services on a per diem and expense basis, exclusively for the benefit of the city of Fullerton, obviously such claim did not conform to the plain requirements of the city's ordinance, and, consequently, was illegal and the allowance thereof void.

With respect to this latter point, section 864 of the Municipal Corporations Act of 1883 relating to cities of the sixth class provides in part as follows:

> "All demands against such city or town shall be presented to and audited by the board of trustees, in accordance with such regulations as they may by ordinance prescribe,"

—and in conformity with the foregoing section the city of Fullerton adopted, and at the time these transactions were had maintained, an ordinance containing the following provisions:

> "Section 4: No demand against the city of Fullerton shall be allowed by the board of trustees, nor an order or warrant ordered drawn paying the same at any other time than a regular meeting of said board, and unless the claimant shall have filed with the clerk his *itemized demand in writing, giving the dates and services rendered, the character of work done and the number of days engaged therein;* the supplies or materials furnished, to whom furnished, and the quantity and the price paid therefor, *which claim must be verified by the affidavit of the claimant, or some competent person for him,* stating that the items therein are true and correct and that no part thereof has been paid. If the work was done for or the supplies furnished to any official of the city or committee of this board in its official capacity such demand must also bear the written approval of such officer or the chairman of such committee. Provided that an order or warrant for the regular monthly salary of an official of the city of Fullerton may be drawn by the president and countersigned by the clerk on the first regular meeting in the month following the one in which the services for which said payment is made were performed without the demand of said official being so made or filed with the clerk." (Italics ours.)

Here appellant made no effort to segregate the amount claimed to be due for services from the amount claimed to be due for expenses; nor does his claim in any manner indicate the number of detectives employed or the dates or number of days on which they were thus engaged; nor can it be determined from the claim whether a specific sum was intended to be charged for the services of all, or whether the total amount claimed was calculated on a per diem basis; and, if it was the latter, the amount intended to be charged per diem is not stated; and, as to the matter of the expenses, no attempt is made to set forth when or where such expenses were incurred, or the nature thereof.

[5] The ordinance containing the provisions relating to itemization of claims carried the same force and effect as an act of the Legislature (City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 P. 699; Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 P. 1085, 39 L. R. A. 444; Jenkins v. Williams, 14 Cal. App. 89, 111 P. 116), and consequently the board of trustees was not empowered to suspend its operation or ignore its effect (South Yuba Water Co. v. Auburn, 16 Cal. App. 775, 118 P. 101), and the fact that the board may have attempted to act favorably upon the claim in the defective form presented did not legalize the same, even though the city may have received value from the claimant (Osburn v. Stone, 170 Cal. 480, 150 P. 367; Times Co. v. Weatherby, 139 Cal. 618, 73 P. 465; Gamewell, etc., Co. v. Los Angeles, 45 Cal. App. 149, 187 P. 163). True, the allowance of claims should be sustained in certain instances where it is apparent that the claimant has endeavored to itemize the same, and, as appellant contends, under some circumstances the question of the sufficiency of the itemization is one for the board to determine; but here, as will be noted, no attempt whatever was made to itemize the claim, and, not being subscribed or sworn to as required by the ordinance, did not constitute even a skeleton claim. Furthermore, it may be conceded that certain classes of demands, such as arise by operation of law, for instance, are not required to be presented in the form of claims at all; but appellant has not called to our attention any case holding that the exception mentioned shall apply to a contract for personal services and reimbursement of money expended in the performance of such services.

[6] Nor can the issuance of the warrant to appellant be justified upon the theory that said detectives were deputy marshals of the city, for the reason that, although the marshal issued badges to Ward and a number of his assistants, and signed certificates purporting to appoint them deputies, the appointments and the oaths attached thereto were not filed with the city clerk nor were the appointments presented for approval and confirmation to the board of trustees in conformity with the law of the municipality, and therefore, as the trial court held, the appointments were illegal; and, in any event, if the appointments were legal, appellant, in the absence of assignments, was not authorized by law to collect the total compensation for all.

[7] The action herein in our opinion is one which may be maintained by a taxpayer of and resident within the city. Section 526a, Code Civ. Proc.; Biggart v. Lewis, 183 Cal. 660, 192 P. 437; Crowe v. Boyle, 184 Cal. 117, 193 P. 111; Nightingale v. Williams, 70 Cal. App. 424, 233 P. 807.

For the reasons given, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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90 Cal. App. 447

BUDD v. JOSEPH ZUKIN BLOUSES, Inc., et al. (Civ. 4620.)

District Court of Appeal, Second District, Division 2, California. March 28, 1928.

As Modified April 6, 1928.

1. **Appeal and error ⇨1011(1)—Findings on conflicting evidence are conclusive on appeal.**

Findings of trial court on conflicting evidence are not disturbed on appeal.

2. **Assignments ⇨137—Finding as to assignment held supported, notwithstanding name of assignor, "S. & B. Knitting Mills, Inc.," was erroneously referred to in assignment as "S. & B. Knitting Company."**

In action to recover price of goods sold, finding of assignment by "S. & B. Knitting Mills, Inc.," of claim against buyer was sufficiently supported, though the assignor was referred to in the body of the instrument as "S. & B. Knitting Company."

3. **Corporations ⇨32(1)—Failure of assignee to prove status of assignor as corporation was not fatal where it was shown assignor did business under title indicating incorporation and assignment was executed by person holding himself out as president.**

In action on assigned claim for price of goods sold, failure of plaintiff to prove status of assignor as a corporation was not fatal, where it was shown that assignor did business under the title "S. & B. Knitting Mills, Inc.," and assignment was signed in that manner by one acting as president, known to plaintiff to be holding himself out as president of company which sold the goods.

4. **Assignments ⇨131—Complaint merely alleging payment of express charges held insufficient to support recovery for such charges in action by assignee of seller's claim for unpaid goods.**

In action by assignee of seller's claim for price of goods, complaint alleging payment of express charges without showing that they were paid for the goods returned, or paid at request of defendants, or that claim for the charges was ever assigned to plaintiff, *held* insufficient on which to base recovery of express charges.

5. Pleading ⚷433(7)—Complaint by seller's assignee, alleging indebtedness of defendant and that specified sum remained due, owing, and unpaid, held sufficient after judgment, in view of answer and evidence.

Complaint by assignee of seller's claim for price of goods sold, alleging defendant's indebtedness and that there was "due, owing, and unpaid" specified sum, "no part of which has been repaid," attacked for failure to contain adequate allegation of nonpayment, *held* sufficient after judgment for plaintiff, in view of admission in answer and evidence; conflict in evidence being resolved in favor of court's findings.

6. Appeal and error ⚷1073(7)—Buyer who sent check for goods used, which check was not cashed, held not prejudiced by judgment for full amount of price.

Judgment for amount claimed to be due on price of goods sold *held* not to prejudice buyer, notwithstanding check for certain goods actually used was sent to seller, where check was never cashed, since findings of fact and judgment would bar any future action on the check.

7. Judgment ⚷614(3)—Judgment for full amount of price barred recovery on buyer's check given for goods actually retained.

Judgment for full amount of price *held* bar to any future action on check, which buyer gave seller for goods actually retained, and which seller failed to cash.

Appeal from Superior Court, Los Angeles County; R. L. Thompson, Judge.

Action by Harold M. Budd against Joseph Zukin Blouses, Inc., and Joseph Zukin. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Dudley Robinson, of Los Angeles, for appellants.

Willis S. Mitchell, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. A judgment by the court sitting without a jury went against defendants, who, after denial of their motion for a new trial, appealed.

[1] Plaintiff represented an eastern cloth house and took an order from defendants for certain goods. The goods were delivered and a comparatively small amount thereof used before defendants, claiming them to be practically useless and not according to sample, returned the articles by express and refused payment. This action resulted. The trial court found for plaintiff on conflicting evidence, and this court will therefore not further consider the evidence on this point, but will examine into the several points made in the inverse order of their statement in appellants' brief.

Appellants' fourth point: "The finding 'that the goods, wares and merchandise sold and delivered by plaintiff's assignor were as represented' is not supported by the evidence." We have passed upon this point in the statement above made.

[2] Appellants' third point: "Finding No. VI is not supported by the evidence." Finding No. VI reads as follows:

> "That it is true that the S. & B. Knitting Company, Inc., duly made and executed a good and sufficient assignment, prior to the filing of said action, to Harold M. Budd, plaintiff herein, of said claim due from the defendants."

The assignment is for the sum alleged in the first alleged cause of action of the complaint as due plaintiff from defendants. It is signed "S. B. Knitting Mills, Inc., by Michael Schuer, Prest., Morris Blum, Secretary." In the body of the instrument, the name "S. & B. Knitting Company, a corporation of the state of New York," is used. There was ample testimony upon which the trial court could properly have based the conclusion that the entity referred to in this document was plaintiff's assignor, the "S. & B. Knitting Mills, Inc." In reading the whole findings it is apparent that the word "Mills" was inadvertently misplaced by the word "Company."

[3] Appellants object to the receipt of the assignment in evidence because it has never been proved that plaintiff's assignor was not shown to be a corporation. It was, however, shown that it did business under the title "S. & B. Knitting Mills, Inc.," and the assignment is signed in the same way by Michael Schuer, "Prest." The plaintiff knew Schuer and his signature, and well knew him to be holding himself out as president of the company Schuer was selling goods for. This identifies the assignment, and it makes no difference whether the concern is a corporation or not. The assignment was withdrawn and sent east and returned with acknowledged statements attached. Of course, this added nothing to the document, and we have here considered it independently of such statements.

[4] Appellants' second point: "The second cause of action does not state facts sufficient to constitute a cause of action." Herein plaintiff alleges payment of some express charges by the eastern house, and it appears from the evidence but not from the complaint that they were for return of the goods to it by defendants. Appellants complain, to quote from their brief, that "the reason for paying the amount mentioned, whether for the use and benefit or at the instance and request of defendants, or for what reason, is not stated. How plaintiff became entitled to the amount sued for does not appear." Plaintiff incorporates paragraphs III and IV of the first cause of action as a part of this

cause, but we must agree with appellants that this does not help the situation. The assignment does not cover this item, and there is no allegation that it was ever assigned to plaintiff. The complaint is fatally defective as to this cause of action.

[5-7] Appellants' point No. 1: "The first cause of action in the complaint does not state facts sufficient to constitute a cause of action." Under this heading it is asserted that no adequate allegation of nonpayment has been alleged. Plaintiff alleges that defendants became indebted to plaintiff's assignor, and "then, instead of alleging that all or any part of said purchase price or value remains unpaid, the said paragraph concludes as follows: 'And there is now due, owing and unpaid from the defendants to plaintiff the sum of $939.58, no part of which sum has been repaid.'" Plaintiff then alleges assignment of the claim from the eastern house to himself, and that he now owns the same; that defendants promised to pay plaintiff; and that they have failed and refused to do so or to pay any part of the claim. The inaccuracies of these allegations are apparent. The evidence does show, however, resolving all conflict in favor of the findings of the court below, that the indebtedness, up to the date of judgment, did exist from defendants to plaintiff's assignor. In fact, the answer by affirmative allegation admits the incurring of the debt, but attempts to avoid it by alleging poor quality and payment to plaintiff's assignor of $44 for goods actually used. The evidence explains that this $44 was not paid, but that defendants did send a check for such sum to plaintiff along with notice of return of goods, and that plaintiff has never cashed the check. There is no contention that the sum alleged to be due, nor any part thereof except the $44, has been paid to anybody, and since the findings of fact and the judgment would be a bar to any future action thereon, defendant has not suffered.

The judgment for the sum of $958.50 is modified by deducting therefrom the sum of $18.92, and as so modified it is affirmed.

Respondent to recover costs on appeal.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 476

PEOPLE v. SEWALL (Cr. 1588.)★

District Court of Appeal, Second District, Division 1, California. March 29, 1928.

Rehearing Denied April 23, 1928. Hearing Denied by Supreme Court May 28, 1928.

1. Larceny 🔑6—Written instrument must have some value to be subject of larceny (Pen. Code, § 487, subd. 1).

Before a written instrument can be the subject of larceny, it must have some value; value of $200 being required in case of grand larceny under Pen. Code, § 487, subd. 1.

2. Larceny 🔑6—Undelivered deed cannot be subject of larceny; "written instrument" (Pen. Code, § 492).

An undelivered deed is not a "written instrument" within the meaning of Pen. Code, § 492, relative to larceny of written instruments, and cannot be subject of larceny because not possessing value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Written Instrument.]

3. Larceny 🔑14(1)—Alleged conduct of defendant in inducing delivery to him of deeds by means of fraud and trickery held not to constitute larceny of written instrument (Pen. Code, § 487, subd. 1, and § 492).

Conviction for grand larceny of written instrument, under Pen. Code, § 487, subd. 1, and section 492, *held* not sustained as to defendant alleged to have induced prosecuting witness to deliver deeds to him by means of fraud and trickery, since fraud, necessary to prove larceny, negatived delivery of deed, and undelivered deed cannot be subject of larceny.

4. Criminal law 🔑14—Court may not consider effect of amendment in prosecution under previously existing law.

In prosecutions arising under law as it existed prior to amendment, court may not consider effect of amendment.

5. False pretenses 🔑49(1)—Evidence of defendant's procurement of loan by fraudulent misrepresentations as to character of security, held to sustain conviction for obtaining money by false pretenses.

Evidence of defendant's procurement of loan by misrepresentation that lots given as security were absolutely clear, whereas lots referred to were either nonexistent or had been previously conveyed, *held* sufficient to sustain conviction for obtaining money by false pretenses.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Clifton Sewall, Jr., was convicted of grand larceny and of obtaining money by false pretenses, and he appeals. Reversed in part, and affirmed in part.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction and from an order denying his motion for a new trial as to each of two counts in an information in which he was charged respectively with the commission of the crime of grand larceny and the crime of obtaining money by false pretenses.

The principal point relied upon by appellant as to the charge of grand larceny, in substance, is that the evidence was insufficient to sustain the verdict. The gist of the allegation in the count of the information by which defendant was charged with the commission of the crime of grand larceny was

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★Rehearing denied. Hearing denied by Supreme Court.

that he stole "two deeds of real estate of the value of $2,000." With respect thereto the evidence showed that the prosecuting witness was 77 years of age, totally blind in one eye, and the vision so impaired in the other that, as stated by him, "when I go to make a letter, or sign anything, I have to touch the paper before I can start a letter." Both he and defendant were interested in helping to finance the buying of a steamship for the Liberia Steamship Company. He testified in substance that in a conversation between him and defendant it was agreed that the prosecuting witness would pledge his real estate for the sum of $2,000 as "security for the people that wants to finance"; and to that end, without reading it, but trusting in the honor of defendant, he signed an instrument which, according to his testimony, he thought was a contract to the effect that "the property to come back to me in a certain length of time if the money ain't got up. * * * My contract was to sign $2,000 worth of property, of my property, and he $2,000 worth of his property up for security to get $4,000, and the people of San Pedro was to get up the other $1,000, which would make $5,000, and we would be able then to take the ship over and go to work. That was the understanding."

As a matter of fact, instead of a contract or anything of that nature which was signed by the prosecuting witness, he executed and delivered to defendant the two deeds to which reference is had in the information. Thereafter, without authorization from the prosecuting witness so to do, defendant conveyed to certain other persons the real property described in the deeds which he had received from the prosecuting witness.

It is contended by appellant that, inasmuch as defendant was the grantee named in each of the two deeds, and that as they were executed by the prosecuting witness and delivered by him to defendant, so far as such deeds were concerned, the crime of larceny was not shown to have been committed.

The case of People v. Dadmun, 23 Cal. App. 290, 137 P. 1071, is cited by appellant to sustain his position. The prosecution of that action, like the one at bar, depended upon the provisions of section 492 of the Penal Code, which provides that:

> "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen."

In the Dadmun Case the defendant was charged with grand larceny, in that he stole a deed wherein he was named as grantee, "which deed, if properly delivered, was sufficient in form and substance to convey to defendant the title * * * to the property described therein. * * *" That case was decided on the point that the deed, not having been delivered to any one for the benefit of the grantee, amounted to nothing, and did not measure up to the requirement of the statute as a "written instrument." The facts in the instant case are distinguishable from those in the Dadmun Case in that herein physical delivery of the deeds occurred. The opinion in the Dadmun Case contains the statement that:

> "If the deed was delivered, and respondent insists that such fact is implied from the allegation that it 'showed and conveyed title to the real property therein described,' then of course no offense is charged."

The salient fact in the case of Stubbs v. Abercrombie, 42 Cal. App. 170, 183 P. 458, was that the deed had been actually delivered for the use of the grantee therein named. Through what by the court was termed "legerdemain" the attorney in fact of the grantee so manipulated the transaction pending between the parties that the grantor was defrauded of her property, and the attorney in fact, who had sold the property, received its value. As affecting the point here at issue, it was held that a criminal complaint which accused the defendant of stealing a deed of a stated value charged the commission of a public offense.

[1-3] The facts in the instant case as testified by the prosecuting witness, show that the delivery of the deeds by him to the defendant was induced by misrepresentation by defendant as to the nature, purpose, and effect of the two instruments in question. It thus appears that defendant procured the two deeds from the prosecuting witness by means of fraud or by methods akin to trick and device, and the fact that defendant was named as grantee in each of the deeds did not have the legal effect of constituting him the owner of the deeds or the property therein described. If such acts on the part of defendant amounted to larceny, then the ownership of the deeds did not pass from the nominal "grantor," and there was no delivery. The theory of larceny as applied to such cases is that the defrauded party did not consent to delivery, and that the act of taking by the guilty party was a larceny because it was a taking without any real consent of the owner. But all of this assumes the existence of property that can be the subject of larceny. Before a written instrument can be the subject of larceny, it must have some value. Before it can be the subject of grand larceny (unless "taken from the person of another"), it must have a value of at least $200. Pen. Code, § 487, subd. 1. But, according to People v. Dadmun, 23 Cal. App. 290, 137 P. 1071, an undelivered deed is not "a written instrument" within the meaning of those words as used

in section 492 of the Penal Code. From this it follows that "the stealing of the deed was merely the unlawful taking of an article having no value other than that of the paper and labor performed in writing thereon." The decision to which we refer discusses the proposition more at length—which we need not do here.

Whatever other crime the facts may establish against the defendant, they are not sufficient to prove grand larceny. For the very facts relied upon to prove the stealing leave the deeds worthless.

[4] Presumably, the new definition of larceny and other similar crimes, by the 1927 amendment (St. 1927, p. 1046) of sections 484 et seq., of the Penal Code, designating all of the described offenses as "theft," is intended to prevent failures in prosecutions of which this case is an example. But, as this case arises under the older law, we may not at this time consider the effect of said amendments.

[5] It is next urged by appellant that the evidence was insufficient to support the verdict against defendant on the charge that he feloniously obtained money by false pretenses; his point being that the prosecuting witness lent to defendant the sum of $275 for which defendant gave her his promissory note, and which transaction did not constitute a public offense. The facts, however, as testified by the prosecuting witness, and which, of course, the jury had a right to believe, were that she was induced to, and did, lend the money to defendant on his representation to her that he would give her "some paper on two lots" that were "absolutely clear, * * * nothing against them"; and that defendant did give her a promissory note which purportedly was secured by a mortgage on the lots to which defendant referred. The property described in the mortgage was lots 12 and 14, block A, of a certain tract. The evidence showed not only that the tract in question contained no block A, but that, as well, at the time the note and mortgage in question were executed by defendant, lots 12 and 14 of block 7 of the specified tract had theretofore been conveyed by a deed of trust by defendant to a third person as security for an indebtedness of defendant amounting to the sum of $600. It is therefore clear that the verdict was amply supported by the evidence.

In support of his claim that the evidence was insufficient to sustain the verdict, appellant has cited several authorities. An examination of them, however, fails to convince this court that any of them is in point so far as the situation hereinbefore outlined is concerned.

The judgment and the order denying defendant's motion for a new trial, as they affect that count in the information by which defendant was charged with the commission of the crime of grand larceny, are and each of them is reversed. As to that part of the judgment and the order denying defendant's motion for a new trial on the charge contained in the information by which defendant was accused of the crime of obtaining money by false pretenses, the judgment and such order are affirmed.

We concur: CONREY, P. J.; YORK, J.

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90 Cal. App. 421

STOWE v. FAY FRUIT CO. (Civ. 4721.)

District Court of Appeal, Second District, Division 2, California. March 27, 1928.

1. Frauds, statute of 🔑158(4)—Evidence held not to show completed sale so as to take case out of statute (Civ. Code, § 1624, subd. 4).

Evidence of oral contract to purchase oranges in excess of the value of $200 *held* not sufficient to show completed sale at time parties bargained, so as to take case out of the statute of frauds, Civ. Code, § 1624, subd. 4, where parties evidently contemplated future sale.

2. Frauds, statute of 🔑93—Payment several days after oral contract held not to take case out of statute (Civ. Code, § 1624, subd. 4).

Payment, by purchaser of oranges under oral contract which was within statute of frauds because of value of oranges exceeding $200, of $250 several days after the initial agreement of buyer and seller, *held* not sufficient under Civ. Code, § 1624, subd. 4, to take case out of statute of frauds, as statute contemplates payment at time of oral agreement.

3. Frauds, statute of 🔑119(1)—That purchaser did not have orange boxes, hence did not pick fruit purchased under oral contract, as result of which fruit was frozen, held not to estop him from invoking statute (Civ. Code, § 1624, subd. 4).

Where plaintiff entered into oral contract to sell oranges on trees to defendant within statute of frauds (Civ. Code, § 1624, subd. 4), because of oranges purchased having contract value of over $200, fact that defendant did not pick oranges immediately, resulting in their being frozen, *held* not to estop such defendant from invoking statute, in view of fact that at no time did plaintiff protest because of delay.

4. Frauds, statute of 🔑119(1)—Party is not estopped to rely on statute unless he relies on it as means of fraud or other party has altered position, hence would suffer material loss if plea of statute were allowed (Civ. Code, § 1624, subd. 4).

Reliance on statute of frauds (Civ. Code, § 1624, subd. 4) cannot be prevented under law, even on doctrine of estoppel, unless one seeks to hide behind statute and use it as means whereby frauds may be committed by him, or unless representations made or acts done by him, even if innocent in themselves, have induced the other party to the attempted oral pact to make expenditures in and about the subject-matter of the agreement, or so to change his position with relation thereto that he will suffer material loss if plea of the statute is allowed.

5. Frauds, statute of 🔑138(2)—Purchaser could recover money paid to seller under void contract subsequent to time contract was entered into (Civ. Code, § 1624, subd. 4).

Where contract was void within statute of frauds (Civ. Code, § 1624, subd. 4), because goods purchased had contract value exceeding $200, *held* that purchaser was entitled to recover money paid to seller subsequent to time void contract was entered into, on destruction of subject-matter so that delivery under contract could not be made.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by E. A. Stowe against the Fay Fruit Company. Judgment for plaintiff, and defendant appeals. Reversed.

Henry O. Wackerbarth and Henry E. Carter, both of Los Angeles (Joseph A. Adair, of Los Angeles, of counsel), for appellant.

U. F. Lewis, of Redlands (R. C. Alford, of Brawley, of counsel), for respondent.

WORKS, P. J. This action is one to recover the selling price of a crop of oranges alleged to have been sold to defendant, but which, for reasons which are shown by the evidence, was never delivered. Judgment went for plaintiff, and defendant appeals.

Appellant contends that several of the findings of the trial court were unsupported by the evidence. Whether some of them were supported depends upon a purely legal question: Was the contract for the sale of the fruit within the statute of frauds? Section 1624 of the Civil Code, subd. 4, is pointed to as the enactment under which it is said that the agreement was invalid. The section provides what contracts must be in writing, and subdivision 4, so far as its language is material here, reads:

> "An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels * * * or pays at the time some part of the purchase-money. * * *"

The evidence in the present case plainly shows—in truth, it is conceded by counsel—that the selling price of the oranges was much more than $200, and it is equally certain that the contract was not in writing. Respondent insists, however, that at the time the agreement was attempted to be made there was a completed sale of the oranges, and that they were accepted or received by appellant, and that appellant then paid a part of the purchase money.

The contract, such as it was, originated in a conversation between respondent and the manager of one of appellant's packing houses. It occurred in the orange orchard of respondent, and the fruit concerning which the two talked was on the trees. The conversation occurred on Friday, the 6th day of a certain January, and it was related on the witness stand by respondent. The manager examined the fruit and offered 2¼ cents a pound for it. Respondent asked for 2½ cents, and the manager finally said, "I will give you two and a half." Respondent then asked, "When can I commence picking?" Respondent's testimony then goes on: "He said, 'Monday morning.' That was the 9th. He bought them on the 6th. That was the 9th day of January I was to commence picking. He said, 'Come in and get the boxes Saturday afternoon,' but he called up Saturday afternoon and told me not to come until Monday morning." It was developed during the cross-examination of respondent that during the conversation on the 6th the manager said that he "wanted to buy" the oranges, and that "the conversation which took place [on that day] was that [respondent] would sell the fruit for two and a half cents per pound delivered f. o. b. the packing house." The testimony thus set forth is the only evidence of the contract between the parties. Nothing more was said during the conversation on January 6th, nor was anything ever said at any other time which at all touched the terms of the agreement made or attempted to be made between them.

[1] It is plain that there was no completed sale on the 6th and that appellant did not accept or receive the oranges within the meaning of the statute of frauds. In contending that there was a sale and that the fruit was accepted or received, respondent relies on Bill v. Fuller, 146 Cal. 50, 79 P. 592, and Miller v. Hunt, Hatch & Co., 47 Cal. App. 768, 191 P. 75, and on cases from other states. None of these cases is in point. The two California cases are mentioned and distinguished in the opinion in MacRae v. Heath, 60 Cal. App. 64, 212 P. 228, and the latter case is itself an all-sufficient answer to respondent's contention. We think, under the doctrine of that case, as the fruit covered by the contract before us was on the trees when the contract was made, and as it was to be delivered by respondent, at his own expense, at the packing house, that the parties contemplated a future sale, and that the fruit was to be both accepted and received when it arrived at the packing house and not before.

[2] As already remarked, respondent also contends that the contract is taken out of the statute of frauds because "some part of the

purchase money" was paid. This point arises under the following circumstances, disclosed by the testimony of respondent: Some time after the conversation which evidences the contract, apparently as much as a week thereafter, respondent appeared at the packing house of appellant. The manager was present at the time and said, when he saw respondent: "I know what you want; you want some money." Respondent answered that he did, and added: "That is what I sold the fruit for, because I want some cash." The manager then remarked: "Very well, I will get you $250 in the next two or three days." Respondent testified that "in the next two or three days he received a check for $250 from" appellant. Other evidence shows that the check came to his hands on January 18. We think this payment was wholly inadequate to take the case out of the statute. Subdivision 4 of section 1624 of the Civil Code provides that the payment of a part of the purchase money for chattels, in order to have the effect ascribed by the appellant to the payment made here, must be made "at the time," and this language, upon the very face of the statute, contemplates a payment at the time a contract is made—a payment, in common parlance, to "bind the bargain." 27 C. J. 253. It is said at the place cited that in order that a payment made after the completion of the contract may take the case out of the statute, "there must be enough in addition to the fact of payment to show that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them"—that is, for the purpose of avoiding the statute. It is further there said that "this being shown a cause of action arises, not on the prior oral contract, but on the new contract made at the time of the payment." There is no room for the application of such a doctrine here.

[3] We are satisfied that the contract attempted to be made by the parties was invalid under the statute of frauds. Respondent insists, however, that appellant is estopped to avail itself of the defense afforded by the enactment. The doctrine of estoppel is invoked because of the following circumstances, disclosed by the record. We have already seen that, at the time the contract between the parties was attempted to be concluded, it was understood that respondent was to begin picking his fruit on January 9th, that he was to get boxes from appellant for the purpose on the 7th, and that on the last-mentioned date the manager of the packing house asked him not to come for the boxes until the 9th. This delay was caused by the fact that appellant did not have the requisite boxes on hand, and the same condition persisted until January 18, when respondent received the check for $250. In the interim, at intervals of two or three days, respondent inquired of the manager about the boxes, and on each occasion was told that they were not yet to be had. Respondent at no time protested against this state of affairs or at the delay which was occasioned by it. Both of the parties appear merely to have sat by in a state of quiescence and satisfaction, awaiting the time when the boxes might be had and when the fruit could be picked and placed in them. Unfortunately, on January 19th, the next day after respondent received the check for $250, a cold snap came on and the crop was frozen. Respondent refused to take it. Not only so, but by virtue of the provisions of the statute referred to in MacRae v. Heath, supra, the fruit became unmarketable under the law and it became as impossible for respondent to move it to the packing house as it was for appellant, on its own judgment, to receive it.

In his resort to the protection of the estoppel for which he contends, appellant cites Pearsall v. Henry, 153 Cal. 314, 95 P. 154, 159; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; Heffernan v. Davis, 24 Cal. App. 295, 140 P. 716; Flint v. Giguiere, 50 Cal. App. 314, 195 P. 85; and Stepp v. Williams, 52 Cal. App. 237, 198 P. 661. There are also to be found the following cases in which such an estoppel was successfully invoked: Keller v. Gerber, 49 Cal. App. 515, 193 P. 809; Price v. Smith Mfg. Co., 53 Cal. App. 303, 200 P. 53; Rundell v. McDonald, 62 Cal. App. 721, 217 P. 1082; Holstrom v. Mullen (Cal. App.) 257 P. 545; and Angelus Leasing Co. v. Stephens (Cal. App.) 261 P. 1038. In this entire catalogue of cases, from Pearsall v. Henry, the first in point of time—although there are earlier ones which are not presented in the list—to Angelus Leasing Co. v. Stephens, the last, there is not one which justifies the application of the doctrine of estoppel in the present instance.

The statute of frauds is an enactment of a highly beneficial nature, designed to prevent those frauds and perjuries which are so likely to be committed in the consummation and enforcement of concords between men which are not reduced to written form.

[4] A reliance upon the statute cannot be prevented under the law—and each of the cases cited above bears witness to the truth of the statement—even upon the salutary principles which support the doctrine of estoppel, unless he who seeks to hide behind the statute would use it as the means whereby frauds may be committed by him, or unless representations made or acts done by him, even if innocent in themselves, have induced the other party to the attempted oral pact to make expenditures in and about the subject-matter of the agreement, or so to change his position with relation thereto that he will suffer material loss if the plea of the statute is allowed. This rule cannot apply to the state of facts now before us. Appellant is not shown by the evidence to have

committed any act, between January 6th and January 19th, which by the highest flight of the imagination could be said to be unfair or unjust to respondent. On the other hand, appellant was not induced by any act of respondent to make any expenditure whatever, nor to put himself in any position which by his assumption of it could have caused him any loss whatever. He merely heard the statements of respondent's manager that boxes were not available for the orange picking, and there he sat. The freeze of January 19th, which caused all the trouble, was a circumstance, of course, utterly apart from the acts of either of the parties. It was but an aberration in the conduct of Dame Nature, who, even in Southern California, sometimes forgets her smile and displays a petulant frown. But for her unseemly intervention, distasteful alike to appellant and to respondent, they two would doubtless have performed in peace and amity the obligations they respectively attempted to assume by their oral concord, invalid under the statute of frauds or not. It was said in Seymour v. Oelrichs, supra, in applying the doctrine of estoppel for which respondent contends here, the italics being ours:

> "We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, *provided always the essential elements of an estoppel are present.* * * *"

This language has been quoted in several of the later cases. We have no difficulty in reaching the conclusion that "the essential elements of estoppel" are not present in the record before us.

[5] But one further point remains to be considered: Appellant endeavored by cross-complaint to recover the $250 paid by it to respondent, but judgment went that it take nothing. The facts which bear upon this phase of the litigation were not disputed, and we think, after all we have said above, that the findings upon which judgment was rendered against appellant on its cross-action were not supported by the evidence. It seems manifest that appellant is entitled to a return of the amount of the check delivered by it to respondent. The property which was the subject of the attempted contract having been destroyed and the ability of respondent to perform having thus been terminated—indeed, the oral concord between the parties having been void under the statute of frauds—respondent cannot be allowed, under the facts shown by the record, to retain the money he received.

Judgment reversed.

We concur: THOMPSON, J.; VALENTINE, Justice pro tem.

MEMORANDUM DECISIONS

90 Cal. App. 534

PEOPLE of State of California, Plaintiff and Respondent, v. Adolph CAVALLO, Defendant and Appellant. (Cr. 1458.) District Court of Appeal, First District, Division 2, California. April 2, 1928. Appeal by defendant from a judgment of the Superior Court of Alameda County, Fred V. Wood, Judge, of conviction of ownership and possession of a still and from an order denying motion for new trial. Affirmed. M. A. Sanborn, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was tried before a jury on an information charging the ownership and possession of a still for the manufacture of intoxicating liquor. The jury returned a verdict of guilty and from the judgment following the verdict and from the order denying the motion for a new trial defendant has appealed upon a typewritten record. No briefs have been filed in support of the appeal, but we have nevertheless examined the entire record and from our examination we are satisfied that the defendant was fairly tried and convicted and that the record is free from prejudicial error. Judgment and order affirmed.

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